SIXTH 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, 2004 - December 31, 2004

REPORT SUMMARY

Since 1999, the Office of the Independent Administrator (OIA) has administered arbitrations between Kaiser Foundation Health Plan (Kaiser) and its members.[1] Sharon Oxborough is the Independent Administrator. This is the sixth year that the OIA has reported on the status of its arbitration system. This report allows readers to gauge how well the OIA system is meeting its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protects the privacy of the parties. It describes an arbitration system that works well and consistently. The highlights listed below either help readers understand what happened in 2004 – the number and types of demands and how the cases closed – or relate directly to the system's fairness, speed, or cost. Additionally, the results of last year's review by independent certified public accountants of portions of the OIA's processes and statistics allow the public to have even more confidence.

A large and balanced pool of neutral arbitrators, among whom the work is distributed, is a crucial ingredient to a fair system. The fact that neutral arbitrators are selected quickly and that cases close within the deadlines make for a timely process, though claimants can and do slow down the process when they need extra time. Most claimants are exercising their options to have Kaiser pay their neutral arbitrators' fees, keeping the system low cost. Finally, both the neutral arbitrators and the parties continue to provide positive evaluations.

Developments in 2004

1. **Review Confirms Accuracy of OIA Work.** An independent accounting firm reviewed the OIA's paper and computerized files and statistics contained in the fifth annual report. It "did not identify any significant weaknesses in the OIA's management of arbitration cases, statistical reporting to the AOB, or data processing controls." In response to its recommendations, the OIA has documented several of its computer policies and modified some procedures. The Arbitration Oversight Board continues to discuss the results. See pages 4-5 and Exhibits D and M.

2. **Rules Amended.** The AOB amended the Rules to clarify the deadline for responses for the selection of the neutral arbitrator and to establish standards for the "reasons" required in awards. See page 5.

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

OIA's Pool of Neutral Arbitrators

3. **Large Neutral Arbitrator Pool.** The OIA has 309 neutral arbitrators in its pool. More than one third of them, or 109, are retired judges. See page 6.

4. **Applications Reveal Balanced Pool of Neutral Arbitrators.** The applications filled out by the members of the OIA pool show that 127 arbitrators spend all of their time acting in a neutral capacity. The remaining members divide their time almost equally between claimants' side and respondents' side work. See pages 7-8.

5. **Applications Reveal Medical Malpractice Experience by Neutral Arbitrators.** Neutral arbitrators' applications also show that 235 of the arbitrators had medical malpractice experience before entering the pool. Since 62 of the remaining 74 neutral arbitrators have been selected in OIA cases, the number who actually have medical malpractice experience is undoubtably larger. See page 8.

6. **Large Percentage of Arbitrators Served on Arbitrations and Heard Cases.** Sixty-three percent of the neutral arbitrators in the OIA pool served on a case in 2004. Arbitrators averaged two assignments each in 2004. Ninety-three different neutrals decided the 143 awards made in 2004. Sixty-three arbitrators made a single award while 20 decided only two. Ten arbitrators decided the remaining 40 cases. See page 9.

7. **Neutral Arbitrators Selected After Making Award of $500,000:** Over the past six years, 28 different neutral arbitrators have made 33 awards of $500,000 or more. Sixteen of these 28 neutral arbitrators have been selected after making such an award. They have been selected from 2 to 34 times. See pages 9-10.

8. **Three-quarters of Neutral Arbitrators Selected by Strike and Rank.** In 2004, the parties chose 73% of neutral arbitrators through the strike and rank process, and jointly selected the remaining 27%. Seventy-four percent of the arbitrators jointly selected were members of the OIA pool. See page 16.

Status of Arbitration Demands

9. **Fewer Demands for Arbitration.** In 2004, the OIA received 861 demands for arbitration. This is a decrease of 128, or 13%, from 2003 and the first year the number fell below 900. See pages 11, 47.

10. **Fewer Open Cases.** As of December 31, 2004, the OIA was administering 796 open cases, a decrease of 69, or 8%, from the end of 2003. See pages 26, 49.

11. **Most Cases Medical Malpractice.** Approximately 93% of the cases the OIA administered in 2004 involved claims of medical malpractice. Only 2% presented benefit and coverage issues. The remaining 5% have premises liability, other torts, lien, or unknown claims. See page 13.

12. **Number of Claimants Without Attorneys Continues to Decline.** Seventeen percent of claimants were not represented in 2004. This is the first year the percentage has dipped below 20%. This percentage has been declining for five years. See pages 14, 49.

How Cases Closed

13. **Nearly Three-quarters of Cases Settled or Withdrawn:** During 2004, 41% of the closed cases settled. The claimants withdrew another 27% and abandoned another 4% by failing to pay the filing fee. See pages 29-30.

14. **One-quarter Closed by Decision of Neutral Arbitrator:** Eight percent were closed through summary judgment, 4% were dismissed by neutral arbitrators, and 16% of cases closed after an arbitration hearing. In the cases that went to arbitration hearing, claimants prevailed in 34%. The average award was $386,000. See pages 30-31.

15. **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 ten of the awards made after a hearing in 2004 - about seven percent. A single neutral decided the other 133. See page 23.

System Meeting Deadlines

16. **More than Half of Neutral Selections Proceed with No Delay; The Other Neutral Selections Include Delays Chosen by Claimants.** More than half (57%) of the neutral arbitrators were selected without the parties exercising options that delay the process. The others either postponed the deadline (40%), disqualified the neutral arbitrator (1.5%), or both (1.5%). Claimants made 99% of the postponements and 95% of the disqualifications. The percent of cases with no delays increased in 2004. See pages 17, 19, 20, 48.

17. **Length of Time to Select Neutral Arbitrators Declined Overall and by Category:** The average time to select a neutral arbitrator was 61 days. This is eight

days less than the prior year. The averages by category range from 24 days when there are no delays to 160 days when parties request a postponement and disqualify neutral arbitrators after a selection. Sixty-one days to select a neutral arbitrator in 2004 is eleven times faster than that described by the *Engalla* case. See pages 20-22, 48.

18. **Cases Close on Time, Though Length of Time Continues to Increase.** In 2004, the cases closed, on average, in 326 days, or less than 11 months. Only two cases failed to close on time. See page 25. Ninety percent of the cases closed within 18 months (the deadline for most cases) and 64% closed in a year or less. See pages 27-28.

19. **Hearings Completed Within Fifteen Months.** The 16% of cases that closed with an award averaged 456 days to close. 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 after an award in 380 days. In the cases that went to an arbitration hearing, claimants prevailed in 34%. The average award was $386,000. See pages 28, 31.

Neutral Arbitrator Fees

20. **Kaiser Paid the Neutral Arbitrator's Fees in 81% of Cases Closed in 2004.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed in 2004, Kaiser paid the entire fees for the neutral arbitrators in 81% of those cases that had fees. See page 36.

21. **Cost of Arbitrators.** Fees charged by neutral arbitrators range from $100/hour to $600/hour, with an average of $314. For the 662 cases that closed in 2004 and for which the OIA has information, the average total fee charged by neutral arbitrators is $3,290, with a range of $0 to $46,100. If we exclude the 104 cases where neutral arbitrators charged no fee, the average is $3,903. See page 37.

Evaluation

22. **Positive Evaluations of Neutral Arbitrators.** In 2004, both claimants and counsel for both sides reported that they would recommend their neutral arbitrator to another individual with a similar case. See pages 38-40.

23. **Positive Evaluations of the OIA.** Similarly, neutral arbitrators continue to evaluate OIA procedures positively. Forty percent said that the OIA experience was better than a court system, and 59% said it was about the same. Only one percent said the OIA experience was worse. See pages 41-44.

24. Most Blue Ribbon Panel Recommendations Achieved. Thirty-three of the 36 recommendations originally made by the Blue Ribbon Panel have been accomplished. See Exhibit B.

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Exhibits

Graphs & 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.

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

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

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

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

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

I. INTRODUCTION & OVERVIEW

This is the sixth annual report issued by the Office of the Independent Administrator (OIA).[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 (AOB), the OIA maintains a pool of neutral arbitrators qualified to hear Kaiser cases and independently administers arbitration cases brought by Kaiser members. The contract also requires that the OIA 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.[3] The majority of the sixth annual report focuses on our work from January 1 through December 31, 2004, while the penultimate section compares that activity with the OIA's earlier years. The conclusion finds that the system is continuing to achieve the goals established in 1998.

A. Background Information

In 1997, the California Supreme Court criticized Kaiser's longstanding arbitration system in *Engalla v. Permanente Medical Group*.[4] In part, the Court said that Kaiser should not administer the system itself and that there was too much delay in the handling of members' claims. In a voluntary response to the Court's evaluation, Kaiser convened a Blue Ribbon Panel (BRP) of outside experts to examine the entire process and recommend improvements. The BRP issued its report in January 1998. It made 36 specific recommendations about how the system should operate.[5] Kaiser accepted the recommendations and, in implementing them, created the Arbitration Advisory Committee (AAC) in

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[1]Until March 28, 2003, the Law Offices of Sharon Lybeck Hartmann served as the Independent Administrator. Under the new Independent Administrator, the OIA continues in the same office, 213.637.9847 (telephone), 213.637.8658 (facsimile), oia@oia-kaiserarb.com. (e-mail). The OIA has a website, www.oia-kaiserarb.com where this report can be downloaded, along with the prior annual reports, the *Rules*, forms, procedures and much other information, including organizational disclosures. A description of the OIA's staff is attached as Exhibit A.

[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 to resolve disputes. Kaiser arranges for medical benefits by contracting exclusively with the The Permanente Medical Group, Inc. (Northern California) and the Southern California Permanente Medical Group. Hospital services are provided by contract with Kaiser Foundation Hospitals, another California nonprofit public benefit corporation.

[3]Contract, Section C(l). Copies of the contract may be obtained from the OIA.

[4]15 Cal.4th 951, 64 Cal.Rptr.2d 843, 938 P.2d 903.

[5] Copies of the Blue Ribbon Panel's report can be obtained from the OIA. Exhibit B to this report contains the full text of all the Panel's recommendations along with an item by item response on what has been accomplished.

1998 to assist in the process. Seeking an independent administrator for the system, Kaiser and the AAC issued a widely advertised Request for Proposal, interviewed a number of those who responded, and selected the predecessor to the current administrator, the Law Offices of Sharon Lybeck Hartmann, to create and operate the new system.

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

Prior reports described the creation and development of the *Rules for Kaiser Permanente Member Arbitrations Administered by The Office of the Independent Administrator Amended as of January 1, 2005 (Rules)*. The *Rules* consist of 54 rules in a 20 page booklet and are available in English, Spanish, and Chinese. The English version is attached as Exhibit C.[6] Some important features they contain include:

Deadlines requiring that cases have an arbitrator in place rapidly;[7]

Deadlines requiring that the majority of cases be resolved within 18 months;[8]

Procedures to shorten or lengthen time for cases that require either less or more than 18 months;[9] and

Procedures under which claimants may choose to have Kaiser pay all the fees and expenses of the neutral arbitrator.[10]

The 18 month timeline that applies to most cases is displayed on the next page. Details about each part of the process are discussed in the body of this report.

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[6]The *Rules* are also available from our website. Exhibit C has been "redlined" to show the changes made in 2004. See Section II.B.

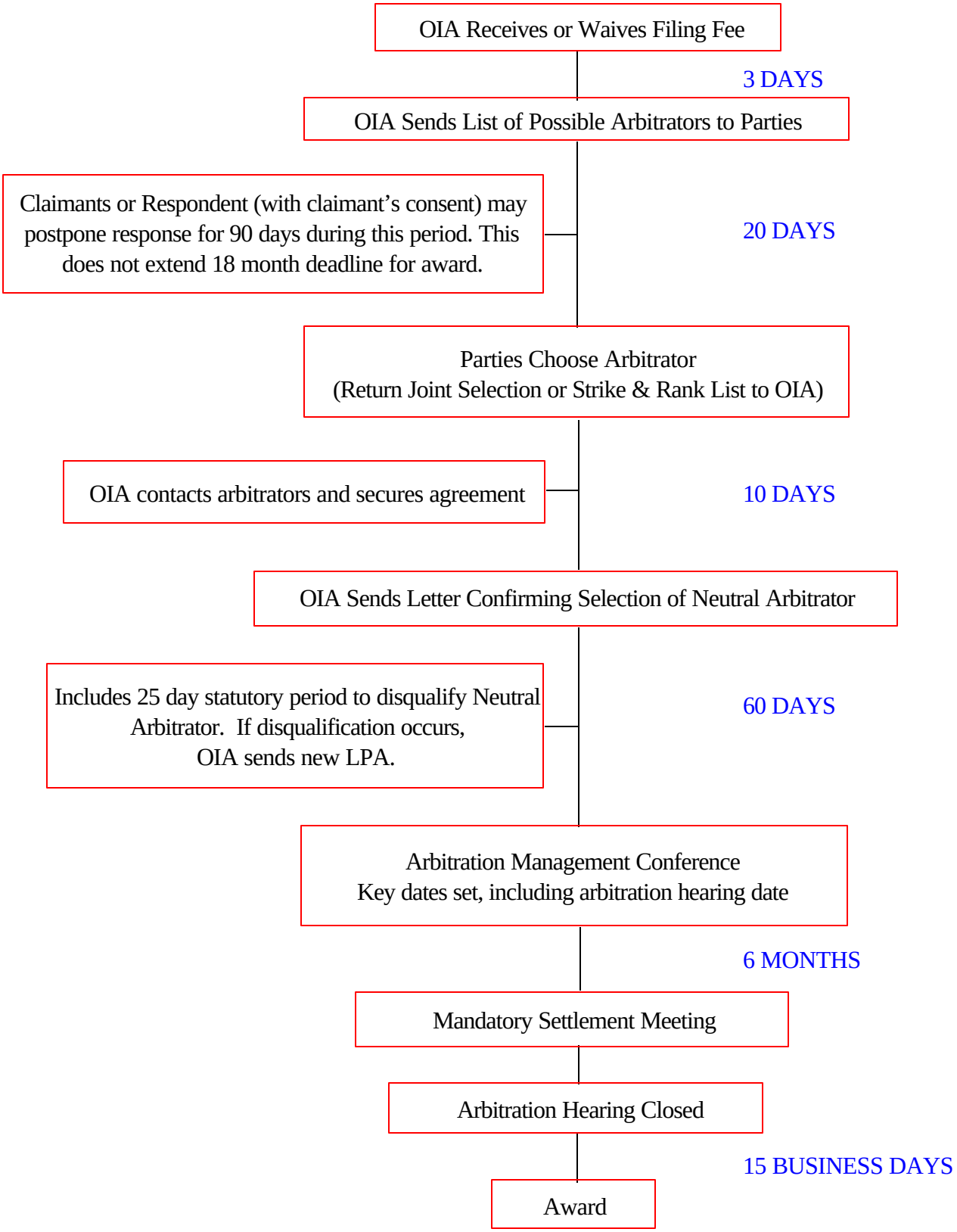
[7]Exhibit C, Rules 16 and 18.

[8]Exhibit C, Rule 24.

[9]Exhibit C, Rules 24, 28 and 33.

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

Timeline for Arbitrations Using Regular Procedures



B. Goals of the OIA System

Consistent with the recommendations of the BRP, the OIA attempts to offer 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. As set out in the balance of this report, we believe that the goals are presently being achieved.

C. Format of This Report

The format of the report is largely consistent with last year's report. Two sets of statistics are new. First, Section III.D.3 discusses the number of neutral arbitrators who have been selected to act as a neutral arbitrator after making an award for $500,000 or more against Kaiser. Second, Section VIII.D discusses the total fees charged to the parties by neutral arbitrators in some cases that closed in 2004.

The report first discusses the audit that occurred and Rule changes made in 2004. The next sections look at the OIA's pool of neutral arbitrators, then the number and types of cases the OIA received in 2004. The selection of the neutral arbitrator in individual cases 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 our system. The parties' evaluations of their neutral arbitrators and the neutral arbitrators' evaluations of the OIA system are highlighted in the following sections. The report ends with a description of the AOB's activities during 2004 and a comparison of 2004 to prior years.

II. DEVELOPMENT AND CHANGES IN THE SYSTEM IN 2004

Overall, 2004 was a stable year. The review of the OIA's record keeping and annual report occurred, with successful results. The AOB also approved changes in the *Rules* which clarified the deadlines for responses for the selection of the arbitrator and the content of awards.

A. Independent Review of the OIA

In March 2004, the AOB selected Clare Chapman Storey & Bowen LLP, a firm of certified public accountants, to conduct a review of OIA records and files. The "overall objectives were to identify control weaknesses, if any, that may exist in the operation and application processing of the OIA case management system and to test their compliance with the amended rules for Kaiser related arbitration cases, and such control procedures to provide an overall assessment of the control

environment, information processing system and control procedures."[11] The review checked that information published in the fifth annual report was accurate and that the OIA had administered the arbitrations in a manner consistent with the *Rules*. In May 2004, the auditors reviewed a random selection of files open in 2003 and neutral arbitrator files. They also checked the most important statistics published in the fifth annual report.[12] The audit "did not identify any significant weaknesses in the OIA's management of arbitration cases, statistical reporting to the AOB, or data processing controls." Exhibit D.

The AOB and OIA have had several discussions about the results. After receipt of the review, the OIA immediately adopted two suggested changes. This report discusses more fully the demands from Kaiser that the OIA did not receive within ten days and it is more aggressively following up with neutral arbitrators who do not return their questionnaires when the case closed because of action by the neutral arbitrators. The OIA has also documented several of its computer policies which had not formerly been written. The AOB is continuing to explore further changes based on the review.

A copy of the entire review can be obtained by contacting the OIA at 213.637.9847 or oia@oia-kaiserarb.com. We will convey the request to the AOB.

B. Changes in OIA Rules

The AOB also amended the *Rules* in 2004. A redlined copy of the amended *Rules* are attached as Exhibit C. There were two different reasons for the amendments.

First, Kaiser informed the AOB and the OIA at the AOB's June 2004 meeting that the Department of Managed Health Care had informed Kaiser that it believed a few of the awards written by neutral arbitrators in OIA cases failed to provide adequate "reasons," which are required by Rule 38 as well as California regulations. The AOB discussed appropriate standards for reasons and whether the *Rules* should provide more specific direction than just "reasons."

Following the meeting, the OIA sent a memo to all neutral arbitrators, providing more specific direction. The OIA also drafted a revision to Rule 38.a.[13] After discussion and further revision, the AOB amended Rule 38.a.

Second, the OIA requested that the AOB amend the Rules that deal with the deadline for parties to return their responses to the List of Possible Arbitrators. An attorney had previously

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[11] See letter attached as Exhibit D.

[12] The complete procedures are set out in Exhibit D, pages 92-96.

[13] Exhibit C at 84.

complained to the OIA that the *Rules* merely set the date by which the parties had to send the response, not the date by which the OIA had to receive them. Agreeing the *Rules* might be susceptible to this ambiguity, the OIA proposed revisions to Rules 16, 17, 18, and 21 to eliminate it. The AOB agreed to these amendments.

III. POOL OF NEUTRAL ARBITRATORS

A. Activity in 2004 and the Pool at the End of 2004

On January 1, 2004, the OIA had 287 people in its pool of possible arbitrators. During the year, 20 people left the pool and 42 were added to it. On December 31, 2004, there were 309 people in the OIA's pool of possible arbitrators. Of those, 109 were former judges, or 35%.

Members of the OIA pool are distributed into three geographic panels: Northern California, Southern California, and San Diego. Members who agree to travel for free may be listed on more than one panel. The Northern California panel has a greater percentage of former judges (37%) than either Southern California (34%) or San Diego (34%) panel. Exhibit E contains the names of the members of each panel.

Number of Neutral Arbitrators by Region

Total Number of Arbitrators in the OIA Pool:	**309***
Southern California Total:	**177**
Northern California Total:	**112**
San Diego Total:	**61**

***The three regions total 350 because 39 arbitrators are in more than one panel; 34 in So. Cal & SD, 2 in No. Cal & So. Cal, 1 in No. Cal & SD, and 2 in all three panels.**

During 2004, the OIA pool admitted 42 people.[14] In addition, as of December 31, 2004, we were waiting for final paper work from five applicants who met the qualifications. The OIA rejected ten applicants in 2004 because they failed to meet the qualifications.[15]

The new members in the OIA pool may be a result of continued advertisement in the *California Bar Journal*, the State Bar's publication that is sent to all California attorneys, and the *San Francisco Attorney Magazine*, which is sent to all members of the San Francisco County Bar Association. We concentrated our advertising in Northern California because we have substantially more members in the OIA Southern California and San Diego panels than in the Northern California panel. In addition to the advertising, we also contacted 35 local, minority, and women's bars to invite their members to apply to the OIA pool. Many told us they passed the information on to their members.

B. Qualifications

The OIA qualifications for neutral arbitrators did not change in 2004. They are attached as Exhibit F and are available from the OIA website.

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

- Arbitrators must have been admitted to the practice of law for at least ten years and have substantial litigation experience;

- Arbitrators must provide satisfactory evidence of their ability to act as arbitrators based upon judicial, trial or other experience or training; and

- Arbitrators must not have served as attorneys of record or party arbitrators[16] either for or against Kaiser within the last five years.

In order to make the panel as large as possible, and also to approximate the experience of parties in a courtroom setting, the qualifications do not require that the potential arbitrator have medical malpractice experience. The extent to which they have this experience is discussed in the next section.

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

[15]If the OIA rejects an application, we inform the applicant of the qualifications which he or she failed to meet.

[16]A party arbitrator is selected by only one side of the arbitration. Party arbitrators are not required to be neutral, although they may be, and often act as advocates for their side.

C. Composition of the Pool

The applications request that the neutral arbitrators allocate the amount of their practice spent in various endeavors.[17] Based on these responses the "average" neutral arbitrator in the OIA pool spends 56% of his or her time acting as a neutral arbitrator, 1% acting as a respondent's party arbitrator, 1% acting as a claimant's party arbitrator, 17% as a respondent (or defense) attorney, 16% as a claimant (or plaintiff) attorney, 1% as an expert, and 8% in other activities, including non-litigation legal work, teaching, mediating, etc. One of the interesting facts about the "average" member of the OIA pool is that the amount of plaintiff work and defense work is nearly identical.

There is, of course, no such "average" neutral arbitrator, in part because a very substantial percentage of the pool spends 100% of their practice acting as neutral arbitrators. More than 40% of the pool, 127 members, reported that they spend 100% of their time that way.[18] The remainder are distributed between 0% and 99%.

Percent of Practice Spent As a Neutral Arbitrator

Percent of Time	0%	1 - 25%	26 - 50%	51 - 75%	76 - 99%	100%
Number of NAs	**29**	**96**	**27**	**6**	**24**	**127**

The remaining members of the OIA pool primarily spend their time as litigators. Significantly, the composition seems to be evenly balanced on both sides.

Percent of Practice Spent As an Advocate

Percent of Practice	Number of NAs Reporting Respondent Counsel Experience	Number of NAs Reporting Claimant Counsel Experience
0%	**185**	**185**
1 - 25%	**47**	**46**
26 - 50%	**43**	**45**
51 - 75%	**15**	**15**
76 - 100%	**19**	**18**

[17] Admittedly, the information may in some cases be somewhat outdated.

[18] This is not surprising as 109 members of the OIA pool are retired judges.

Finally, while the qualifications do not require that members of the OIA pool have medical malpractice experience, three-quarters of them do. At the time they filled out their applications, 235 reported that they had such experience, while 74 stated they did not. Members of the pool who have served on a Kaiser case since they joined the pool have most likely acquired medical malpractice experience since their initial report to us.[19]

D. How Many in the Pool of Arbitrators Have Served?[20]

One of the recurring concerns expressed about arbitration of this type is the possibility of a "captive," defense-oriented pool of arbitrators. The theory is that defendants (or respondents) are repeat players but claimants are not; defendants therefore have 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 the defense 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, nobody depends on the defendant for his or her income and impartiality is better served.

1. The Number Who Have Served in 2004

The size of the OIA pool from which the OIA randomly compiles the Lists of Possible Arbitrators (LPA) and the ability for parties to jointly select persons outside the pool are the two main factors which allow us to meet these objectives. In 2004, 229 different neutral arbitrators were selected to serve as neutral arbitrators in 763 OIA cases. One-hundred-ninety-five (195) of these were members of the OIA pool. Thus, in 2004, 63% of the OIA pool were selected to serve in a case. The range in number of times a neutral in the OIA pool was selected in 2004 is 0 to 23. The neutral arbitrator at the highest end was jointly selected ten times. The average number of appointments for members of the pool in 2004 is 2, the median is 1, and the mode is 0.

2. The Number Who Wrote Awards in 2004

The number of neutral arbitrators deciding awards after hearing is similarly diverse. The 143 awards made in 2004 were decided by 93 different neutral arbitrators. Sixty-three of the arbitrators made a single award, while twenty decided two. Six other neutral arbitrators decided three cases each,

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[19]Of the 74 who reported no medical malpractice experience in their applications, all but 12 of them have served as a neutral arbitrator in an OIA case. (One neutral arbitrator has been selected 17 times.) Thirty-five of these neutral arbitrators have decided at least 1, and as many as 7 cases. While some of these could have been decided on purely procedural grounds, it is likely that the report of medical malpractice experience is outdated. When neutral arbitrators update their applications in 2005, the OIA will encourage them to update this information.

[20]The procedure for selecting neutral arbitrators for a particular case is described below at Section V.A.

one decided four cases, one decided five cases, one decided six cases, and one decided seven cases. All but two of these ten neutral arbitrators made mixed awards.

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

Critics have claimed that neutral arbitrators who made large awards will not be allowed by Kaiser to be chosen in subsequent arbitrations, either because they will be stricken from the LPA or disqualified. The OIA examined this contention by checking how many neutral arbitrators were selected to serve again after the date of their first award of $500,000 or more.[21] There have been 33 such awards since the OIA began to operate. Twenty-eight different neutral arbitrators made these awards.[22] There was one award in 2000, three in 2001, ten in 2002, eight in 2003, and eleven in 2004.

Sixteen of the 28 neutral arbitrators have served as a neutral arbitrator on subsequent cases. Two of these 16 were not in the OIA pool at the time of the award, but are now.[23] The number of subsequent selections range from 2 cases to 34 cases. The average is 8. The neutral arbitrator with the most subsequent cases made his award of $500,000 or more in 2000. Two of the neutral arbitrators who made awards of $500,000 or more in 2004 have already been selected to serve again.

Twelve of the 28 neutral arbitrators have not been selected as a neutral arbitrator after making their awards of $500,000 or more. For many of these neutral arbitrators, reasons appear to explain the fact. Four of them were not in the OIA pool and had been jointly selected. Subsequent selections therefore depend upon joint selection. Four of them, including one of the neutrals not in the OIA pool, made their awards in 2004, one as recently as November 30, 2004. Two of them resigned from the OIA panel, and stopped arbitrating. They could not have been selected again.

4. The Number Named on a List of Possible Arbitrators in 2004

All of neutral arbitrators in the OIA pool have been named at least once on a list of possible arbitrators sent to the parties by the OIA in 2004. The average number of Northern California arbitrators appearing on a list is 42, the median number is 44, and the mode is 45. The range of

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[21]Kaiser's attorney may have submitted his or her LPA response prior to the service of the large award, but the neutral arbitrator could have been subsequently disqualified.

[22]Two neutral arbitrators have made three $500,000 or more awards, and one other has made two such awards.

[23]One of these, however, did not accept cases for almost a year while he was accepting cases from the court.

appearances is from 6 to 62 times.[24] In Southern California, the average number of appearances is 23, the median is 23, and the mode is 21. The range is from 1 to 37. In San Diego, the range of appearances is from 3 to 25. The average is 14, the median is 15, and the mode is 15.

E. "One Case Neutral Arbitrators"

Standard 12 of California's Ethics Standards for Neutral Arbitrators requires that neutral arbitrators disclose whether they will accept additional work from the parties or attorneys in the case while the first case remains open. If a neutral arbitrator fails to disclose that he or she will accept such work, that neutral arbitrator is barred from doing so until the first case closes or the neutral arbitrator resigns from it. Moreover, this particular disclosure must be made timely – a late disclosure is the same as no disclosure. A neutral arbitrator may also inform the parties that he or she will not accept any future work from the parties or attorneys while the present case remains open and some do. Neutral arbitrators who either fail to serve timely Standard 12 disclosures or who state that they will not accept such future while the first case is open are considered "one case neutral arbitrators."[25]

The OIA tracks Standard 12 disclosures and removes "one case neutral arbitrators" from the pool while their cases are open. During 2004, 17 neutral arbitrators were "one case neutral arbitrators" for part of the year. At the end of 2004, nine remained "one case neutral arbitrators."

IV. DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA

Kaiser submitted 861 demands for arbitration in 2004. Geographically, 417 demands for arbitration came from Northern California, 370 came from Southern California, and 74 came from San Diego.[26]

The demands are initially treated differently depending on whether they are mandatory or opt ins. **Mandatory cases** are those which arose under contracts dated or amended after December 31,

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[24]In addition to chance, the number of members in each panel, and the number of demands for arbitration submitted in a geographical area, the range is affected by how long a given arbitrator has been in the pool. Some have been here since we started, one joined December 27, 2004, a few days before the end date for this report. The number of times an arbitrator is selected also depends on whether the individual will hear cases where the claimant has no attorney (*pro per* cases). Almost 20% of the pool will not.

[25]Because we consider this to be a very important disclosure, we have prepared a sample Standard 12 disclosure form that neutral arbitrators can use. It is also available from our website, and we send it to anyone who requests it. See Exhibit G.

[26]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. Rule 8 specifies different places of service for Northern and Southern California.

2000, when all Kaiser arbitration clauses were changed to require the use of the OIA.[27] On the other hand, **opt ins** are those cases which arise under earlier contracts which require arbitration, but do not require that the OIA administer it. Thus, the claimant can choose to use the OIA or return to Kaiser for administration of the case.

When we receive an opt in demand for arbitration from Kaiser, we send the claimant several letters explaining our system and asking if the claimant wishes to opt in. We also explain the deadline to do so and that we will return the case to Kaiser if he or she does not opt in.

The following sections of this report describe how long it has taken Kaiser to submit demands for arbitration to the OIA after it received them from claimants, the number of cases that are mandatory, and what happened in the opt in cases. We then discuss the composition of the cases we administer, based on the claims made and whether the claimant has an attorney.

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

Under the *Rules*, Kaiser must submit a demand for arbitration to the OIA within ten days of receiving it.[28] In 2004, the average length of time that Kaiser has taken to submit demands to the OIA was six days. The mode was one. This means that usually Kaiser sent the OIA a demand on the day after Kaiser receives it. The median was four days. The range was 0 to 95 days.

There were 115 cases in 2004 in which Kaiser took more than ten days to submit the demand to the OIA. If only these "late" cases are considered, the average was 25 days, the median was 18 days, and the mode was 13 days. Ninety of these cases were brought in Southern California or San Diego.

As mentioned above, last year's review focused attention upon these cases. Immediately thereafter, the number of cases began to decline. The OIA expects very few "late" cases in 2005.

B. Mandatory Cases

All Kaiser disputes with its members arising from events that occur after December 31, 2000 are subject to OIA administration. Of the 861 demands for arbitration the OIA received in 2004, 828 were mandatory and 33 were opt in. At the end of 2004, 97% of the open cases were mandatory and 3% were opt in.

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[27] A few contracts had been amended before this date.

[28] Exhibit C, Rule 11.

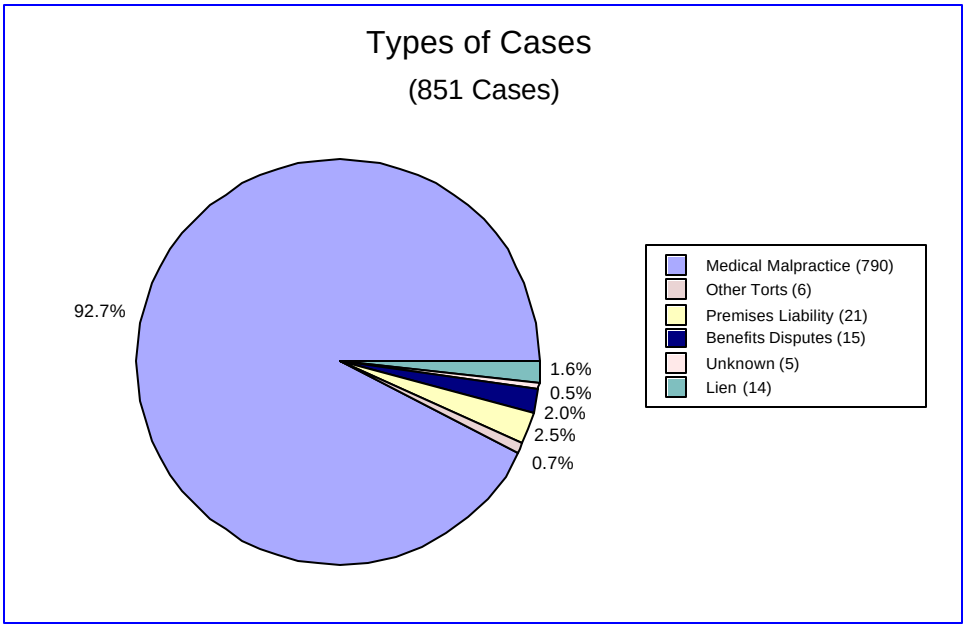
C. Opt In Cases

Of the 33 opt in demands the OIA received in 2004, 23 claimants decided to have the OIA administer their claims. Only one affirmatively opted out of the OIA. In three instances, the deadline had not occurred by the end of the year. The remaining six were returned to Kaiser because the claimants did not opt in to the OIA.

D. Types of Claims

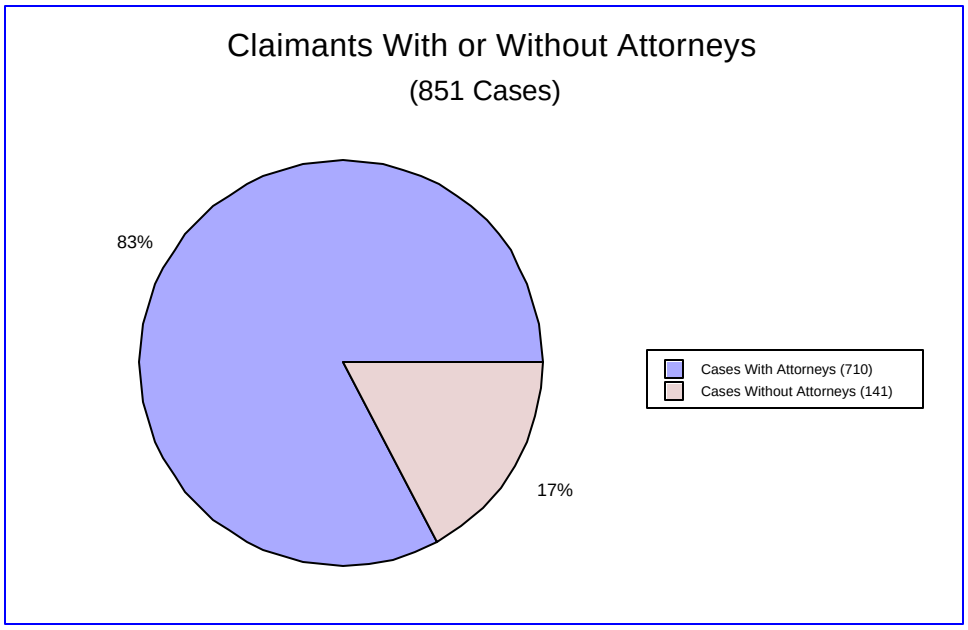
In 2004, the OIA administered 851 cases. We categorize cases by the subject of their claim: medical malpractice, premises liability, other tort, liens, or benefits and coverage cases. In addition, cases are categorized as unknown when the demand for arbitration does not describe the claim. Medical malpractice cases were the most common, making up 93% (790 cases) in the OIA system. Benefits and coverage cases represent only 2% of the system (15 cases).

The chart below shows the types of claims the OIA administered during 2004.



E. Claimants With and Without Attorneys

Claimants were represented by counsel in 83% of the cases the OIA administered in 2004 (710 of 851). In the remaining 17% of cases, the claimants were representing themselves (or acting in *pro per*).



V. SELECTION OF NEUTRAL ARBITRATORS

One of the most important parts 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 sections discuss different aspects of the selection process in detail: 1) the manner in which the parties selected the neutral arbitrator **B** jointly agreeing or based upon their separate responses; 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, almost always the claimant **B** disqualified a neutral arbitrator; and 4) the amount of time it took the parties to select the neutral arbitrator. Finally, we report the numbers of 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[29] 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 names of 12 members of the appropriate panel from the OIA pool of neutral arbitrators.[30] The names are generated randomly by computer.

Along with the LPA, we send the parties information about the people named on the LPA. At a minimum, we send a copy of each person's application and fee schedule, along with any update. If the people have served in any earlier, closed OIA case, we send copies of any evaluations we have received about them, as well as redacted versions of the decisions they have prepared in OIA cases.

The parties have 20 days to respond to the LPA. A member of the OIA staff attempts to contact the parties before their responses to the LPA is due to remind them of the deadline. Parties can respond in one of two ways. First, they 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.[31] Provided the person agrees to follow the OIA *Rules*, the parties can jointly select any one 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, we eliminate any names who have been stricken by either side and then total the scores of the names that remain. The person with the lowest score is asked to serve. We call this the "strike and rank" procedure.

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

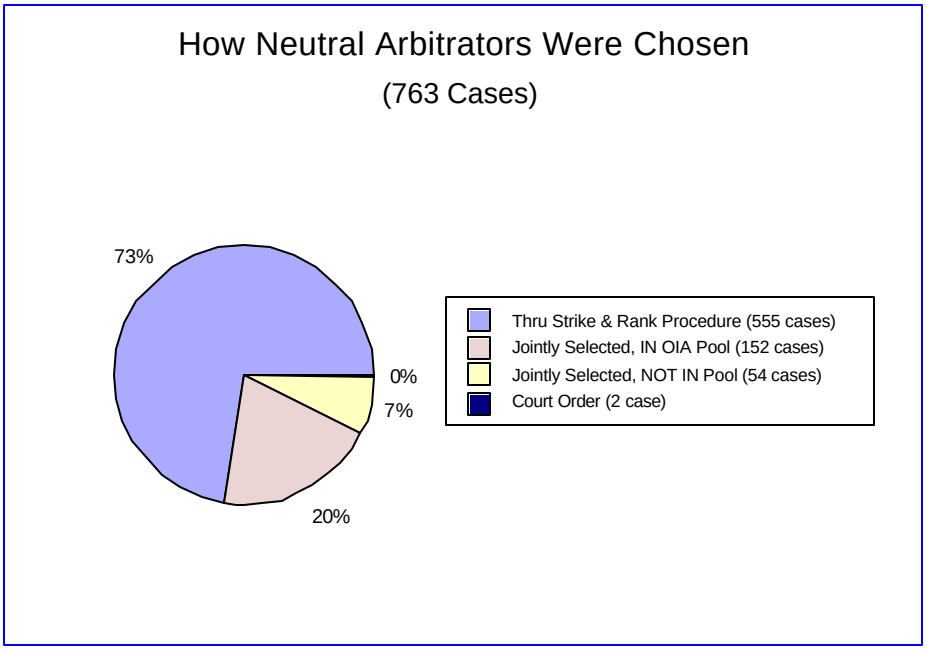
[30]We have two versions of each of the three geographically based panels based on whether the neutral arbitrators will accept *pro per* cases.

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

A significant number of OIA administered cases close before a neutral arbitrator is selected, and even before that process is begun. In 2004, 77 cases either settled (28) or were withdrawn (49) without a neutral arbitrator in place.[32] Before a neutral has been selected, the parties can request a postponement of the LPA deadline. (See Rule 21.) 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 763 neutral arbitrators selected in 2004, 206 were jointly selected by the parties (27%) and 555 (73%) were selected by the strike and rank procedure. Two neutral arbitrators were selected by the court. Of the neutral arbitrators jointly selected by the parties, 152, or 74%, were members of the OIA pool, though not necessarily on the LPA sent to the parties.



[32] In 55 of the 77 cases, the process to select a neutral arbitrator had begun, but the cases closed before the process ended. These 55 cases included both cases with attorneys and cases where the claimant was in *pro per*. The disposition varied however. In the 21 *pro per* cases that closed without a neutral arbitrator selected, 3 settled and 18 were withdrawn. In the 34 cases with an attorney, 18 settled and 16 were withdrawn.

C. Cases with Postponements of Time to Select Neutral Arbitrators

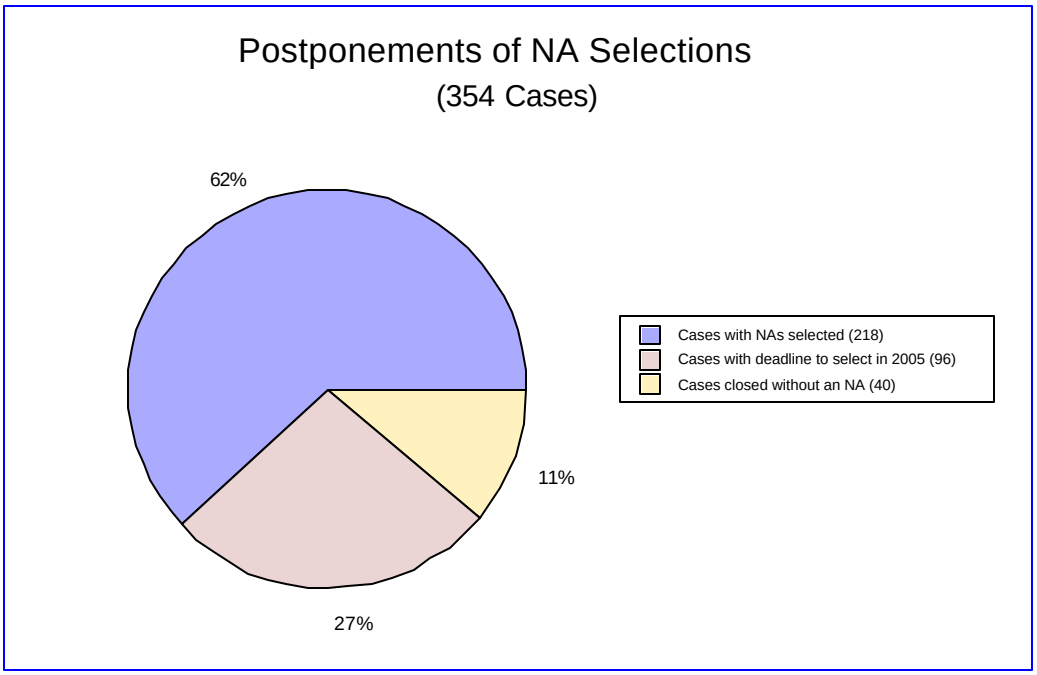
Under Rule 21, claimants have a unilateral right to a 90 day postponement of the deadline to respond to the LPA. If claimants have not requested one, respondents may request such a postponement, but only if the claimants agree in writing. The parties can request only one postponement in a case – they cannot, for example, get a 40 day postponement at one point and 50 day postponement later on. The postponement, however, does not have to be 90 days; it can be shorter, and many are. In addition to Rule 21, Rule 28 allows the OIA, in cases where the neutral arbitrator has not been selected, to extend deadlines. The OIA has used this power occasionally to extend the deadline to respond to the LPA. Generally, parties must use a 90 day postponement under Rule 21 before the OIA will extend the deadline under Rule 28. A Rule 28 extension is generally short – two weeks if the parties say that they have settled or the case is being withdrawn[33] – though it may be longer if based on the claimant's medical condition.

Claimants do not have to give a reason for why they want a 90 day postponement under Rule 21, though there must be a reason for a Rule 28 extension. The reasons for a Rule 28 extension are often the same as claimants volunteer for why they use Rule 21. In some cases, the parties are seeking to settle the case or to select a neutral arbitrator jointly. Some claimants or attorneys want a little more time to evaluate the case before incurring the expense of a neutral arbitrator. As noted above, 55 cases either settled or were withdrawn before a neutral arbitrator was put in place. Some claimants who do not have an attorney want time to find one. Occasionally we have discovered at the deadline that an attorney no longer represents a claimant. There are also some unrepresented claimants who are not feeling well and want more time for health reasons. One reason for Rule 21 postponements that does not justify a Rule 28 extension is that the claimants or their attorneys simply want more time to submit their LPA responses.

There were 354 cases in 2004 where the parties requested either a Rule 21 postponement or a Rule 28 extension of the time to return their responses to the LPA, or requested both. Most of these were Rule 21 postponements. There were 343 in 2004. Claimants made the request in 340 cases. Respondents did so only in three cases. There were 29 requests for a Rule 28 postponement. In only one of these cases had there not been a prior request under Rule 21.

[33]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.

The following chart shows what has happened in those 354 cases. Two-hundred-eighteen (218) of them (62%) now have a neutral arbitrator in place. Forty of them closed before a neutral arbitrator was ever selected. For the remaining ninety-six cases, the deadline to select a neutral arbitrator is after December 31, 2004.



D. Cases with Disqualifications

California law gives the parties in an arbitration the opportunity to disqualify neutral arbitrators at the start of a case.[34] Neutral arbitrators are required to make various disclosures within ten days of the date they are selected.[35] After they make these disclosures, the parties have 15 days to serve a disqualification on 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

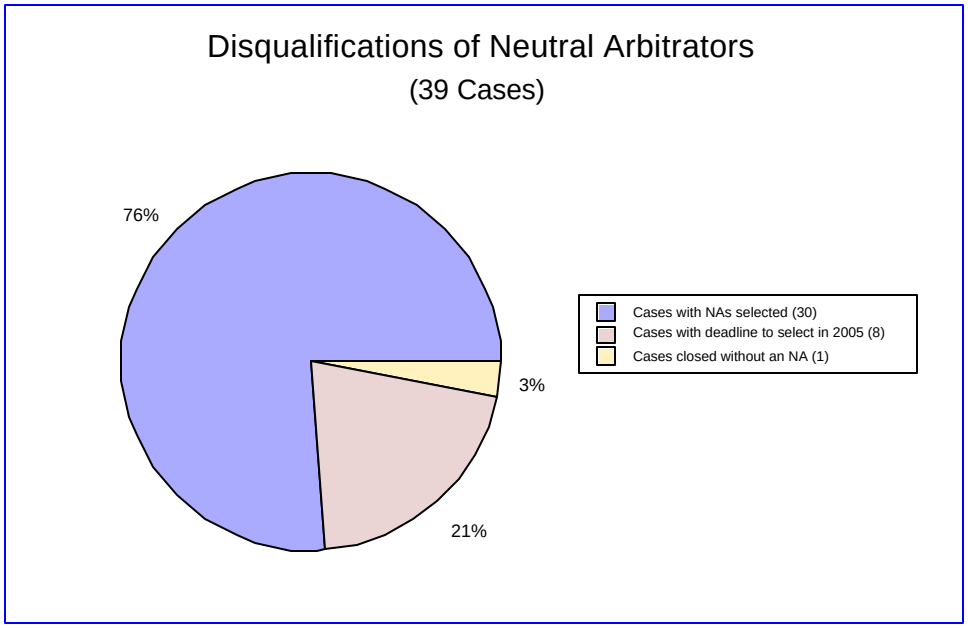
[34]California Code of Civil Procedure ' 1281.91 and Exhibit C, Rule 20.

[35]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.

arbitrator. Absent court action, there is no limit as to the number of times a party can disqualify neutral arbitrators in a given case.[36]

Multiple disqualifications occur infrequently. In 2004, neutral arbitrators were disqualified in 39 cases. Thirty-two cases had a single disqualification. Two cases had two disqualifications, two cases had three, one case had four disqualifications, and two cases had five disqualifications.[37] In 30 cases with a disqualification, a neutral arbitrator had been selected at the end of 2004. In eight cases with a disqualification, the time for the neutral arbitration selection had not expired by the end of the year. In the last case, the claimant settled the demand after the neutral arbitrator was disqualified, but before a new one was selected.

Because of multiple disqualifications, these 39 cases represent 56 neutral arbitrators who were disqualified in 2004. The neutrals were disqualified by the claimants' side 53 times, and by the respondents' side 3 times.



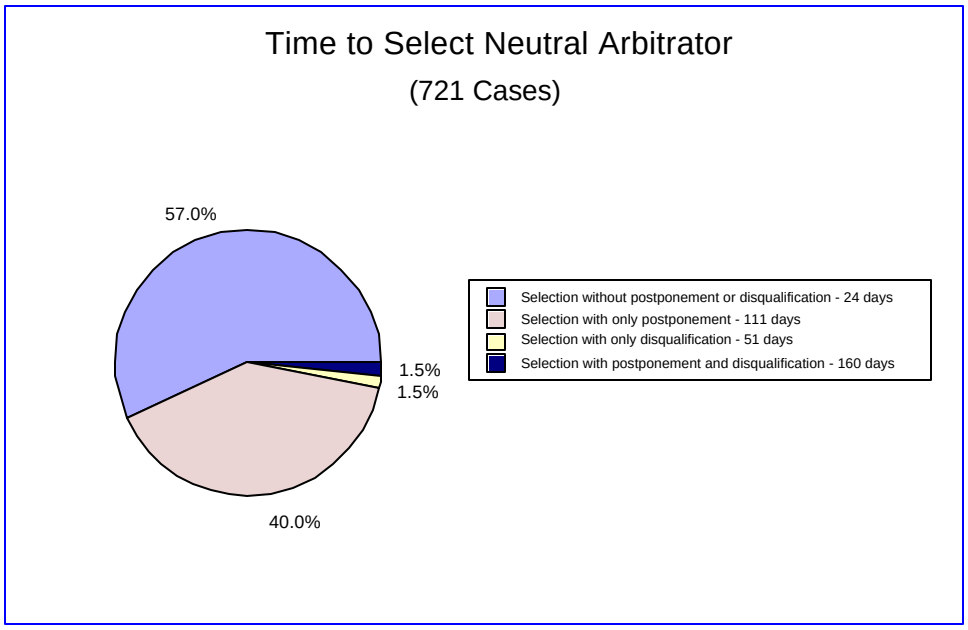
[36]Under Rule 18.f, after two neutral arbitrators have been disqualified, the OIA randomly selects subsequent neutral arbitrators, rather than continuing to send out new LPAs.

[37]In cases with multiple disqualifications, one of the parties may petition the California Superior Court to select a neutral arbitrator. In such cases, a party is only permitted to disqualify one neutral arbitrator without cause; subsequent disqualifications must be based on cause. California Code of Civil Procedure ' 1281.6.

E. Length of Time Taken to Select a Neutral Arbitrator

In this section we consider the 721 cases in which a neutral arbitrator was selected in 2004.[38] There are an additional 165 cases where the process for selecting the neutral arbitrator began in 2004 **B** an LPA was sent **B** but the process was not completed December 31, 2004.

Because parties can postpone the deadline and disqualify a neutral arbitrator, we divide 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 has 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 has to be 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 721 cases. The four categories are displayed in the chart below.



[38] Forty-two cases in which a neutral arbitrator was selected in 2004 are not included in this one section. In 38 cases, a neutral arbitrator had previously been appointed, had begun acting as the neutral arbitrator, but had subsequently removed him or herself, or had been removed, as the neutral arbitrator. These include cases where a neutral arbitrator died or became seriously ill, was made a judge, moved, etc. In addition, three neutral arbitrators were dis qualified after making disclosures in the middle of cases, because of some event occurring after the initial disclosure. In one case, one of the parties went to court to have the court select the neutral arbitrator. Because we count time from the first day that the case entered the OIA system, those cases are not included in these computations of length of time to select a neutral arbitrator.

1. Cases with No Delays

There were 409 cases where a neutral arbitrator was selected in 2004 in which there was no delay. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is no delay was 33 days. The average number of days to select a neutral arbitrator in those cases was 24 days, the mode was 23 days, the median was 23 days, and the range was 3-57 days.[39] At 57% , this category represents a majority of the cases in which the parties selected a neutral arbitrator in 2004.

2. Cases with Postponements

There were 289 cases where a neutral arbitrator was selected in 2004 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 2003, but the neutral arbitrator was actually selected in 2004. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is a 90 day postponement was 123 days. The average number of days to select a neutral arbitrator in those cases was 111 days, the mode was 113 days, the median was 114 days, and the range was 22-329 days.[40] This category represents 40% of all cases which selected a neutral arbitrator in 2004.

3. Cases with Disqualifications

There were 12 cases where a neutral arbitrator was selected in 2004 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 2003. Under the *Rules*, the maximum number of days to select a neutral

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[39]The case that took 57 days to select a neutral arbitrator could have been treated as a disqualification case. Based upon the transmission form from Kaiser, we sent the parties an LPA with the names from the OIA Northern California panel. After the deadline for responses to this LPA, we were informed by the claimant's attorney that the case was actually a Southern California case and should have a Southern California neutral arbitrator. Without insisting upon the procedure of sending out a letter confirming the service of the Northern California neutral and a subsequent disqualification, the OIA sent the parties a new LPA drawn from the Southern California panel, from which a neutral arbitrator was selected. The case then settled in less than 8 months.

[40]In the case that took 329 days to select a neutral arbitrator, the claimant originally obtained a 90 day postponement and then the parties jointly selected a neutral arbitrator. At that point, we were informed that the claimant was also pursuing his claim in state court and that a motion to compel arbitration was pending. Unfortunately, the court continued the date for hearing the motion many times, from August 2003 to February 2004. We finally received the order February 18, 2004, and the jointly-selected neutral arbitrator was put in place. The OIA could have put the neutral arbitrator in place in July 2003. Then the neutral arbitrator would have stayed the case until the State Court acted. While that would have improved the OIA's statistics, it would have meant that the disclosures the neutral arbitrator served on the parties would have been out-dated by the time the case became active.

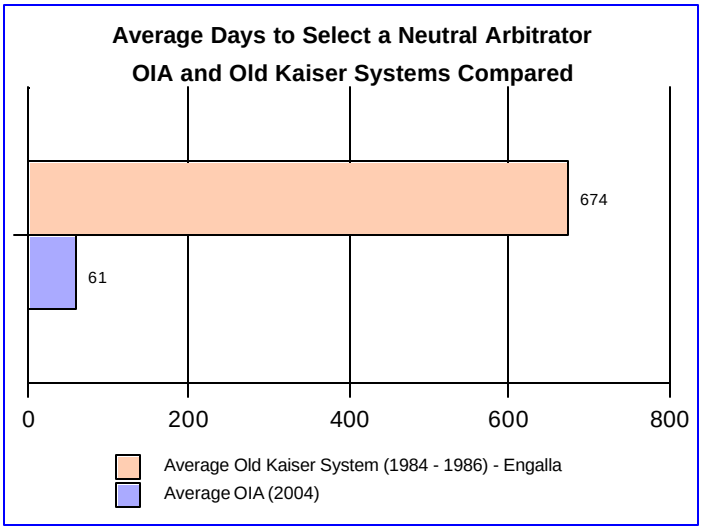
arbitrator is 96, if there is only one disqualification.[41] The average number of days to select a neutral arbitrator in the 12 cases is 51 days, the median is 51 days, the range is 33-76 days, and there is no mode. Disqualification only cases represent 1.5% of all cases which selected a neutral arbitrator in 2004.

4. Cases with Postponements and Disqualifications

There were 11 cases where a neutral arbitrator was selected in 2004 after a postponement and the disqualification of a neutral arbitrator. Again, this includes cases where the postponement or disqualification was made in 2003. 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 those cases is 160 days, the mode is 148 days, the median is 148 days, and the range is 128-213 days.[42] These cases represent 1.5% of all cases which selected a neutral arbitrator in 2004.

5. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases in 2004 is 61 days. For purposes of comparison, the *Engalla* decision reported that the old Kaiser system averaged 674 days to select a neutral arbitrator over a period of two years. Thus, in 2004, the OIA system was 11 times faster.



[41]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.

[42]In the case which it took 219 days to select a neutral arbitrator, the claimant both obtained a 90 day postponement and disqualified the first two neutral arbitrators.

F. Cases With a Party Arbitrator

A California statute gives parties in medical malpractice cases where the claimed damages exceed $200,000 a right to proceed with three arbitrators: one neutral arbitrator and two party arbitrators.[43] The parties may waive this right. The BRP questioned whether the value added by party arbitrators justified their expense and the additional delay of obtaining and scheduling two more participants in the arbitration process.[44] Such delay and rescheduling lengthens cases and raises costs for all parties. In the interest of increased speed and lowered expense, the BRP suggested that the system create incentives for cases to proceed with one neutral arbitrator, specifically by having Kaiser pay the neutral arbitrators' fees if the arbitration proceeds with a single neutral arbitrator.[45]

Rules 14 and 15 provide the incentive urged by the BRP. Kaiser will pay the full cost of the neutral arbitrator if the claimant will waive the statutory right to a party arbitrator, as well as 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 would proceed with a single neutral arbitrator. Thus far, in all the cases where claimant has waived, Kaiser has also waived.

Few party arbitrators are being used in our system. In 2004, party arbitrators signed the award in only 10 of the 143 cases in which we received an award. That means that the remaining 133 cases were decided by a single arbitrator. These 10 cases closed in an average of 554 days, with a range from 202 to 1,086 days.[46] Six of the ten cases found for the claimant, awarding from $167,728 to $3,300,000.

Of the 796 cases that remained open at the end of 2004, party arbitrators had been designated in 29 of them. In 17 of those, we had designations from both parties. We received designations of party arbitrators in 22 cases in 2004.

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[43]California Health & Safety Code §1373.19.

[44]Blue Ribbon Panel Report at 42.

[45]Blue Ribbon Panel Report at 41-42, Exhibit B at Recommendation 27.

[46]Cases with party arbitrators take longer to have the arbitration hearing. The average for all cases is 456 days, versus 554 days for cases with party arbitrators. They are also more likely to use either the complex designation or a Rule 28 extension to continue the 18 month deadline. (See generally Section VII.B)

VI. MAINTAINING THE CASE TIMETABLE

In this section we briefly summarize our approach to monitoring compliance with deadlines and then look at actual compliance with deadlines at various points during the arbitration.

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 on calendar and the case is on track to be closed in compliance with the *Rules*. In addition, the Independent Administrator holds monthly meetings to discuss the status of all cases open more than 15 months. Cases that fall into this category generally require more OIA contact for a number of reasons, e.g., a claimant with a continuing medical problem which makes scheduling the hearing and maintaining scheduled dates difficult or the recusal or death of the neutral arbitrator late in the case and/or right before the scheduled hearing. OIA attorneys also review a neutral arbitrator's open cases when they offer him or her new cases.

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

In a few cases, neutral arbitrators have not responded to a second communication. In those cases, the OIA removes the neutral arbitrators' names fromthe OIA panel until they take the necessary action. As discussed in the following sections, this occurred 33 times in 2004. Two neutral arbitrators were still suspended at the end of the year.

A. Neutral Arbitrator's Disclosure Statement

As discussed, once neutral arbitrators have been selected, they must make written disclosures to the parties within ten days. The *Rules* require neutral arbitrators to serve the OIA with a copy of these disclosures. The OIA monitors all cases to ensure that timely disclosures are made. In 2004, one neutral arbitrator was suspended until he served it. He has been reinstated.

B. Arbitration Management Conference

The *Rules* require the neutral arbitrator to hold an arbitration management conference (AMC) within 60 days of his or her selection.[47] It was the most highly rated feature of the OIA system according to neutral arbitrators' questionnaire responses.

The neutral returns the AMC form to the OIA within five days after the conference. The schedule set forth on the form controls dates for the rest of the case and allows the OIA to see that the case has been scheduled for completion within the time allowed by the *Rules*, usually eighteen months. Receipt of the form is therefore important. Seventeen neutrals were suspended for failing to return an AMC form in 2004. One remained suspended at the end of 2004.

C. Mandatory Settlement Meeting

The *Rules* instruct the parties to hold a mandatory settlement meeting (MSM) within six months of the AMC.[48] Consistent with the BRP recommendation, the *Rules* state that the neutral arbitrator is not present at this meeting.[49] The OIA provides the parties with an MSM form to fill out and return, stating that the meeting took place and its result. We have received notice from the parties in 403 cases that they have held an MSM. Twenty-eight of them reported that the case had settled at the MSM. Three of these cases involved *pro pers*. On the other hand, in 171 cases neither party returned the MSM form to the OIA despite requests in 2004.

D. Hearings and Awards

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*. We suspended seven neutral arbitrators for failing to set a hearing date, generally after one was cancelled, or setting a date that violated the *Rules*. One of these neutrals first failed to set a hearing and then set a date that violates the *Rules*. He remains out of compliance.

We suspended two neutral arbitrators for failing to provide the fee and fee allocation information required by California Code of Civil Procedure § 1281.96. One of these neutral arbitrators

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[47] Exhibit C, Rule 25.

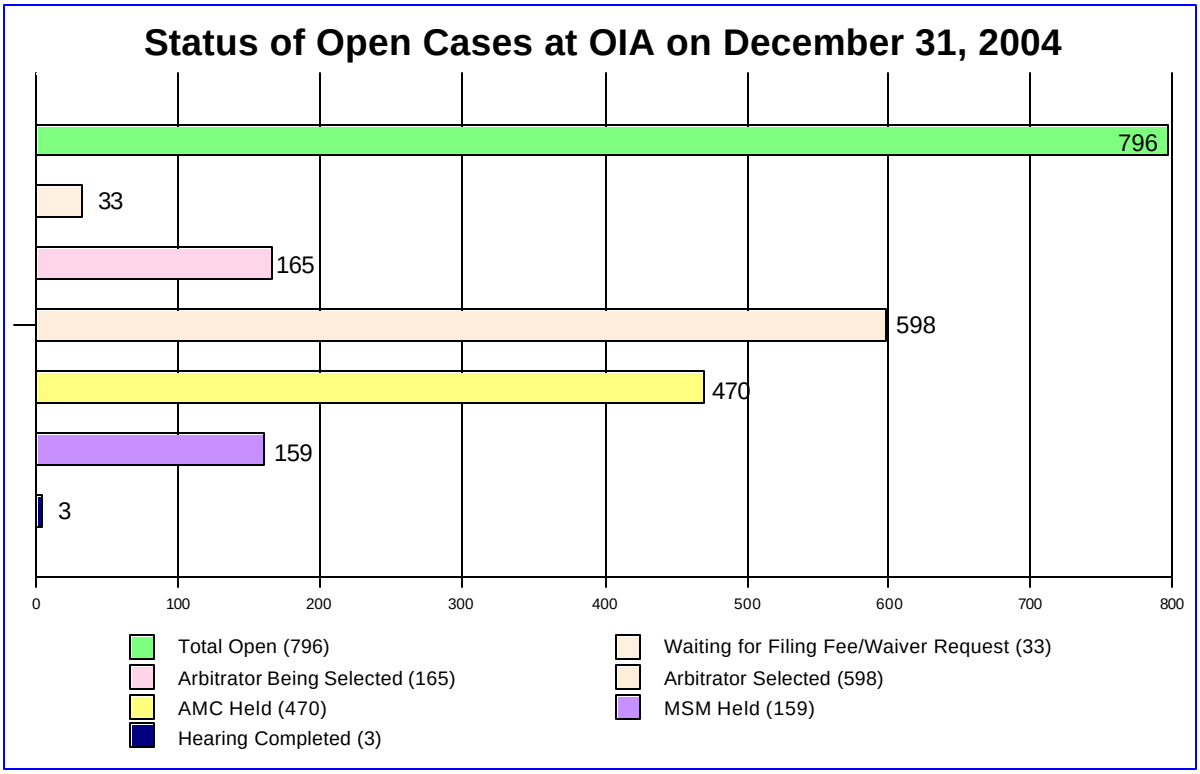
[48] Exhibit C, Rule 26.

[49] As the settlement conference is supposed to be conducted without the appointed neutral and in a form agreed to by the parties, the OIA has no real way to track whether the event has occurred except for receiving the forms from the parties. We have 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.

was suspended for this in two different cases. Both neutral arbitrators had also been suspended earlier in 2004 for failing to set hearing dates.

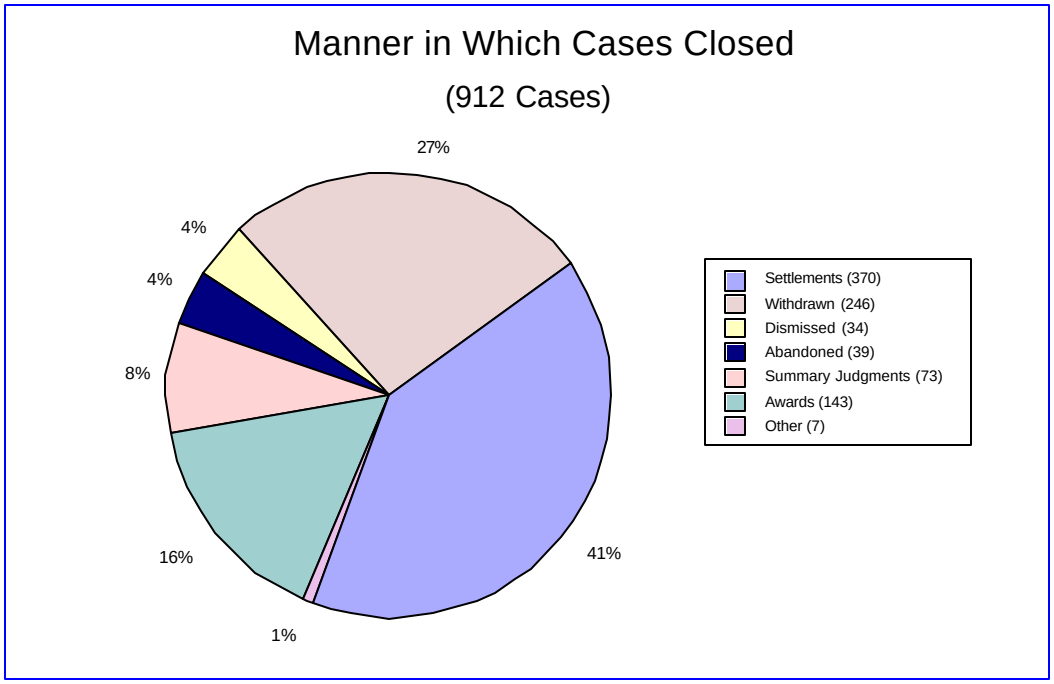
E. Status of Open Cases Currently Administered by the OIA

As of December 31, 2004, the OIA was administering 796 open cases. In 33 of these cases, the OIA was waiting for the payment of the filing fee or submission of paperwork which would waive it. In 165 cases, the parties were in the process of selecting a neutral arbitrator. In 598 cases, a neutral arbitrator had been selected. Of these, an arbitration management conference had been held in 470. This is 59% of all open cases. In 159 cases, the parties had held the mandatory settlement meeting. In three cases, the hearing had been held but the OIA had not yet been served with the decision. Ninety-seven percent of the open cases were mandatory. The following graph illustrates the status of open cases.



VII. THE CASES THAT CLOSED

In 2004, 912 cases in the OIA system closed. Cases close either because of action by the parties (cases that are settled, withdrawn, or abandoned for non-payment of fees), or by action of the neutral arbitrator (cases are dismissed, summary judgment is granted, or cases are decided after a hearing). The first half of this section looks at each of these methods, how many closed, and how long it took. The discussion of cases that closed after a hearing also includes the results; who won and who lost. The following chart displays how cases closed, while the graph on page 26 shows the length of time to close, again by manner of closure.[50]

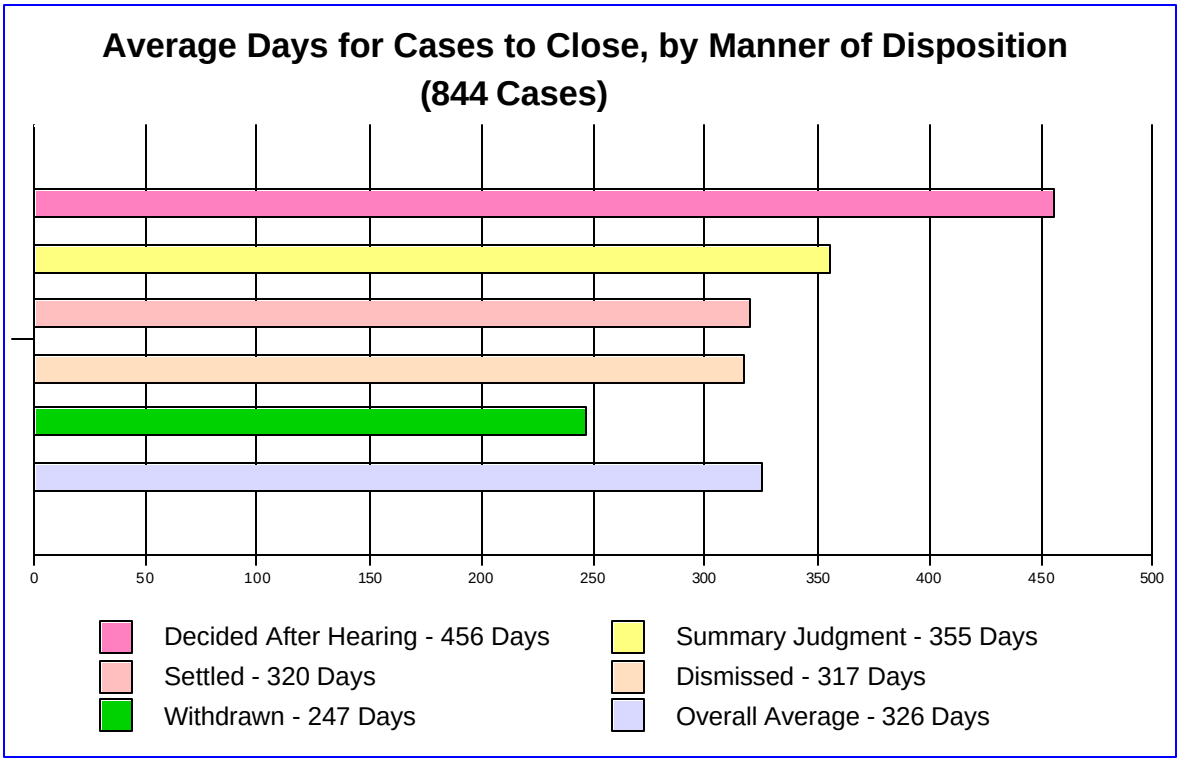


The second half of this section briefly discusses cases that employed special Rules to either have the cases decided faster or slower than most. Under the *Rules*, cases ordinarily must be completed within 18 months. Ninety percent of our cases are closed within this period, and almost two-thirds (64%) close in a year or less. If a claimant needs a case decided in less time, the case can be expedited.

[50] There were 7 cases that closed because the case was consolidated with another, had a split outcome, judgment on the pleadings, or other rare result. (A split outcome means that there was more than one claimant and who had different outcomes.) As they represent less than one percent of the total of all closed cases, they are not further discussed in this section.

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.

As shown on the chart on the next page, cases closed on average in 326 days, or 11 months.[51] The median is 311 days. The mode is 280 days. The range is 3 to 1,285 days. Only two cases closed late. If you consider only regular cases - which are the vast majority of all cases, the average is less: 290 days, or less than 10 months. The difference is most pronounced in cases that are decided by an award. Thirty percent of these employ one of the special devices. While the average number of days for all cases to close after a hearing is 456 days, or 15 months, the average for regular cases to close after a hearing is 380 days, or less than 13 months.



[51] 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 844 closed cases, not 912. It excludes 39 abandoned case, 22 cases that were withdrawn or settled before the fee was paid, and 7 cases closed other ways.

A. How Cases Close

1. Settlements – 41% of Closures

During 2004, 370 of the 912 cases settled, which represents 41% of the cases closed during the year. The average time to settlement was 320 days, or about ten and a half months. The median was 301, the mode was 280, and the range was 7 to 1,285 days.[52] In 18 settled cases, the claimant was in *pro per*.[53]

2. Withdrawn Cases – 27% of Closures

In 2004, the OIA received notice that 246 claimants had withdrawn their claims. In 78 of these cases, the claimant was in *pro per*. Withdrawals take place for many reasons, but the OIA has only anecdotal information on this point. We categorize a case as withdrawn when a claimant writes us a letter withdrawing the claim, or when we receive a dismissal without prejudice from the parties. When we receive a "dismissal with prejudice," we call the parties to ask whether the case was "withdrawn," meaning voluntarily dismissed, or "settled" and enter the closure accordingly. About 27% of closed cases have been withdrawn.

The average time to withdrawal of a claim in 2004 is 247 days. The median is 243 days. The mode is 47 days, and the range is 3 to 789 days.[54]

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[52]The case that took 1,285 days entered the system in August 2000 and settled in February 2004. The claimant was represented by counsel. The neutral arbitrator extended the time to close the case because the incident arose in Alaska, was dependent upon a parallel court case that was itself continued, and involved a doctor who moved to New York.

[53]The parties are not required to provide information as to how cases settle. Some forms, however, will state that the case was "dismissed for a waiver of costs." We no longer treat these as settlements, but now classify them as withdrawn.

[54]The case that was withdrawn after 789 days received an order extending the deadline from the neutral arbitrator, who was selected only after the first neutral arbitrator recused himself, and the next two were disqualified by the attorneys. It entered the OIA system in late February 2002, and most of that year was spent getting a neutral arbitrator in place. The claimant attorney withdrew soon before the October 2003 hearing date, and the neutral arbitrator gave the claimant repeated opportunities to find new counsel, which were unsuccessful. The claim was withdrawn in February 2004.

3. Abandoned Cases – 4% of Closures

Claimants failed to either pay the filing fee or obtain a waiver in 39 cases.[55] These were therefore deemed abandoned. In 15 of the 39 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 our office and are offered the opportunity to apply for fee waivers. Those excluded have either failed to pay or to apply for a waiver. We denied two applications for one type of waiver in 2004, but the claimants received another form.

4. Dismissed Cases - 4% of Closures

In 2004, neutral arbitrators dismissed 34 cases, about 4% of the closed cases. Neutral arbitrators dismiss cases if the claimant fails to respond to hearing notices or otherwise to conform to the *Rules* or applicable statutes. Twenty-five of these closed cases involved *pro pers*.

5. Summary Judgment – 8% of Closures

In 2004, 73 cases were decided by summary judgments granted to the respondent. This represents 8% of cases closed in 2004. In 53 of these cases, the claimant was in *pro per*. Failing to have an expert witness (20 cases), failing to file an opposition (33 cases), and exceeding the statute of limitations (7 cases) were most common reasons given by the neutrals in their written decisions for the grant of summary judgment. The reasons parallel summary judgments granted in the courts.

The average number of days to closure of a case by summary judgment in 2004 was 355 days. The median was 334 days. The mode was 334. The range was 153 to 603 days.[56]

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[55]The arbitration filing fee is a uniform $150 irrespective of how many claimants there may be in a single case. This is significantly lower than court filing fees except for small claims court. If a Kaiser member's claim is below the small claims ceiling amount of $5,000, the member is free to go there. Both the OIA and Kaiser inform these claimants of their right to go to small claims court.

[56]In the case that closed after 603 days, the neutral arbitrator extended the deadline after the claimant attorney withdrew in late 2003, so as to give the claimant an opportunity to find new counsel. The claimant was unsuccessful. The neutral arbitrator ultimately granted summary judgment because the claimant did not have a medical expert.

6. Cases Decided After Hearing – 16% of Closures

a. Who Won

About 16% of all cases closed in 2004 (143 of 912) have proceeded through a full hearing to an award. Judgment was for Kaiser in 95 of these cases, or 66%. In 12 of these cases, the claimant was in *pro per*. The claimant prevailed in 48 of them or 34% . In four of these cases, the claimant was in *pro per*.

b. How Much Did Claimants Win

Forty-eight cases resulted in awards to claimants. One claimant was awarded $3.3 million. The range of relief was $3,000 to $3.3 million. The average amount of an award was $386,000. The median was $249,500. The mode was $250,000.

A list of all awards in chronological order is attached as Exhibit H. The awards for 2004 begin on page 112.

c. How Long Did it Take

The 121 total cases that have proceeded to a hearing in 2004, on average, closed in 456 days. The median is 439 days. The mode is 203 days. The range is 23 to 1,091 days.[57]

B. Cases Using Special Procedures

1. Expedited Procedures

The *Rules* include provisions for cases which need to be expedited, that is, resolved in less time than 18 months. Grounds for expedition include a claimant's illness or condition raising substantial medical doubt of survival, a claimant's need for a drug or medical procedure, or other good cause.[58]

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[57]The case that closed in 1,091 days was decided in favor of the respondent in April 2004. The original hearing in this case had been set for September 2002. At that time the first neutral arbitrator granted an order extending the deadline because witnesses were unavailable. After an aborted hearing in December 2002, the neutral arbitrator recused himself. The parties jointly selected the next neutral arbitrator, whom the claimant attorney then disqualified. The ultimate neutral arbitrator held an AMC in June 2003. He originally set the hearing for October 2003, continuing it at the request of the claimant's attorney. The hearing lasted three days in April 2004. The claimant was represented.

[58]Exhibit C, Rules 33-36 (expedited cases).

In 2004, 14 claimants requested that their cases be resolved in less than the standard eighteen months. All but one received such status. The OIA received 11 of those requests from claimants before a neutral was selected in the case. In such cases, under Rule 34, the OIA makes the decision. The OIA granted ten and denied one without prejudice to it being made again to the neutral arbitrator, at which time it was granted. Kaiser objected to one request for expedited status, which the OIA granted. Four requests (one made to the OIA previously) were made to neutral arbitrators. Three were granted and one was denied. Neutral arbitrators in two cases revoked the expedited status as the circumstances changed.

We had one open expedited case on January 1, 2004. Eight expedited cases closed in 2004, including the case that was open at the beginning of the year. All closed on time. Four cases settled and four cases went to hearing; two awards for claimant and two awards for respondent. In one, the claimant received an award in the amount of $1.2 million. The average for the eight cases to close was 121 days (less than 4 months), the median was 131 days and the range was from 23 to 202 days. The 23 day case closed after a hearing which was decided in favor of Kaiser.

Although originally designed in part to decide benefit questions quickly, none of the expedited cases in 2004 involved benefit or coverage issues.

2. Complex Procedures

The *Rules* also include provisions for cases that need more time. In complex cases, the parties believe that they need 24 to 30 months.[59] In 2004, neutral arbitrators designated 33 cases 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 get a better sense of the information that is needed. In addition to the 33 cases designated in 2004, at the beginning of 2004, there were 4 open cases designated as complex. Seventeen complex cases closed in 2004. The average length of time for complex matters to close in 2004 was 627 days, about 21 months. The median was 635 days. There is no mode. The range was from 434 to 779 days (about 25 months).

Considering the cases designated as complex in 2004, thirteen cases had been designated as complex because of medical issues; nine had complex discovery; eight were designated by order of the neutral; and three by stipulation of the parties. Complex medical issues include cases where multiple liability issues exist, or the nature or amount of damages is difficult to ascertain. Complex discovery includes cases involving large document productions, many depositions, or extensive travel to complete discovery.

[59] Exhibit C, Rule 24(b).

3. Extraordinary Procedures

Extraordinary cases need more than 30 months for resolution.[60] The OIA received notice in 2004 that one case had been designated as extraordinary and therefore would take more than 30 months to resolve. There were four extraordinary cases open at the beginning of 2004. Two cases settled this year. The average number of days for an extraordinary case to close was 1,032 days, or 34 months. The range was 933 to 1,130 days (37 months).

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 (or thirty-month) deadline if there are "extraordinary circumstances" that warrant it. In 2004, the neutral arbitrators had made Rule 28 determinations of "extraordinary circumstances" in 78 cases and extended these cases beyond their limit. In addition, there were 47 such cases open at the beginning of 2004.[61] Of these 122 cases, 53 remain open, and 69 closed in 2004. Considering only those cases that received a Rule 28 extension in 2004, 30 closed and 48 remain open. Regardless of when the extension was made, the average time in 2004 to close cases with a Rule 28 order was 661 days, about 22 months. The median was 603 days. There mode is 570. The range was 168 to 1,285 days.[62]

According to the neutral arbitrator orders granting the extension, respondent requested 4 extensions, claimants requested 25, and the parties stipulated 9 times. Extensions were ordered 12 times over the respondents' objections. Two orders noted that the respondent attorney did not object. Nineteen orders merely recited there was good cause or extraordinary circumstances. The most common reason was the illness of a party or attorney (including the need for a claimant's condition to stabilize) (11 cases); problems with an expert witness (9 cases); procedural problems of some sort (adding a new party, cause of action or brief; appointing a guardian ad litem; etc.) (5 cases); and scheduling (5 cases). Four orders referred to the withdrawal of the claimant attorney and another four to general complexity. Three orders mentioned multiple neutral arbitrators. Two referred to discovery.

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[60] Exhibit C, Rule 24(c).

[61] For technical reasons, some cases received an extension in both 2003 and 2004. The numbers, therefore, do not add up.

[62] The case that closed in 1,285 days was settled and is discussed in fn. 52.

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.[63] In addition, state law provides that if the claim is for more than $200,000, the arbitration panel will consist of three arbitrators – a single neutral arbitrator and two party arbitrators,[64] one selected by each side.

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, the OIA sends information about the types of waiver and the waiver forms. The claimants can thus choose which they want to submit.[65]

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 standards. If granted, the OIA's $150 arbitration fee is waived. We inform claimants of the existence of this waiver in the first letter we send to them. They have 75 days to submit the form, from the date the OIA receives their demands for arbitration. This waiver was created in 2003.[66] 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.

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[63]California Code of Civil Procedure § 1284.2.

[64]Party arbitrators are not expected to be neutral, although they can be. Party arbitrators are not covered by the *Ethics Standards*.

[65]Exhibit I contains the packet we send to those who ask for it. This contains a general explanation, the forms, and instructions on how to fill them out.

[66]California Code of Civil Procedure §1284.3; Exhibit C, Rule 12. A copy of this waiver form is at Exhibit I, page 115.

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

This type of fee waiver, which has existed for the past six years, depends upon the claimants' ability to afford the cost of the arbitration fee and neutral arbitrator. Claimants must disclose certain information about their income and expenses. If this waiver is granted, the claimant does not have to pay either the neutral arbitrator's fee or the OIA $150 arbitration filing fee. This waiver form is the same as that used by the state court to allow a plaintiff to proceed *in forma pauperis*. 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 the waiver.[67]

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

As discussed above, the *Rules* contain provisions to shift the cost to Kaiser for the full payment of neutral arbitrators' fees and expenses. The procedures are simple and voluntary. They rely entirely on the claimant's choice.[68] For claims under $200,000, the claimant must agree in writing not to object later that the arbitration was unfair because Kaiser paid the neutral arbitrator. For claims over $200,000, the claimant must also agree not to use a party arbitrator.[69] No financial information is required. These forms are served on Kaiser, the neutral arbitrator, and the OIA.

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

1. The $150 Arbitration Filing Fee

In 2004, we received 35 completed forms asking for the waiver of the $150 filing fee. The OIA granted all 35. Twenty-three of these claimants received both a waiver of the $150 arbitration filing fee and the waiver of the filing fee and neutral arbitrator's fees and expenses. Two other claimants received this waiver, but were denied the other. By obtaining the waiver of the $150 fee, the neutral arbitrator selection process can begin immediately, without waiting for the second waiver to be granted.

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[67] See Exhibit C, Rule 13. A copy of this waiver form is at Exhibit I, pages 118-22.

[68] See Exhibit C, Rules 14 and 15. The forms are contained in Exhibit I, pages 123-24

[69] 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.

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

In 2004, we received 55 completed fee waiver applications. Because 3 requests were pending on January 1, 2004, the OIA decided 58 requests in 2004. We granted 56 waivers of the arbitration fees and neutral arbitration fees and denied 2.[70] No requests for waivers of the fees and neutral fees remained at the end of the year. Kaiser did not object to any application.

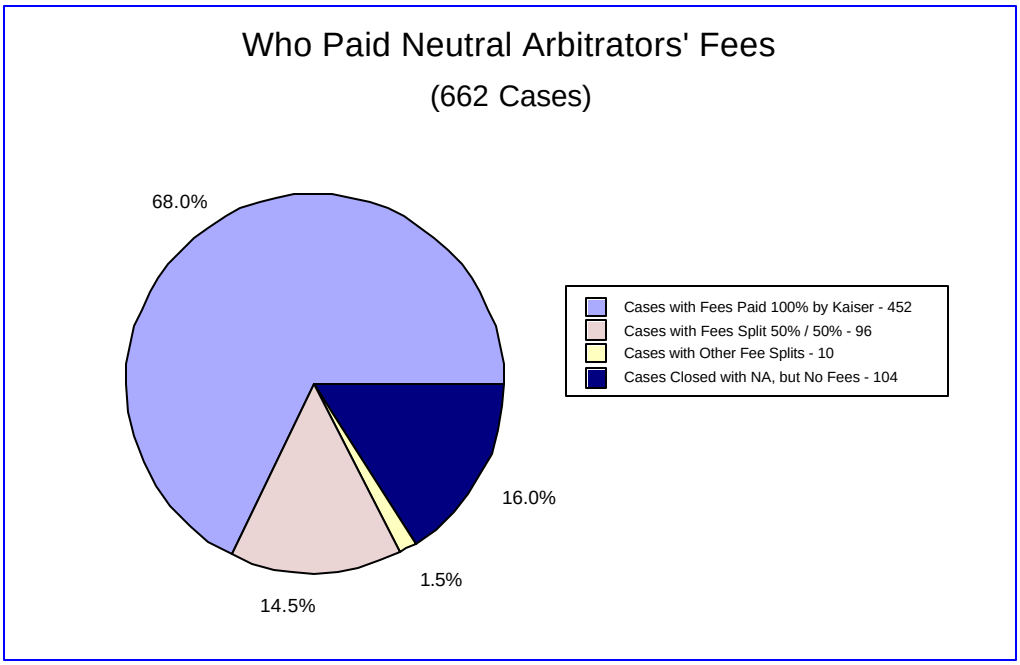
3. The Neutral Arbitrators' Fees and Expenses

In the past we reported the number of waivers we received from the claimants as proxies for how fees are allocated. More accurate information, however, is now available. Arbitration providers now disclose neutral arbitrators' fees and fee allocation for closed cases that we received after January 1, 2003.[71] We received fee information from neutral arbitrators in 662 cases that closed in 2004.

Of these 662 cases, 104 reported no fees were charged. Four-hundred-fifty-two (452) reported that fees were allocated 100% to Kaiser. The claimant paid nothing in these cases. Ninety-six reported that the fees were split 50/50. Ten neutrals reported other allocations, which ranged between 25 and 99 percent to Kaiser. Claimants who are not represented by counsel seem to be more likely to have Kaiser pay 100% of the neutral arbitrators' fees than claimants represented by attorneys. (88% vs. 79%.) Of the 558 cases where the neutral arbitrators charged fees, Kaiser paid all of the neutral arbitrators' fees in 81% of the cases. As shown in the chart on the next page, claimants paid neutral fees in only 16% of cases that closed in 2004 with a neutral arbitrator in place.

[70] As noted above, these two proceeded with their cases having received the other waiver. Four claimants who requested waiver forms but did not return them did abandon their claims.

[71] California Code of Civil Procedure §1281.9.



D. The Fees Charged by Neutral Arbitrators

Members of the OIA pool set their own fees. They are allowed to raise their fees once a year, but the increases do not affect cases on which they have begun to serve. The fees range from $100/hour to $600/hour. The average hourly fee is $314, the median is $300, and the mode is $350.[72] Neutral Arbitrators also often offer a daily fee. This ranges from $400/day to $6,000/day. The average daily fee is $2,345, the median is $2000, and the mode is $2000.[73]

Looking at the 558 cases, the average neutral arbitrator=s fee for all the cases in which fees were charged is $3,903. The median is $1,155 and the mode is $500. That excludes the 104 cases in which there are no fees. The average for all cases, including those in which no fees were charged, is $3,290.

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[72]According to the *Los Angeles County Bar Association's County Bar Update*, the average billing rate for the attorneys in the firms surveyed in the 2003 RBZ Law Firm compensation Survey for Southern California was $353/hour.

[73]In addition to daily and hourly fees, neutral arbitrators may also impose deposits.

The prior fees include many cases where the neutral arbitrator performed very little work. If only the cases where the neutral arbitrator wrote an award are considered, the average neutral arbitrator fee is $12,178, the median is $10,158, and the mode is $6,060. The range is $1,325 to $46,100.

IX. EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM

At the end of a case where a neutral arbitrator has been selected, the OIA sends forms to its parties or attorneys to allow them to evaluate the neutral arbitrator. We also send 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. This section discusses the highlights of the responses we have received in 2004 from the parties and the neutrals. The complete statistics and copies of the forms are set out in Exhibits J and K, respectively.

A. The Parties or Their Counsel Evaluate the Neutral Arbitrators

Under Rule 49, at the close of an arbitration in which a neutral arbitrator has been appointed and held an arbitration management conference, the OIA sends an evaluation form to each attorney. 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 appointed in the matter in eleven different categories including fairness, impartiality, respect shown for all parties, timely response to communications, understanding of the law and facts of the case, and fees charged. 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 questionnaires are anonymous, though the people filling it out are asked to identify themselves by category and to say how the case ended.

During 2004, the OIA sent out 1,360 evaluations and received 590 responses in return. Two-hundred-twenty-eight identified themselves as claimants (34) or claimants' counsel (194), and 349 identified themselves as respondent's counsel. Thirteen did not specify a side.[74]

The responses have been quite positive overall, and they are encouragingly similar for both claimants and respondents. The mode for <u>all</u> questions and all types of evaluators was 5. That means that the most common answer to all the questions was the most favorable response possible.

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

Here are the responses to some of the inquiries.
Respond from 5 (Agree) to 1 (Disagree).

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

The average of all responses is 4.7 out of a possible maximum of 5. Claimants counsel average 4.7. *Pro pers* average 4.1. Respondents counsel average 4.8.[75] The median and the mode in all three groups is 5.[76]

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

The average of all responses is 4.6. Claimants counsel average 4.5. *Pro pers* average 4. Respondents counsel average 4.8. The median and the mode is 5 in all three subgroups.

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

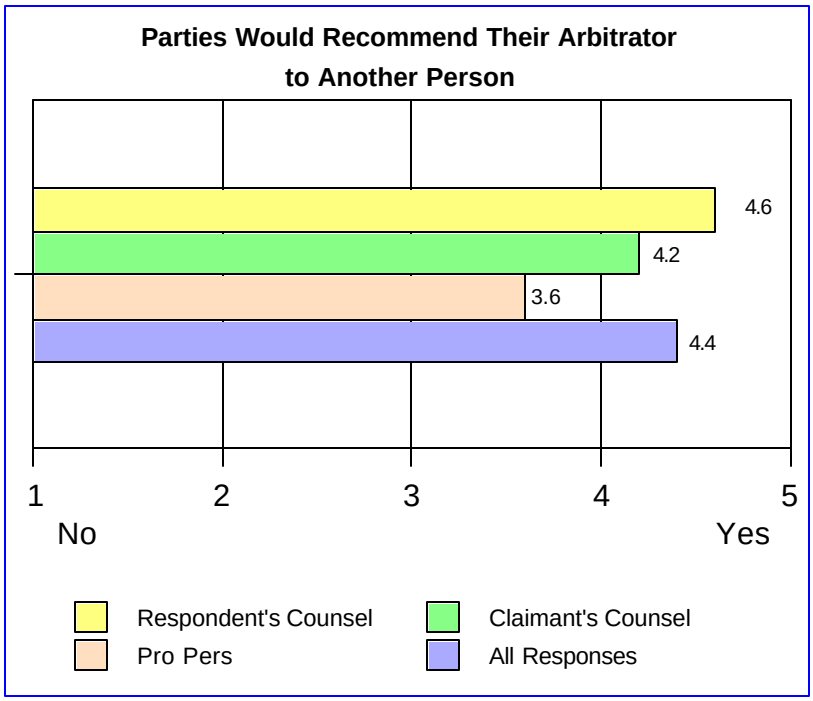
The average of all responses is 4.5 with the median and mode both at 5. Claimants counsel average 4.3. *Pro pers* average 3.5. Respondents counsel average 4.7. The median and the mode is 5 for both claimants and respondents counsel. *Pro pers* have a median of 4 and a mode of 5.

[75]The responses from *pro pers*, while positive, are lower than those from attorneys on either side. This is consistent with the results for the past four years. We believe that this lower score arises from a lesser understanding of the process – how it will work and what is possible within it. *Pro pers* are also less likely to win at their hearing or to settle their cases, so they are also less likely to be satisfied with the result of the arbitration than lawyers. Finally, some *pro pers* sometimes tell us that they want an opportunity to tell their account of what happened, regardless of the neutral arbitrator's decision in the case. Arbitration is poorly suited to such a goal.

[76]When the median and mode are both 5, it means that a large number of people responding gave that number as their answer. It was the highest score. This is another measure of satisfaction with the neutral arbitrators in the OIA pool.

Item 11: AI would recommend this arbitrator to another person or another lawyer with a case like mine.@ B 4.4 Average

The average on all responses to this question is 4.4. Both the median and mode are 5. Claimant attorneys average response of 4.2. *Pro pers* average 3.6. Respondents counsel average 4.6. The median and the mode are 5 for both claimants and respondents counsel. *Pro pers* have a median of 4 and a mode of 5.



B. The Neutral Arbitrators Evaluate the OIA System

Under Rule 48, when cases close, the neutral arbitrators complete questionnaires about their experiences with the *Rules* and with the overall system. The information is solicited to evaluate and improve the system. The OIA designed this form with input from Kaiser and the AAC and began using it during 2000. During 2004, we sent out the questionnaire in 680 closed cases and we received 597 responses.[77] The results continue to show a high degree of approval of, and satisfaction with, the *Rules* and the OIA.

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

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

[77] This report has previously reported that 912 cases closed in 2004. Obviously, we do not send questionnaires if the case closed without a neutral arbitrator in place. Similarly, the OIA does not send them where the case was closed soon after an arbitration management conference was held. This eliminates cases that settle early or are withdrawn shortly after the arbitrator is selected. This policy took effect after the first year of mailing them. Large numbers of questionnaires were returned blank with a note from the neutral saying he or she had never met with the parties and had nothing to say about the case.

The actual number returned in 2004 was 636; however, 39 were blank. They are not included in the following discussion.

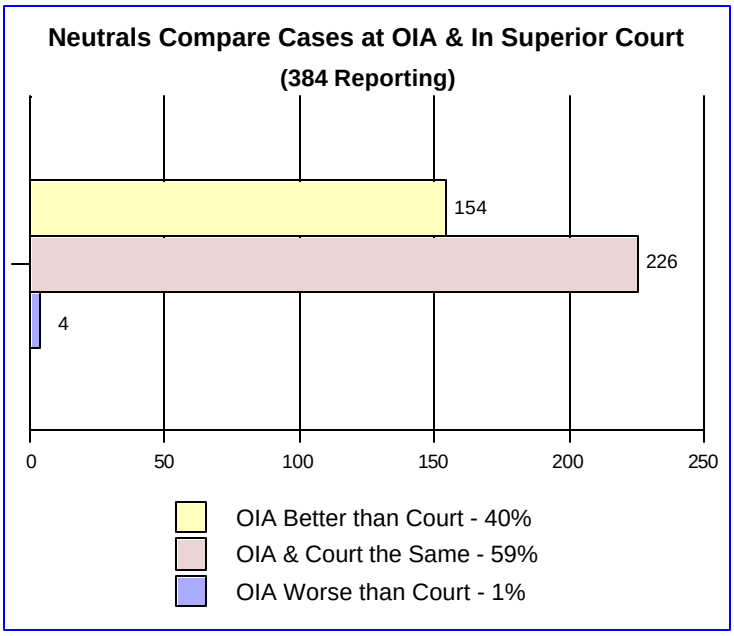
The questionnaires also include two questions that ask arbitrators to check off features of the system which worked well or poorly in the specific case. The vast majority of those who responded were positive. While some who returned these forms left some or all of these questions blank, these are the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

Neutral Arbitrators' Opinions Regarding OIA System

Feature of OIA System	Works Well	Needs Improvements
Manner of NA's appointment	461	10
Early Management Conference	467	11
Availability of expedited proceedings	139	4
Award within 15 business days of hearing closure	109	18
Claimants' ability to have Kaiser pay NA	282	30
System's rules overall	420	9
Hearing within 18 months	216	14
Availability of complex/extraordinary proceedings	58	9

Finally, the questionnaires asked the neutrals whether they would rank the OIA experience as better or worse than or about the same as a case tried in court. Sixty percent of the neutral arbitrators (384) made the comparison. One-hundred-fifty-four, or 40%, said the OIA experience was better. Two-hundred-twenty-six, or 59%, said it was about the same. Only four -- one percent -- said the OIA experience was worse. Those who believe it was better described it generally as faster, more efficient, and less expensive than court while as fair. One person praised its flexibility, another said it handled complex issues better, one liked the early AMC,

one said it has prevented cases where the claimant's attorney lost interest from lingering, and five specifically mentioned telephone conference calls. Two of those who judged it as worse Amissed the court reporter@ or said that the process was difficult with *pro per* claimants.



The vast majority of the neutral arbitrators' comments were compliments on how well the *Rules*, system, or the OIA staff works or assurances that no changes need to be made. Those comments are deeply appreciated. Disregarding those comments, the subjects eliciting the largest number of responses in 2004 concerned the billing process, followed by *pro per* claimants. The need for special rules for failure to prosecute, statutory disclosures, and notifications about settlement and withdrawals drew five comments each.[78]

There were more than 25 comments about the payment of fees and the waiver process. Some complained that Kaiser (5), claimant attorneys (1), *pro pers* (3), or undifferentiated parties (3) were slow to pay or wanted more specificity from the OIA about who was obligated to pay (5). A few still seemed to think the OIA was more involved in the billing process than we are and complained about cancellation policies (5). Six complained that *pro per* claimants would not sign the waivers and another said there was a dispute about whether the claimant had done so. As the OIA is not involved in the billing process, there is not much the OIA can do with most of these complaints other than try to ensure

[78]Most other suggestions were made by a single neutral arbitrator, although a few were made by up to three. If you are interested, please call the office.

that neutral arbitrators and parties understand billing and waiver processes and to remind neutral arbitrators they can require deposits. We inform neutral arbitrators of the billing allocation at the outset of the case, and if we subsequently receive waiver forms. We also changed the AMC form this year to remind neutral arbitrators to address the issue at the AMC.

Neutral arbitrators once again made many comments about the difficulty *pro pers* have navigating a legal system. While this has been a constant issue, it is significant that the OIA sent questionnaires to 130 neutral arbitrators in 2004 with pro pers, and we received comments from only approximately 20 of them. This year a dozen comments focused on the need for someone – apparently the OIA – to educate *pro per* claimants as to what is expected of them in arbitration, what evidence they will need to win, that the neutral arbitrator cannot provide them with legal advice, and that they need to keep the OIA and neutral arbitrator informed of their current address. Two seemed to suggest special, simpler *Rules* just for *pro per* claimants. One neutral arbitrator wanted pro pers to have to sign a statement at the beginning of the case that they understood their obligations.[79] The *pro per* handout and Rule 54 discuss most of these issues.

Five neutral arbitrators expressed concern about the confusing nature of the disclosure requirements. Two realized that the requirements are not created by the OIA (though we do enforce them to an extent). One neutral arbitrator, no longer in the OIA pool, believed the OIA should serve his disclosures and maintain his conflict information.

Five wanted the *Rules* to provide procedures for claimants who fail to prosecute cases, one wanted the *Rules* to deal with claimants who die, and another wanted the *Rules* to address summary judgment motions.

Finally, five neutral arbitrators thought that the *Rules* should require attorneys to inform the OIA and neutral arbitrators of settlements and withdrawals. (They do.) Two others complained that the OIA pressured them to set hearing dates in cases where the parties failed to provide written proof of settlements. This is the OIA's only leverage.

[79]The only other specific suggestion was a toll free number for *pro per* claimants to call. Four neutral arbitrators complained about the difficulty without offering any suggestions.

X. THE ROLE OF THE ARBITRATION OVERSIGHT BOARD

A. Membership

The Arbitration Oversight Board (AOB) is chaired by David Werdegar, M.D. 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. Al Ybarra, Secretary-Treasurer of the Orange County Central Labor Council of the AFL-CIO, was elected to replace the Honorable Linda Sanchez Valentine, who had resigned after being elected to the United States House of Representatives.

There are eleven board members, besides the two officers. They serve staggered terms. The members represent various stakeholders in the system, such as Kaiser Health Plan members, employers, labor, plaintiffs 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*, however, 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. (Formerly served on the AAC).
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> **Lark Galloway-Gilliam**, MPA, Executive Director, Community Health Councils, Inc., Los Angeles.
>
> **Tessie Guillermo**, President and CEO, Community Technology Foundation of California, San Francisco.
>
> **Dan Heslin**, former Director of Employee Benefits at Boeing, Murrieta. (Formerly served on the AAC).
>
> **Mary Patricia Hough**, medical malpractice attorney representing plaintiffs, San Francisco.

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

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

Kenneth Pivo, medical malpractice attorney representing respondents, Costa Mesa. (Formerly served on the AAC).

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

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

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

B. Activities

The AOB takes an active role. It meets at least quarterly to review operation of the OIA and receive reports from OIA staff. During 2004, it also heard reports from Kaiser about programs it has instituted to resolve member problems before the arbitration stage. It selected the firm and the parameters for the review of the OIA and then had several discussions of the review results. The needs of *pro pers* in the system continued as a particular topic of concern. The AOB has worked on revising Rule 54 to make it even easier for *pro per* claimants to understand. As noted above, it discussed the content of the awards and amended the *Rules*

Officers of the AOB are in regular contact with the OIA by e-mail and by telephone. AOB members Terry Bream, Dan Heslin, and Rosemary Manchester visited the OIA, met with all of its staff, and observed its operations in 2004.

The AOB also reviews the draft annual report and comments upon it with particular reference to how well the OIA is achieving the goals formulated by the Blue Ribbon Panel, which is, in effect, its mission statement. Exhibit M is the AOB Comments on the Sixth Annual Report.

XI. COMPARISON OF 2004 WITH PRIOR YEARS

A. Pool of Neutral Arbitrators

The number of neutral arbitrators in the OIA pool increased. It has the most members since December 31, 2000, when it crested at 349. It has 22 more members that it did at the end of 2003. All three geographical panels grew. San Diego's panel is at a new all time high. Appendix 1, lines 1, 5-7.[80] The percentage of the OIA pool composed of former judges is slightly lower than last year (35% vs 37%). This is a result of the Northern California panel, which has two fewer former judges and eight more members. Appendix 1, lines 6, 12-15.

B. How Many Neutral Arbitrators Have Served

The percent of neutral arbitrators in the OIA pool who served in 2004 has declined to 63%. Appendix 1, line 22. This is a natural result of a larger pool and smaller number of new demands. The number of different neutral arbitrators making awards after hearings continues to increase, from 136 to 246. Similarly, the number who have written only one award increased from 78 to 104. Sixty-three neutral arbitrators wrote only a single award in 2004. Appendix 1, lines 161 and 162. This wide-spread involvement by members of the OIA pool is a good sign.

C. Demands for Arbitration

The number of demands received during the year fell significantly in 2004, to 861. In 2002, we received 1,053 demands and in 2003, we received 989. This decrease may be a one year anomaly,[81] or may be the result of some of the actions Kaiser has discussed at AOB meetings that are designed to remedy problems when they arise. Appendix 1, line 42. The number of opt in demands continues to decline. We received only 33 in 2004. In 2002, we received 131. Appendix 1, line 48. Ninety-seven percent of all open cases are mandatory. Appendix 1, line 123.

D. How Neutral Arbitrators are Selected

The percentage of neutral arbitrators chosen by strike and rank versus those jointly selected was stable in 2004. Appendix 1, lines 17 and 18. The percent of the jointly selected neutral arbitrators

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[80]Appendix 1 contains the statistics set out in the first five reports, as well as the cumulative numbers through December 31, 2004 and for 2004 alone. References to Appendix 1 include a line number, which directs the reader to the precise row of the Appendix that sets out the statistics.

[81]The OIA received 115 demands in the first six weeks of 2005, which would result in 988 for 2005 if it continued.

who are members of the OIA pool, however, continues to increase. In 2004, 74% of jointly selected neutral arbitrators were members of the OIA pool. Appendix 1, lines 20 and 21. Put another way, in 2004 parties chose a neutral arbitrator who was not part of the OIA pool only 7% of the time. This indicates that attorneys who use our system have a high level of comfort with the members of the OIA pool.

E. Time to Select Neutral Arbitrators

2004 saw a reversal of trends, but this may be a one-year anomaly. For the first five years, the percent of cases in which a neutral arbitrator was selected with no delays had decreased from 81% in 2000 to 52% in 2003. In 2004, it increased to 57%. The percent of cases with a postponement decreased to 40%. Cases with only a disqualification declined to 1.5%. Appendix 1, line 61. The percent of cases with both a disqualification and a postponement decreased to 1.5% as well. This is the smallest number of cases with disqualifications ever.

Even more importantly, the length of time to select a neutral arbitrator has decreased, both within each category and overall. Appendix 1, line 61. We will continue to watch all of these factors in 2005 to see what happens.

Comparison of Percentage of Selections and Days to Selection of Neutral Arbitrators by Category

	1999-2000	2001	2002	2003	2004	1999 - 2004
No delay	25 days, 79%	23 days, 66%	27 days, 56%	25 days, 52%	24 days 57%	25 days, 62%
Only Postponement	106 days, 15%	104 days, 26%	115 days, 38%	114 days, 43%	111 days 40%	111 days, 32%
Only Disqual.	73 days, 5%	61 days, 6%	62 days, 4%	75 days, 2%	51 days 1.5%	64 days, 3.5%
Postponement & Disqual.	167 days, 1%	143 days, 3%	164 days, 4%	162 days, 4%	160 days 1.5%	158 days, 2.5%
Total	41 days	50 days	67 days	69 days	61 days	57 days

F. Claimants Without an Attorney

The percent of cases with claimants who are not represented by an attorney continues to decrease. It has fallen from 29% in the first year to 17% in 2004. Appendix 1, line 99. The information provided by the OIA may have encouraged the parties who could to obtain an attorney.[82]

G. Types of Claims

The percentage of medical malpractice claims has remained stable at 93%. The percentage of benefit claims remains at 2%. Appendix 1, lines 93-94.

H. Status of Cases

The OIA had 69 fewer open cases at the end of the 2004 than 2003. Appendix 1, line 116. This is a product of closing many cases and receiving significantly fewer new cases.

I. How Cases Close

The percentage of cases that settled in 2004 fell to 41%, the lowest percentage ever. In both absolute numbers and percentages, cases with hearings and cases withdrawn by the claimants increased to the greatest ever. Appendix 1, line 127. The percentages for cases abandoned, dismissed, or with a summary judgment remained stable.

Comparison of How Cases Closed[83]

	2001	2002	2003	2004
Settlements	44 %	45 %	49 %	41%
Withdrawn	20 %	23 %	23 %	27%
Abandoned	5 %	3 %	4 %	4%
Dismissed	3 %	3 %	2 %	4%
Summary Judgment	14 %	11 %	9 %	8%
Awards	15 %	14 %	12 %	16%

[82] Exhibit C, Rule 54.

[83] This chart only looks at the last four years as there were not that many closed cases in the first 21 months.

J. Time to Close

The time to close continues to increase, except for cases after hearing, which decreased by five days. Appendix 1, line 173. The increase in cases that settled and overall average were small (3 and 7 days). Withdrawn (16 more days) and summary judgment (22 more days) cases had greater increases. The increase in the time for summary judgment cases to close may be attributable to changes in California procedural law which required more notice before such motions.

Comparison of Average Number of Days to Close, by Category

	2001	2002	2003	2004
Settlements	278 days	300 days	317 days	320 days
Withdrawn	199 days	222 days	231 days	247 days
Summary Judgment	299 days	280 days	333 days	355 days
Awards	372 days	410 days	461 days	456 days
Average	281 days	296 days	319 days	326 days

As mentioned in last year's report, we considered changing the format of how we report the length of time to close cases to highlight whether the case was "regular" versus one that employed special treatment – i.e., expedited, complex, extraordinary, or Rule 28. Because almost 90% of the cases are regular, there is not that much effect on the averages, except with respect to the length of time for cases to close after a hearing (380 days) or after settlement (291 days).

K. Reasons for Summary Judgment Decisions

In 2004, the two major reasons for granting summary judgment continued to be failing to file an opposition and failing to have a medical expert. Appendix 1, lines 146-150. If Rule 54 is revised, it will remind *pro per* claimants that the motion will almost certainly be granted and the case closed if they do not file an opposition to a motion for summary judgment.

L. Fees Waivers

We received fewer waivers to shift the cost of both the neutral arbitrator and arbitration fees to Kaiser than any prior year. Appendix 1, line 101. We also received fewer requests to waive just the arbitration fee. (35 this year vs. 46 in 2003.) Perhaps the reduction results from the reduced number of new demands; the percentage of cases where the neutral arbitrator reported that Kaiser paid all the fees remained exactly the same as last year – 81% – even though the number of cases on which we have information increased tenfold. The OIA continues to grant almost all of them. Appendix 1, line 102. For a second year, Kaiser did not object to any request for waiver. Appendix 1, line 105.

M. Evaluations of Neutral Arbitrators and the OIA System

The responses by the parties to the evaluations remained stable or declined slightly. The neutral arbitrators' evaluation of the OIA remained the same.

XII. CONCLUSION

Rule 1 sets out the goals for the OIA system - a fair, timely, low cost arbitration system that protects the privacy interests of the parties. As far as this office is able to measure its outcomes, those goals 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 has largely disappeared as an issue. The fact that only one percent of cases closed after their time limit is a very good statistic.

Cost is an area we are beginning to measure. We know that the $150 filing fee is lower than court filing fees (other than small claims), that no claimant who sought a waiver of this fee was denied one, and that in 81% of the cases with fees that began after January 1, 2003 and ended in 2004, the neutral arbitrators were paid by Kaiser.

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

Finally, there is the question of fairness. The *Rules* promote fairness in the arbitration process and in the result in many ways. These include:

First, the composition of the pool of neutral arbitrators is balanced between those who have plaintiff's side experience and those who have defendant's side experience. Seventy-six percent report medical malpractice experience.

Second, the selections are being spread out to a larger number of neutral arbitrators. This includes a large number who preside over hearings. Spreading the work among more people helps reduce the appearance and possibility of neutral arbitrators being dependent upon Kaiser work.

Third, 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 the parties the identical information about the neutral arbitrators. The parties can jointly select anyone who agrees to follow the *Rules*, and either party can disqualify a neutral arbitrator after the selection. The decreasing number of disqualifications is a positive sign that parties are satisfied with the neutral arbitrator selected.

Fourth, a review of OIA records shows that most neutral arbitrators who have made a significant award in favor of claimants have been selected to serve again.

Fifth, the California Legislature and the Judicial Council have decided that disclosures about organizations involved in arbitrations helps promote fairer arbitrations. The OIA has posted this information for all to see, and has helped the neutral arbitrators comply with their obligations.

Last, the system is easier than a court system to access: the fee is only $150, no particular forms are required, and the neutral arbitrators' fees can and generally are paid by Kaiser.

It is the goal of the OIA to produce a fair, timely, low cost, and confidential arbitration process. It is proud of what has been accomplished so far.