

**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, 2019 - December 31, 2019**

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## REPORT SUMMARY

This is the annual report for the Office of the Independent Administrator (OIA) for 2019. It discusses the arbitration system between Kaiser Foundation Health Plan, Inc., or its affiliates (Kaiser) and its members.<sup>1</sup> Since 1999, the OIA has administered such arbitrations, and its Independent Administrator is Marcella A. Bell. From the data and analyses in this report, readers may gauge how well the OIA system meets its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protects the privacy of the parties.

### Status of Arbitration Demands

The total number of demands for arbitration slightly increased from the previous year. Most of the claims were for medical malpractice. This year, roughly the same percentage of claimants proceeded without attorneys, *in pro per*, as last year.

- 1. Number of Demands for Arbitration.** The OIA received 610 demands, 4 more than last year. The number of demands increased in Southern California and San Diego but decreased in Northern California. Two lien cases were received. See pages 10, 33, and 43.
- 2. Types of Claims.** Ninety-five percent (95%) of the cases involved allegations of medical malpractice. Less than two percent (<2%) presented benefit and coverage allegations. Lien cases made up less than one-half percent (<.5%). The remaining cases were based on allegations of premises liability and other torts. See page 10. Because lien cases differ significantly from cases brought by members, they are reported separately on page 33.
- 3. Thirty-one Percent (31%) of Claimants Did Not Have Attorneys.** Claimants in 187 cases, or 31%, were not represented by counsel, a slight decrease from last year. See pages 11 and 45.

### How Cases Closed

In the majority of cases, the parties themselves resolved their claims. Neutral arbitrators decided the remaining cases, almost always with a single neutral arbitrator. Only two cases went forward with party arbitrators.

- 4. More Than Three-Quarters (76%) of Cases Closed by the Parties' Action.** The parties settled 45% of cases, slightly less than last year. Forty-seven cases settled at the Mandatory Settlement Meeting. Of the cases that settled at the MSM, in five, claimants were *in pro per*. Claimants withdrew 26% of cases and

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

abandoned 6% by failing to pay the filing fee or get the fee waived. See pages 25 – 26, and 47 – 48.

5. **Nearly One-Quarter (24%) Closed by Decision of the Neutral Arbitrator.** Eight percent (8%) of cases closed after an arbitration hearing, 11% were closed through summary judgment, and 5% were dismissed by neutral arbitrators. See pages 26 – 27, and 47 – 48.
6. **Almost Half (47%) of Claimants Received Some Compensation.** Claimants receive compensation either when their cases settle (45%) or when they are successful after a hearing (2%). See pages 25, 27 and 47 – 48.
7. **Eight Percent (8%) of Cases Went to Hearing.** Claimants prevailed in 30% of these cases. The average award was \$846,223, and the range was from \$51,000 to \$5,258,636. See pages 27, 48, and Exhibit E.
8. **All But Two Cases Were Heard by a Single Neutral Arbitrator.** All but two of the hearings involved a single neutral arbitrator. A panel of three arbitrators decided only two of the 46 cases that went to hearing. See page 19.

## Meeting Deadlines

The *Rules* allow the parties to delay the neutral arbitrator selection process and extend the arbitration completion date. Even with such delays, the process is expeditious.

9. **More Than Half (55%) of Neutral Arbitrator Selections Proceeded Without any Delay.** The *Rules* give parties the option to postpone the deadline to select a neutral arbitrator, but more than half (55%) of the neutrals were selected without the parties exercising this option. This year, the claimants made all but five of the requests for 90 day postponement. California law gives parties the opportunity to timely disqualify neutral arbitrators. In two percent (2%) of the cases, parties disqualified the neutral arbitrator. In three percent (3%) of the cases, parties exercised both the postponement and disqualification options. Claimants disqualified 28 neutral arbitrators and Kaiser disqualified 11. See page 18.
10. **Average Length of Time to Select a Neutral Arbitrator is 62 Days.** The time to select a neutral arbitrator in cases with no delay was 23 days. The time to select a neutral with a 90 day postponement was 109 days. In cases with only a disqualification, it was 55 days. In cases with both a postponement and disqualification it was 149 days. The overall average length of time to select a neutral arbitrator for all cases was 62 days, 1 day less than last year. See pages 14 – 19, and 46 – 47.
11. **On Average, Cases Closed in Twelve Months.** Cases closed, on average, in 366 days, 23 days more than last year. No case closed beyond the deadline required

by the *Rules*. Eighty-two percent (82%) of the cases closed within 18 months (the deadline for “regular” cases) and 59% closed in a year or less. See pages 24 – 25 and 48 – 49.

12. **On Average, Cases With Hearings Were Completed in Less than Two Years.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 676 days (a little over 22 months). This average includes cases that were designated complex, extraordinary, or that received a Rule 28 extension because they needed extra time. “Regular cases” closed in 435 days (less than 15 months). See page 27.

### **Panel of Neutral Arbitrators**

More than half (59%) of the OIA panel spend all of their time acting as neutral arbitrators. More than half (60%) of the neutral arbitrators served on a case. The two methods of selecting a neutral arbitrator – strike and rank or joint selection – allow parties to select anyone they collectively want. The majority of neutral arbitrators the parties jointly selected were from the OIA panel.

13. **The Neutral Arbitrator Panel.** The OIA has 193 neutral arbitrators on its panel, 32 fewer than last year. Forty-three percent (43%) of them, or 83, are retired judges. See page 6.
14. **Neutral Arbitrator Backgrounds.** The applications completed by the members of the OIA panel show that 114 arbitrators, or 59%, spend all of their time acting as neutral arbitrators. The remaining members divide their time by representing plaintiffs and defendants, though not necessarily in medical malpractice litigation. Ninety-two percent (92%) of the neutral arbitrators report having medical malpractice experience. See page 7.
15. **More Than Half (60%) of Arbitrators Served on a Case.** Sixty percent (60%) of the neutral arbitrators on the OIA panel served on a case. Arbitrators averaged two assignments each. Thirty-five neutrals, including arbitrators not on the OIA panel, decided the 46 awards made. Seventy-four (74%) of the neutral arbitrators wrote only a single award. See pages 8 and 44.
16. **Majority of Neutral Arbitrators (67%) Selected by Strike and Rank.** Sixty-seven percent (67%) of neutral arbitrators were selected through the strike and rank process, and 33% were jointly selected by the parties. Seventy-six percent (76%) of the arbitrators jointly selected were members of the OIA panel. In the other cases, the parties chose a neutral arbitrator who was not a member of the OIA panel. See page 13.

## Neutral Arbitrator Fees

While the OIA arbitration filing fee is less than the comparable court filing fee, claimants in arbitration can be faced with neutral arbitrator fees, which do not exist in court. These fees, however, can be shifted to Kaiser.

17. **Kaiser Paid the Neutral Arbitrators' Fees in 91% of Closed Cases.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. Kaiser paid the neutral arbitrators' fees in 91% of closed cases. See page 32.
18. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$150/hour to \$1,500/hour, with an average of \$540/hour. For the 494 cases that closed, and for which the OIA has information, the average fee charged by neutral arbitrators was \$7,774. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was \$8,295. The average fee in cases decided after a hearing was \$36,093. See page 32.

## Evaluations

When cases conclude, the OIA sends questionnaires to the parties or their attorneys asking them about the OIA system, and if the cases closed by neutral arbitrator actions, an evaluation of the neutral arbitrators. Of those responding, the parties gave their neutral arbitrators and the OIA system positive evaluations. When cases close by neutral arbitrator actions, the OIA also sends the neutral arbitrators a questionnaire about the OIA system. Neutral arbitrators gave positive evaluations of the OIA system.

19. **Positive Evaluations of Neutral Arbitrators by Parties.** Most parties who responded to the OIA evaluation expressed satisfaction with the neutral arbitrators and would recommend them to others, with an average of 4.0 on a 5 point scale. *Pro pers* view neutral arbitrators less favorably. See pages 34 – 35.
20. **Positive Evaluations of the OIA by Neutral Arbitrators.** Ninety-eight percent (98%) of the neutral arbitrators reported that the OIA experience was the same as or better than the court system and 2% said it was worse. See pages 36 – 37.
21. **Positive Evaluations of the OIA by Parties.** Eighty-seven percent (87%) of the responding parties and attorneys reported that the OIA system was the same as or better than the court system and 13% said it was worse. See pages 38 – 39.

## Development and Changes in the System

The OIA and the Arbitration Oversight Board (AOB) continuously strive to improve the arbitration system.

22. **Change in Membership of the AOB.** Dr. Bruce R. Merl retired after 17 years of service on the AOB. His replacement is in process. See pages 4 and 40.
23. **AOB Finalizes Rule Change.** The AOB finalized approval of a Rule change which had been temporarily approved by the AOB chair in order to comply with a request from the Department of Managed Health Care. The mandated language was added to OIA Rule 14(a). See page 4 for a detailed description.
24. **AOB Approves Arbitration Rule Changes.** The AOB discussed and approved two Rule changes. See page 4 for a detailed explanation and Exhibit B for a redlined version.
25. **Collecting Diversity Data.** One of the AOB's strategic objectives is to improve data on diversity and inclusion. It therefore passed a resolution to recognize the value and importance of the State Bar of California's decision to collect diversity data. Pursuant to state law, the OIA will be collecting demographic data of all arbitrators as self-reported by the arbitrators and will post the information in the aggregate on the OIA website. See pages 4 – 5 and 42.

## Conclusion

The goal of the OIA is to provide an arbitration system that is fair, timely, lower in cost than litigation, and protects the privacy of the parties. To summarize:

- Neutral arbitrators are selected expeditiously, and the cases close faster than in court.
- Parties can, and do, disqualify neutral arbitrators they do not like.
- The filing fee is lower than in court, and parties can and do shift the costs of the neutral arbitrators to Kaiser.
- OIA arbitrations are confidential, and the OIA does not publish the names of individual claimants or respondents involved in them.
- Neutral arbitrators on the OIA panel have plaintiff, defendant, and judicial backgrounds. The cases are distributed among them.
- Neutral arbitrators and the OIA system receive positive evaluations.
- The OIA publishes annual reports, information about its cases in compliance with California law, and neutral arbitrator redacted decisions. This information is available on the website for the parties and the public.

## I. INTRODUCTION & OVERVIEW

The Office of the Independent Administrator (OIA) issues this report for 2019.<sup>1</sup> It describes the arbitration system that handles claims brought by Kaiser members against Kaiser Foundation Health Plan, Inc. or its affiliates (Kaiser).<sup>2</sup> Marcella A. Bell, an attorney, is the Independent Administrator. Under her contract with the Arbitration Oversight Board, the OIA maintains a panel of neutral arbitrators to hear Kaiser cases and independently administers the arbitration system between Kaiser and its members. The contract requires that Ms. Bell write an annual report describing this system. The report describes the goals of the system, the actions being taken to achieve them, and the degree to which they are being met. While this report mainly focuses on what happened in the arbitration system during 2019, the final section compares 2019 with earlier years.

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

The arbitrations are administered pursuant to the *Rules for Kaiser Permanente Member Arbitrations Administered by the Office of the Independent Administrator Amended as of January 1, 2020 (Rules)*. The *Rules* consist of 54 rules in a 21 page booklet and are available in English, Spanish, and Chinese.<sup>3</sup> Some important features include:

Procedures for selecting a neutral arbitrator expeditiously;<sup>4</sup>

Deadlines requiring that most cases be resolved within 18 months;<sup>5</sup>

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<sup>1</sup>This report, along with the prior annual reports, the *Rules*, various forms, and other information, including OIA disclosures, are available on the OIA website, [www.oia-kaiserarb.com](http://www.oia-kaiserarb.com). The OIA can be reached by calling 213-637-9847, faxing 213-637-8658, or e-mailing [oia@oia-kaiserarb.com](mailto:oia@oia-kaiserarb.com). A description of the OIA's staff is attached as Exhibit A.

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

<sup>3</sup>The *Rules* were amended and the changes took effect January 1, 2020. A redlined version of the *Rules* are attached as Exhibit B. See Section II for a discussion of the changes.

<sup>4</sup>Exhibit B, Rules 16 and 18.

<sup>5</sup>Exhibit B, Rule 24.

Procedures to adjust these deadlines when required;<sup>6</sup> and

Procedures under which claimants may choose to have Kaiser pay all the fees and expenses of the neutral arbitrator.<sup>7</sup>

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

### **A. Goals of the Arbitration System Between Members and Kaiser**

The system administered by the OIA is expected to provide a fair, timely, and low cost arbitration process that respects the privacy of the parties. These goals are set out in Rule 1. The data in this report are collected and published to allow the AOB and the public to determine how well the arbitration system meets these goals.<sup>8</sup>

### **B. Format of This Report**

Section II discusses developments and changes in the system in 2019. Sections III and IV look at the OIA's panel of neutral arbitrators, and the number and types of cases the OIA received. The parties' selection of neutral arbitrators is discussed in Section V. Section VI summarizes the methods for monitoring compliance of open cases, and Section VII analyzes how cases are closed and the length of time to close. Section VIII discusses the cost of arbitration. Sections IV.B. through VIII exclude lien cases.<sup>9</sup> Section IX presents the analyses for lien cases. The parties' evaluations of neutral arbitrators and the parties' and neutral arbitrators' evaluations of the OIA system are summarized in Section X.<sup>10</sup> Section XI describes the AOB's membership and activities during 2019. Finally, Section XII compares the operation of the system over time.

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<sup>6</sup>Exhibit B, Rules 24, 28 and 33.

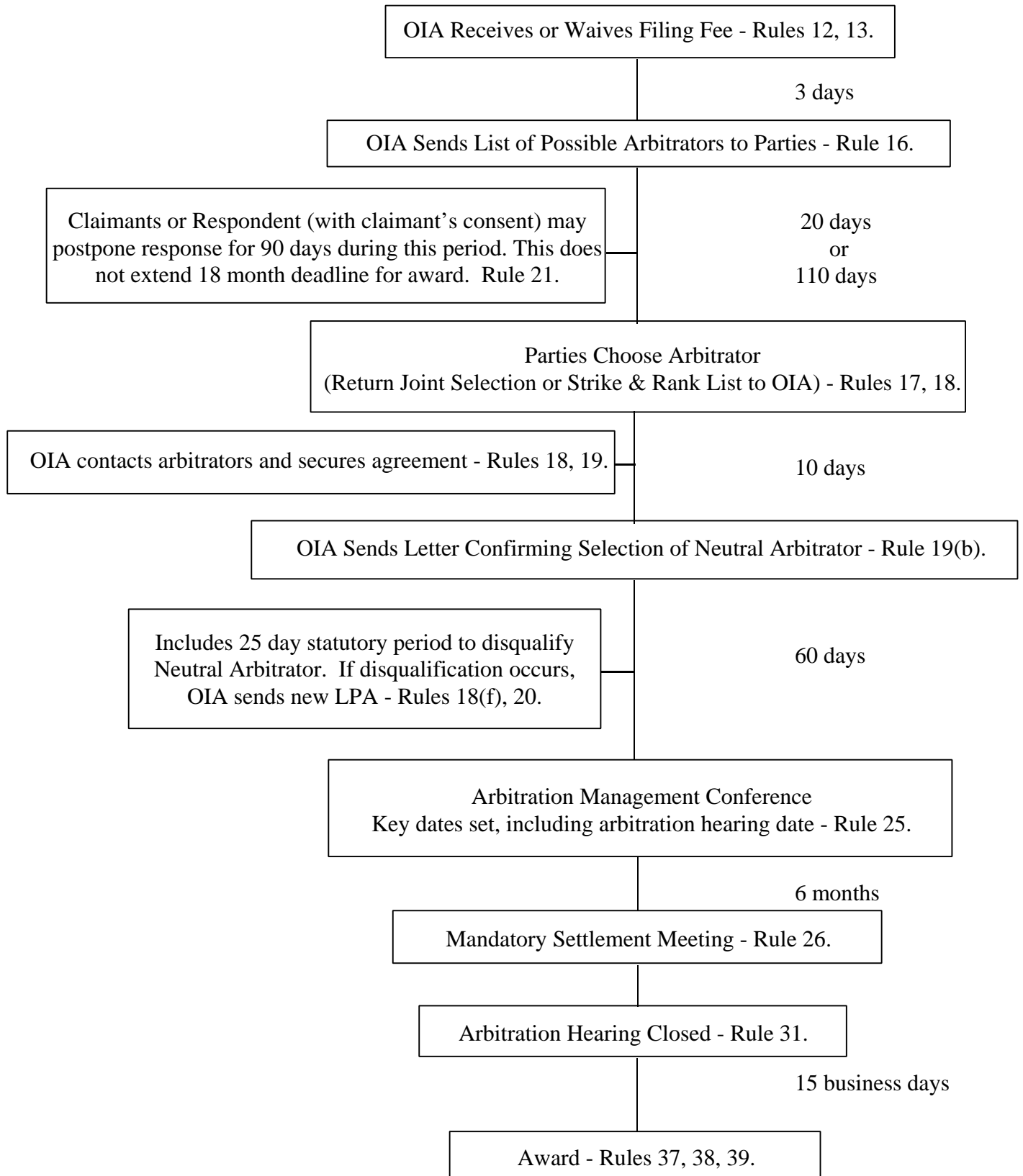
<sup>7</sup>Exhibit B, Rules 14 and 15.

<sup>8</sup>The OIA was created in response to the recommendation of a Blue Ribbon Panel (BRP) and began operating March 28, 1999. Ms. Bell has served as the Independent Administrator since March 29, 2015. The OIA met all of the recommendations that pertain to it since its first operating year. A full copy of the BRP report and the current status of each recommendation is available on the OIA website.

<sup>9</sup>Lien cases are brought by Kaiser against its members to recover costs of medical care provided to a member who received a third party recovery.

<sup>10</sup>Because these are anonymous, all of the evaluations are considered together.

# Timeline for Arbitrations Using Regular Procedures



MAXIMUM OF 18 MONTHS\*

\*Unless Rule 24(b), 24(c), 28, 34, or 35 applies.



## **II. DEVELOPMENT AND CHANGES IN THE SYSTEM IN 2019**

### **A. Change in Membership of the AOB**

Dr. Bruce R. Merl, the Director of Medical-Legal Affairs for The Permanente Medical Group, a member of the AOB since 2002, retired in December, after 17 years of service. His replacement is in progress.

### **B. AOB Finalizes Rule 14 Amendment**

The AOB finalized approval of a Rule change which had been temporarily approved by the AOB Chair at the end of 2018. In order to be compliant with the Department of Managed Health Care's request that Kaiser modify its 2019 Evidence of Coverage to include regulatory language pursuant to Health & Safety Code Section 1373.19, the mandated language was also added to Rule 14(a). This language includes, in part, that if a demand for arbitration seeks damages of \$200,000 or less, it may be heard by two party arbitrators and one neutral arbitrator if the parties agree in writing and after a dispute has arisen and a request for binding arbitration has been submitted [emphasis added].<sup>11</sup> This amendment took effect January 1, 2019.

### **C. AOB Approves Rule Changes<sup>12</sup>**

In 2018, the OIA presented the AOB with 16 proposals for Rule changes. Ten of the proposals were approved in 2018 and took effect January 1, 2019. At that time, three proposals were withdrawn by the OIA and three were pending discussion this year. Two were approved and will be discussed briefly below. One proposal was not passed.<sup>13</sup>

Rule 33 recognizes a neutral arbitrator's authority to grant a postponement for good cause in expedited cases. It also moved language from Rule 34 to Rule 33 regarding a neutral arbitrator's responsibility in expedited cases.

Rule 34 correctly identifies the OIA's role when expedited procedures are requested. It also recognizes that discovery may commence as soon as the OIA grants expedited procedures.

### **D. OIA Researches Ways to Increase Diversity of OIA Neutral Arbitrators**

The AOB has had several discussions about the ways in which the OIA could increase the diversity of the panel of neutral arbitrators. At the AOB's request, the OIA contacted

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<sup>11</sup>The new required language is underlined.

<sup>12</sup>The amendments took effect January 1, 2020. See Exhibit B for a redlined version.

<sup>13</sup>After modifications to the OIA proposal were made by Kaiser, the OIA proposal and two other Kaiser proposed Rule changes did not receive the requisite number of votes to pass.

minority bar association leaders and provided information about the OIA, and offered to attend any upcoming events in an effort to recruit new members to the panel. The OIA also contacted the California State Bar's Office of Access and Inclusion for guidance. Some of the suggestions included: creating and maintaining a referral budget to be paid if a qualified applicant is accepted on the panel; focus recruitment on retired judicial candidates rather than practicing attorneys; offer training specific to the OIA process if a few interested parties could be convened; and to encourage parties to jointly select diverse members in OIA documents. The OIA will continue to work with the AOB in an effort to improve diversity.

#### **E. Senate Bill Regarding Consumer Arbitration**

The OIA and AOB discussed how Senate Bill 707 could affect consumer arbitrations; particularly, what changes would be needed by the OIA if the bill became law. The Governor approved the bill on October 13, 2019.<sup>14</sup> Under the amended statute, California Code of Civil Procedure Section 1281.96(a)(12) requires provider organizations, like the OIA, to collect demographic data relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrators. Pursuant to the statute, OIA neutral arbitrators will be required to provide the demographic data, and the OIA will then post it in the aggregate on the OIA website.<sup>15</sup>

#### **F. AOB Passes Resolution Regarding the Value in Collecting Diversity Data**

As a result of discussions about the ways in which the OIA could increase the diversity of its panel of neutral arbitrators, the AOB passed a resolution recognizing the importance and value of the California State Bar's decision to collect diversity data.

The AOB adopted the following statement, and asked the OIA to include it on its website: "Collecting diversity data will help raise awareness of barriers, create an evidence base for examining diversity issues, identify sector-specific problems areas, and measure progress toward improved diversity and inclusivity."

The OIA will also add this statement to its neutral arbitrator application and to the demographic data posted on the OIA website pursuant to state law.<sup>16</sup> The AOB will analyze the data and determine what particular interventions, if any, are needed.

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<sup>14</sup>The bill amended Sections 1280 and 1281.96, and specifically added to Sections 1281.97, 1281.98, and 1281.99 of the California Code of Civil Procedure, relating to arbitration.

<sup>15</sup>The statute takes effect January 1, 2020 and requires the demographic data to be updated quarterly. The OIA will post the data it has collected on its website by March 31, 2020.

<sup>16</sup>This update will take effect March 31, 2020.

### III. PANEL OF NEUTRAL ARBITRATORS

#### A. Turnover in 2019 and the Size of the Panel at Year-End

On December 31, 2019, there were 193 people on the OIA's panel of neutral arbitrators. Of those, 83 were former judges, or 43%.

Members of the OIA panel are distributed into three geographic panels: Northern California, Southern California, and San Diego. See Table 1. Members who agree to travel without charge may be listed on more than one panel. Exhibit C contains the names of the members of each panel.

**Table 1 - Number of Neutral Arbitrators by Region**

<b>Total Number of Arbitrators on the OIA Panel:</b>	<b>193</b>
<b>Northern California Total:</b>	<b>97</b>
<b>Southern California Total:</b>	<b>103</b>
<b>San Diego Total:</b>	<b>55</b>
<b>The three regions total 255 because 43 arbitrators are on more than one panel; 19 on all three panels, 1 on No. Cal &amp; So. Cal, and 23 on So. Cal &amp; San Diego.</b>	

At the beginning of the year, the OIA panel of neutral arbitrators contained 225 names. During the year, 34 arbitrators voluntarily left the panel<sup>17</sup> and 8 additional arbitrators were removed. Three were removed because they no longer met the qualifications required for neutral arbitrators,<sup>18</sup> three for failing to update their applications,<sup>19</sup> one for failing to comply with the mandated Ethics Standards for Neutral Arbitrators in Contractual Arbitration and one for refusing to follow the *Rules*. Eight neutral arbitrators joined the panel,<sup>20</sup> and two applicants were rejected.<sup>21</sup>

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<sup>17</sup>For the neutrals who provided reasons, the most common given for resigning were: retiring practice; changing practice or limiting arbitrations; or for health reasons.

<sup>18</sup>The qualifications for neutral arbitrators are attached as Exhibit D.

<sup>19</sup>Neutral arbitrators are required to update their applications every two years.

<sup>20</sup>Neutral arbitrator applications are available on the OIA website.

<sup>21</sup>If the OIA rejects an application, we inform the applicant of the qualification(s) he or she failed to meet.

**B. Practice Background of Neutral Arbitrators**

The neutral arbitrator application requires applicants to estimate the percentage of their practice spent in various professional endeavors. On average, OIA neutral arbitrators spend their time as follows: 72% of the time acting as a neutral arbitrator, 7% as a claimant (or plaintiff) attorney, 6% as a respondent (or defense) attorney, 11% in other forms of employment (including non-litigation legal work, teaching, mediating, etc.) and 1% acting as a respondent’s party arbitrator, a claimant’s party arbitrator, or an expert.

More than half (59%) of the panel, 114 members, report that they spend 100% of their practice acting as neutral arbitrators. The full distribution is shown in Table 2.

**Table 2 - Percentage of Practice Spent as a Neutral Arbitrator**

Percent of Time	0%	1 – 25%	26 – 50%	51 – 75%	76 – 99%	100%
Number of NAs	<b>7</b>	<b>39</b>	<b>17</b>	<b>5</b>	<b>10</b>	<b>114</b>

The members of the OIA panel who are not full time arbitrators on average spend 13% of their time as litigators. See Table 3 for the full distribution.

**Table 3 - Percentage of Practice Spent as an Advocate**

Percent of Practice	Number of NAs Reporting Claimant Counsel Practice	Number of NAs Reporting Respondent Counsel Practice
0%	<b>160</b>	<b>164</b>
1 – 25%	<b>12</b>	<b>10</b>
26 – 50%	<b>12</b>	<b>12</b>
51 – 75%	<b>3</b>	<b>2</b>
76 – 100%	<b>6</b>	<b>5</b>

Finally, while the qualifications do not require that members of the OIA panel have medical malpractice experience, 92% of them do. At the time they filled out or updated their applications, 178 reported that they had medical malpractice experience, while 15 did not. Of the 15 who reported no medical malpractice experience, 13 of them have since served as a neutral arbitrator in an OIA case and may now have acquired medical malpractice experience.

## **C. Participation of Neutral Arbitrators on the Panel<sup>22</sup>**

The first four parts of this section consider the number of neutral arbitrators named on the List of Possible Arbitrators; the number who served; the number who wrote awards; and the number who have served after making a large award. The final section compares cases closed by neutral arbitrators selected ten or more times with cases closed by other neutral arbitrators.

### **1. The Number Named on a List of Possible Arbitrators**

All of the neutral arbitrators on the OIA panel were named on at least one List of Possible Arbitrators (LPA) sent to the parties by the OIA.<sup>23</sup> The average number of times Northern California arbitrators appeared on a LPA was 33. The range of appearances was 14 – 49 times. In Southern California, the average number of appearances was 27. The range was 2 – 45. In San Diego, the average number of appearances was 9. The range was 0 – 19.<sup>24</sup>

### **2. The Number Who Served**

This year, 132 different neutral arbitrators were selected to serve in 509 cases. The majority (116) were members of the OIA panel. Thus, 60% of the OIA panel were selected to serve in a case. The number of times a neutral was selected ranges from 0 – 30. The neutral arbitrator at the highest end was jointly selected 23 times. The average number of appointments for members of the panel was two.

### **3. The Number Who Wrote Awards**

Thirty-five neutral arbitrators wrote 46 awards. Twenty-six arbitrators wrote a single award, while seven wrote two. Two neutral arbitrators wrote three awards each, three in favor of the claimants and three in favor of Kaiser.

### **4. The Number Who Have Served After Making a Large Award**

Concerns have been made whether Kaiser will allow neutral arbitrators who have made large awards to serve in subsequent arbitrations, since its attorneys could strike them from LPAs

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<sup>22</sup>The procedure for selecting neutral arbitrators for individual cases is described in Section V.A.

<sup>23</sup>In addition to chance, the number of times a neutral arbitrator is listed is affected by how long in a given year the arbitrator has been on the panel, the number of members on each panel, and the number of demands for arbitration submitted in the geographical area for that panel. The number of times an arbitrator is selected also depends on whether the individual will hear cases when the claimant has no attorney (*pro per* cases). Twenty-six percent (26%) of the panel will not hear *pro per* cases.

<sup>24</sup>There was one neutral arbitrator who was not listed on a San Diego LPA but is also on the Southern California and Northern California panels and was listed on an LPA for both panels.

or disqualify them if selected. Therefore, annual reports describe what has happened to neutral arbitrators after making an award of \$500,000 or more.

This year, six neutral arbitrators made awards for more than \$500,000. The awards ranged from \$686,088 to \$5,258,636. Five have been selected to serve again after making their award.<sup>25</sup> One neutral has been selected three times and two others have been selected twice. Four of these neutrals had made previous large awards; one has made two.

### **5. Comparison of Cases Closed by Neutral Arbitrators Selected Ten or More Times with Cases Closed by Other Neutral Arbitrators**

Each year, the OIA compares how cases closed by neutral arbitrators selected ten or more times with cases closed by other neutral arbitrators. There were three neutral arbitrators who were selected ten or more times this year. Table 4 shows the comparison of cases closed with these three neutral arbitrators versus cases closed with other neutral arbitrators.

**Table 4 - Comparison of Cases Closed with Neutral Arbitrators Selected Ten or More Times vs. Cases Closed with Other Neutral Arbitrators**

<b>Cases Closed 2018 – 2019</b>	<b>Cases with Neutral Arbitrators Selected 10 or More Times in 2019</b>		<b>Cases with Other Neutral Arbitrators<sup>26</sup></b>	
Settled	53	54%	462	49%
Withdrawn	21	21%	204	22%
Summary Judgment	16	16%	129	14%
Awarded to Respondent	4	4%	54	6%
Awarded to Claimant	1	1%	28	3%
Dismissed	3	3%	57	6%
Total	98		934	

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<sup>25</sup>One neutral arbitrator retired after making the award.

<sup>26</sup>One case was consolidated with another case and is not included in these numbers.

#### IV. DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA

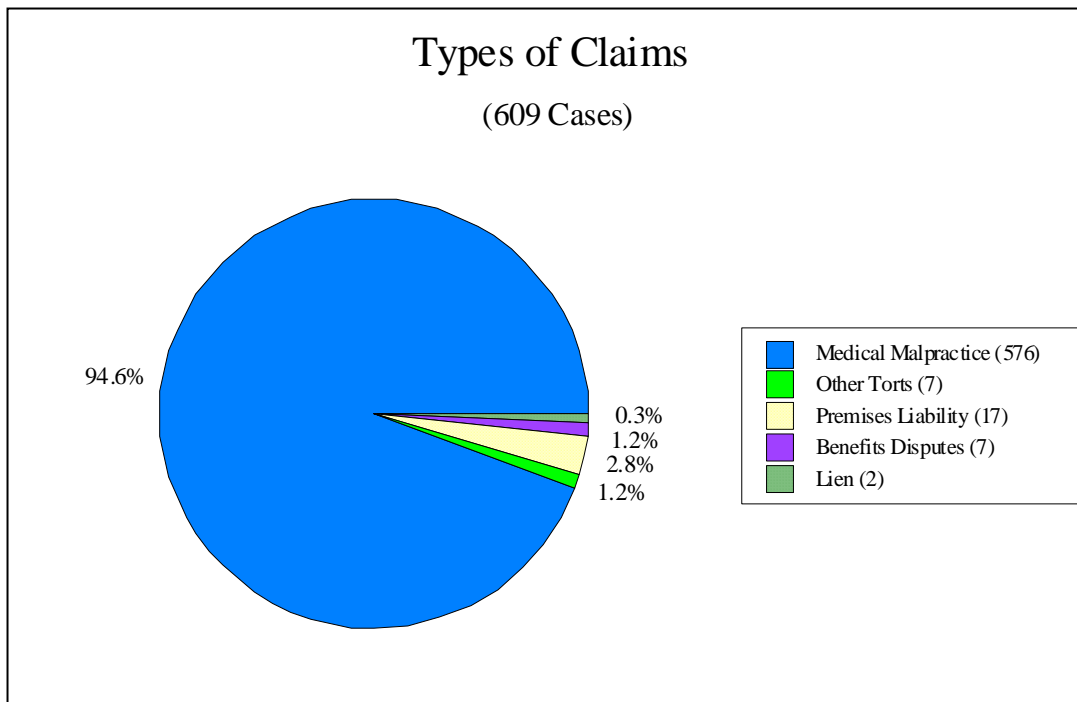
Kaiser submitted 610 demands for arbitration. Geographically, 291 demands for arbitration came from Northern California, 265 came from Southern California, and 54 came from San Diego.<sup>27</sup>

##### A. Types of Claims

The OIA administered 609 new cases.<sup>28</sup> The OIA categorizes cases by the subject of their claim: medical malpractice, premises liability, other tort, lien, or benefits and coverage. Medical malpractice cases make up 95%, or 576 cases. Benefits and coverage cases represent one percent of the system, or seven cases.

Chart 1 shows the types of new claims the OIA administered during the year.

**Chart 1**



<sup>27</sup>The allocation between Northern and Southern California is based upon Kaiser’s corporate division. Roughly, demands based upon care given in Fresno or north are in Northern California, while demands based upon care given in Bakersfield or south are in Southern California or San Diego. Rule 8 specifies where to serve demands for Northern and Southern California, including San Diego.

<sup>28</sup>A few of these demands submitted by Kaiser are “opt in” cases – based on a contract that required arbitration but not the use of the OIA. There were three “opt in” cases. Two claimants chose to have the OIA administer their claims, and one was returned to Kaiser for administration.

As discussed in Section I.B., the rest of this report, with the exception of Sections IX – XII, excludes lien cases from its analysis. Lien cases are discussed in Section IX.

### **B. Length of Time Kaiser Takes to Submit Demands to the OIA**

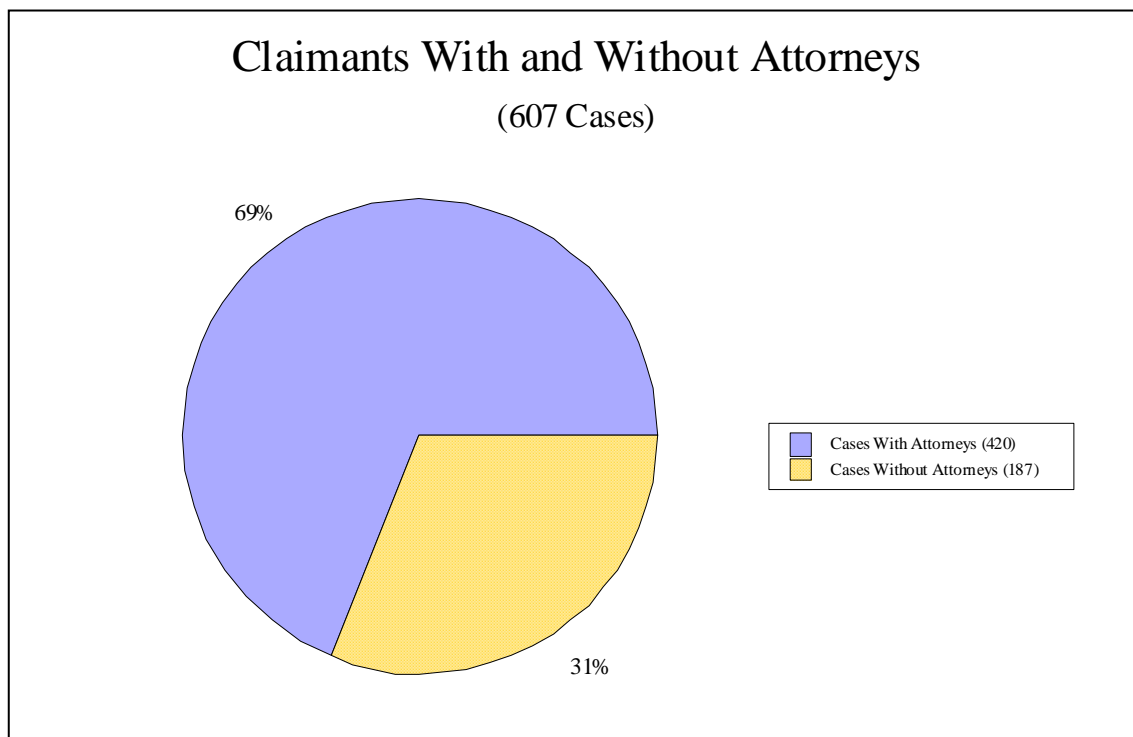
The *Rules* require Kaiser to submit a demand for arbitration to the OIA within ten days of receiving it.<sup>29</sup> The average length of time that Kaiser took to submit demands to the OIA was five days. The range was 0 – 62 days.<sup>30</sup>

There were 12 cases in which Kaiser took more than 10 days to submit the demand to the OIA. The average was 18 days, and the range was 11 – 62 days.

### **C. Claimants With and Without Attorneys**

Claimants were represented by counsel in 69% of new cases (420 of 607). In 31% of cases, the claimants represented themselves (or acted in *pro per*).

**Chart 2**



<sup>29</sup>Exhibit B, Rule 11.

<sup>30</sup>In the case that took 62 days, the claimant originally filed in court and stipulated to arbitrate the claim, but the stipulation was inadvertently not sent to the OIA for 2 months.



## V. SELECTION OF THE NEUTRAL ARBITRATORS

One of the most important steps of the arbitration process occurs at the beginning: the selection of the neutral arbitrator. Subsection A describes the selection process in general. The next four sub-sections discuss different aspects of the selection process in detail: whether the parties selected the neutral arbitrator by joint selection or by striking and ranking the names on their List of Possible Arbitrators (LPA); the cases in which the parties decided to postpone the selection of the neutral; the cases in which the parties disqualified a neutral arbitrator; and the amount of time it took the parties to select the neutral arbitrator. Finally, the report examines cases in which parties have selected party arbitrators.

### A. How Neutral Arbitrators are Selected

The process for selecting the neutral arbitrator begins after the OIA receives a claimant's demand for arbitration and the \$150 arbitration filing fee or a waiver of that fee. The OIA sends both parties in the case a LPA. The LPA contains 12 randomly computer generated names of neutral arbitrators from the appropriate geographical panel.

Along with the LPA, the OIA sends the parties information about the neutrals named on the LPA. The parties receive a copy of each neutral arbitrator's application and fee schedule, and subsequent updates to the application, if any.<sup>31</sup>

The parties may also receive copies of any evaluations previous parties may have submitted about the arbitrator. Any redacted awards or decisions the OIA neutral arbitrator has written within the last five years are available on the OIA website.

The parties have 20 days to respond to the LPA.<sup>32</sup> Parties can respond in one of two ways. First, both sides can jointly select a neutral arbitrator. This person does not have to be named on the LPA, be on the OIA panel, or meet the OIA qualifications.<sup>33</sup> Provided the person agrees to follow the *Rules*, the parties may jointly select anyone they want to serve as neutral arbitrator.

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<sup>31</sup>Neutral arbitrators are required to update their applications every two years. If an arbitrator has not served on the panel for at least two years, he/she may not have any update.

<sup>32</sup>A member of the OIA staff contacts the parties before their responses to the LPA are due to remind them of the deadline.

<sup>33</sup>Neutral arbitrators who do not meet the OIA qualifications may serve as jointly selected neutral arbitrators so long as they agree to follow the *Rules*. There is, however, one exception: If, pursuant to California's Ethics Standards, a neutral arbitrator has promised not to take another case with the parties while the first remains open and the OIA knows the case is still open, the OIA would not allow the person to serve as a neutral arbitrator in a subsequent case.

Second, if the parties do not jointly select a neutral arbitrator, each side returns the LPA, striking up to four names and ranking the remaining eight names in order of preference, with “1” as the top choice. When the OIA receives the LPAs, the OIA eliminates any names that have been stricken by either side and then totals the scores of the names that remain. The person with the best score<sup>34</sup> is asked to serve. This is called the “strike and rank” process.

Before a neutral has been selected, claimant can request a postponement of up to 90 days of the LPA deadline under Rule 21. In addition, after the neutral arbitrator is selected, but before he or she begins to serve, California law allows either party to disqualify the neutral arbitrator. A number of cases close before a neutral arbitrator is selected. Sixty-five cases either settled (25) or were withdrawn (40) without a neutral arbitrator in place.<sup>35</sup>

## **B. Joint Selections vs. Strike and Rank Selections**

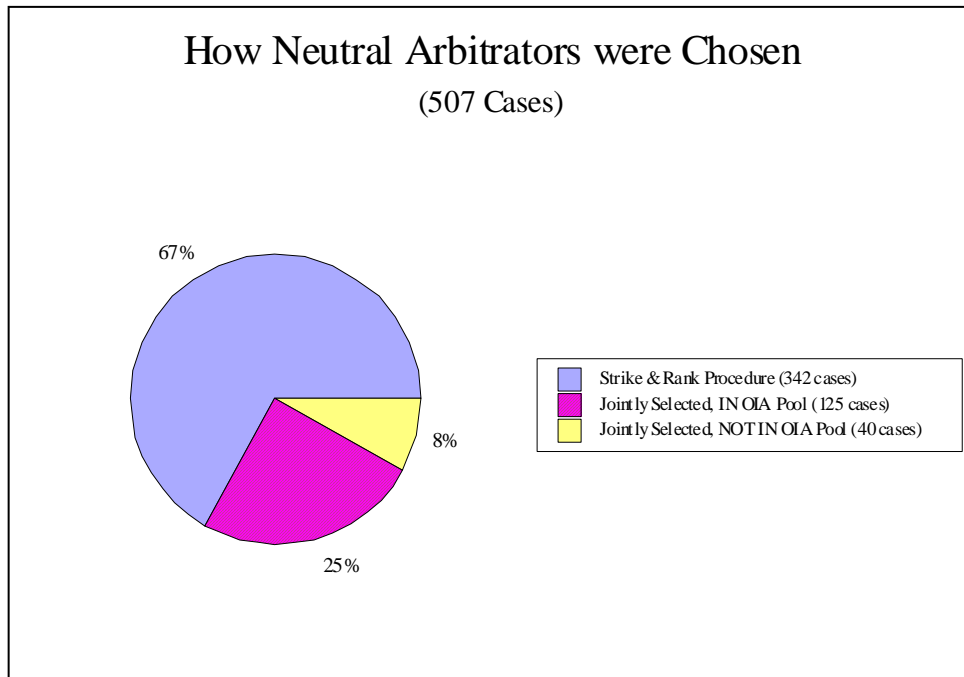
Of the 507 neutral arbitrators selected, 165, or 33%, were jointly selected by the parties and 342, or 67%, were selected by the strike and rank procedure. Of the neutral arbitrators jointly selected by the parties, 125, or 76%, were members of the OIA panel, though not necessarily on the LPA sent to the parties. In 40 cases, or 24%, the parties selected a neutral arbitrator who was not a member of the panel. See Chart 3. One neutral arbitrator who is not part of the OIA panel accounts for 25 of the joint selections.

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<sup>34</sup>For example, a person who was ranked “1” by both sides – for a combined score of “2” – would have the best score.

<sup>35</sup>This includes cases with attorneys and cases where the claimant was in *pro per*. For *pro per* cases, six settled and 20 were withdrawn. For represented cases, 19 settled and 20 were withdrawn.

**Chart 3**



**C. Status of Cases with Postponements of Time to Select Neutral Arbitrators**

Under Rule 21, a claimant has a unilateral right to a 90 day postponement of the deadline to respond to the LPA. If a claimant has not requested one, the respondent may do so, but only if the claimant agrees in writing. The parties can request only one postponement of up to 90 days. They cannot, for example, get a 40 day postponement at one point and a 50 day postponement later. There are times when parties request a postponement of less than 90 days. In addition to Rule 21, Rule 28 allows the OIA, in cases where the neutral arbitrator has not been selected, to extend deadlines for good cause. The OIA has used this authority occasionally to extend the deadline to respond to the LPA. Generally, parties must use a 90 day postponement under Rule 21 before the OIA will extend the deadline under Rule 28. A Rule 28 extension is generally short – two weeks if the case is settled or withdrawn<sup>36</sup> – though it may be longer if, for example, it is based on the claimant’s medical condition, or a party has gone to court for some reason.

There were 284 cases where the parties obtained either a Rule 21 postponement, a Rule 28 extension of the time to return their responses to the LPA, or both. The claimants made all but five of the requests for Rule 21 postponement. Requests for a Rule 28 extension were made in 32 cases. In some, the Rule 21 request was made in prior years but the selection of a neutral

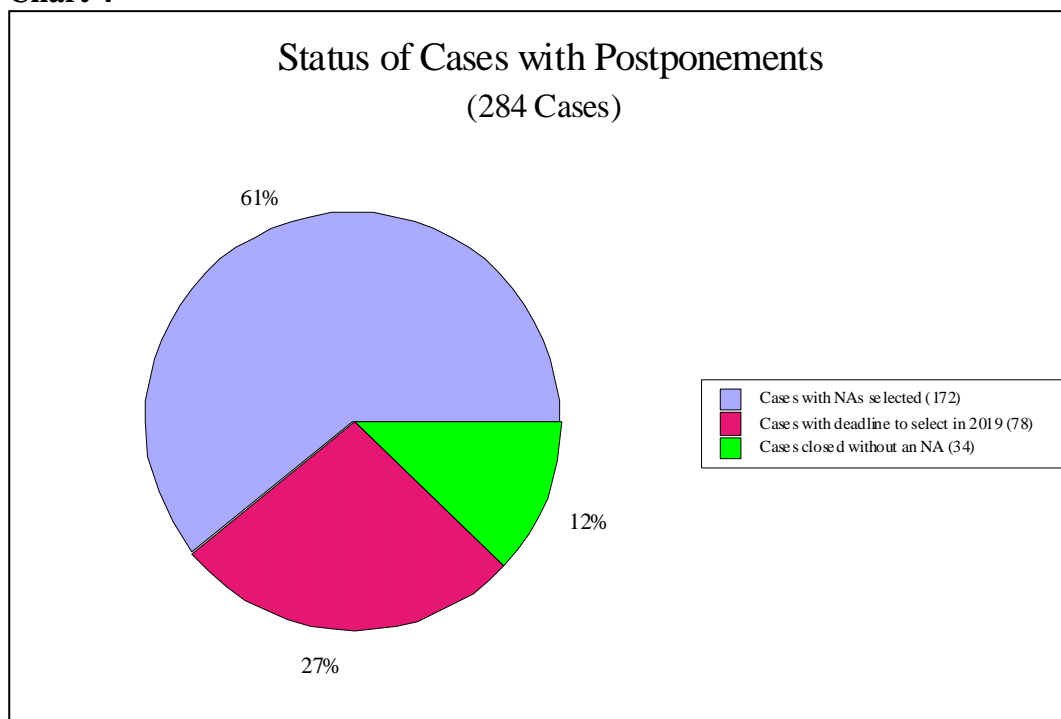
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<sup>36</sup>The extension allows the claimant to send written notice of settlement or withdrawal without a neutral arbitrator being selected, which generally reduces expenses.

arbitrator occurred this year. There was one case where the Rule 28 extension was given without a prior Rule 21 postponement.<sup>37</sup>

Chart 4 shows what happened in those 284 cases. Sixty-one percent (61%), 172 cases, have a neutral arbitrator in place. Thirty-four closed before a neutral arbitrator was selected. For the remaining 78 cases, the deadline to select a neutral arbitrator was after December 31, 2019.

**Chart 4**



#### **D. Status of Cases with Disqualifications**

California law gives the parties in arbitration the opportunity to disqualify neutral arbitrators.<sup>38</sup> Neutral arbitrators are required to make various disclosures within ten days of their selection.<sup>39</sup> After they make these disclosures, the parties have 15 days to disqualify the neutral arbitrator. Additionally, if the neutral arbitrator fails to serve the disclosures, the parties have 15

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<sup>37</sup>Respondent requested a Rule 28 extension of the LPA deadline in order to petition the court to appoint a neutral arbitrator after five neutral arbitrator disqualifications by the *pro per* claimant. The matter is currently pending in court.

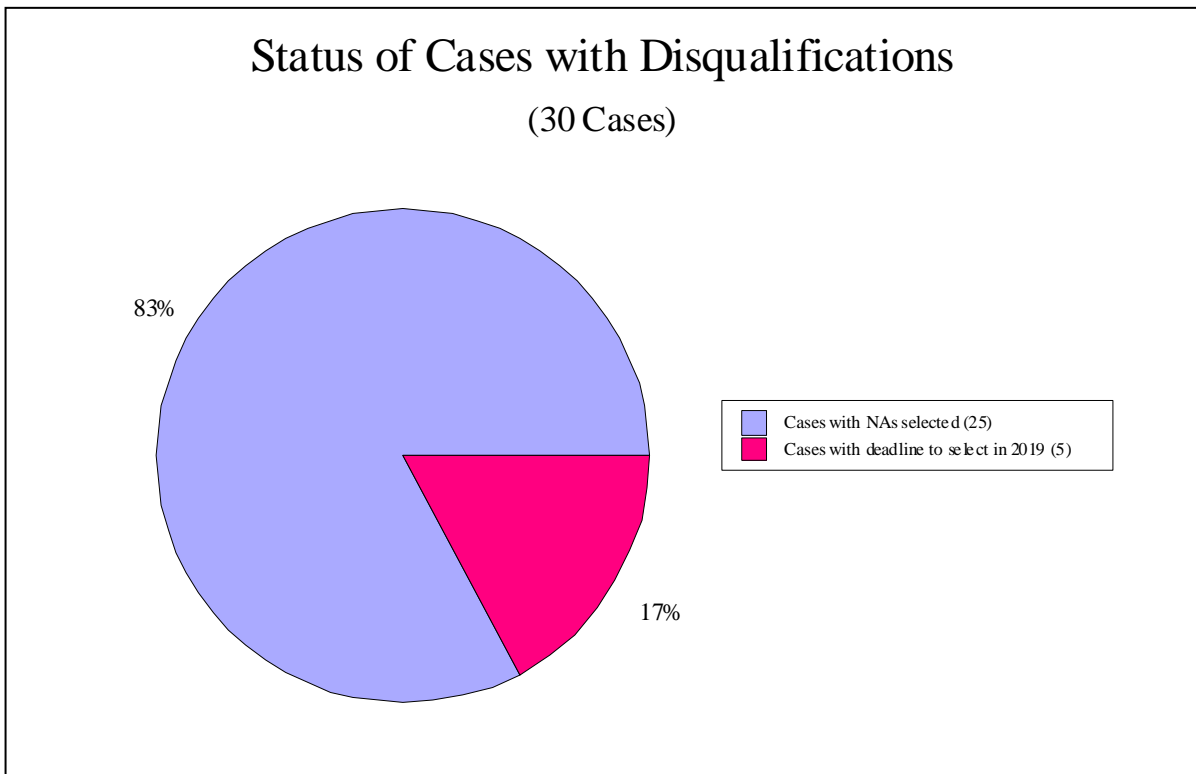
<sup>38</sup>California Code of Civil Procedure §1281.91; see also Exhibit B, Rule 20.

<sup>39</sup>See California Code of Civil Procedure §1281.9, especially §1281.9(b). In the OIA system, the ten days are counted from the date of the letter confirming service which the OIA sends to the neutral arbitrator, with copies to the parties, after the neutral arbitrator agrees to serve.

days after the deadline to serve disclosures to disqualify the neutral arbitrator. Absent court action, there is no limit as to the number of times a party can timely disqualify neutral arbitrators in a given case. However, under Rule 18(f), after two disqualifications, the OIA randomly selects subsequent neutral arbitrators who have not been named on prior LPAs.

Neutral arbitrators were disqualified in 30 cases. Claimants disqualified 28 neutral arbitrators and Kaiser disqualified 11. Twenty-seven cases had a single disqualification. One case had two disqualifications, and two cases had five disqualifications.<sup>40</sup> In 25 of the cases with a disqualification, a neutral arbitrator had been selected. In five of the cases, the deadline to select another neutral arbitrator was after December 31, 2019. See Chart 5.

**Chart 5**



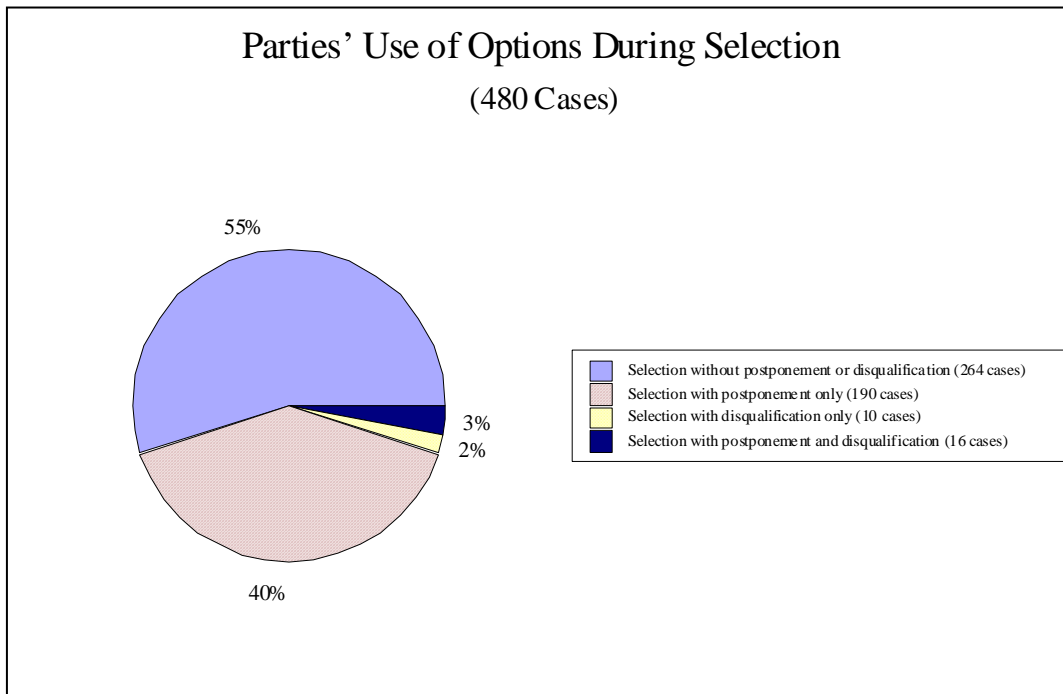
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<sup>40</sup>In cases with multiple disqualifications, one of the parties may petition the Superior Court to select a neutral arbitrator. If the court grants the petition, a party is only permitted to disqualify one neutral arbitrator without cause; subsequent disqualifications must be based on cause. See California Code of Civil Procedure §1281.91(2). See also footnote 37 wherein Kaiser is petitioning the court in 1 case to appoint a neutral arbitrator after 5 disqualifications.

### E. Length of Time to Select a Neutral Arbitrator

This section considers 480 cases in which a neutral arbitrator was selected<sup>41</sup> and divides the selections into four categories when discussing the length of time to select a neutral arbitrator. The first category 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 postponed. The third category is those cases in which a neutral arbitrator was disqualified by a party and another neutral arbitrator was selected. The fourth category is those cases in which there was both a postponement of the LPA deadline and a disqualification of a neutral arbitrator. The last three categories include cases where the request for postponement and/or the disqualification was made in prior years, but the neutral arbitrator was selected this year. Finally, we give the overall average length of time to select a neutral arbitrator for all four categories. Chart 6 displays the categories.

**Chart 6**



<sup>41</sup>Twenty-seven cases in which a neutral arbitrator was selected are not included in this section. In these cases, a neutral arbitrator had previously been appointed, had begun acting as the neutral arbitrator, but was subsequently removed. These include cases where a neutral arbitrator died, became seriously ill, became a judge, or made disclosures in the middle of a case – because of some event occurring after the initial disclosure – and was disqualified. Because we count time from the first day that the case was administered, these cases are not included in these computations of length of time to select a neutral arbitrator.

## **1. Cases with No Delays**

There were 264 cases where a neutral arbitrator was selected in which there was no delay. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is no delay is 33 days. The average number of days to select a neutral arbitrator in those cases was 23 days, and the range was 5 – 34 days. This category represents 55% of all neutral arbitrators selected.

## **2. Cases with Postponements**

There were 190 cases where a neutral arbitrator was selected and the only delay was a 90 day postponement and/or an OIA extension of the deadline under Rule 28. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is a 90 day postponement is 123 days. The average number of days to select a neutral arbitrator in those cases was 109 days, and the range was 16 – 768 days.<sup>42</sup> This category represents 40% of all cases which selected a neutral arbitrator.

## **3. Cases with Disqualifications**

There were 10 cases where a neutral arbitrator was selected and the only delay was one or more disqualification(s) of a neutral arbitrator. Under the *Rules*, the maximum number of days to select a neutral arbitrator if there is only one disqualification is 96.<sup>43</sup> The average number of days to select a neutral arbitrator was 55 days, and the range was 14 – 78 days. Disqualification only cases represent 2% of all cases which selected a neutral arbitrator.

## **4. Cases with Postponements and Disqualifications**

There were 16 cases where a neutral arbitrator was selected after a postponement and a disqualification of a neutral arbitrator. Under the *Rules*, the maximum number of days to select a neutral arbitrator if there is both a 90 day postponement and a single disqualification is 186 days. The average number of days to select a neutral arbitrator in these cases was 149, and the range was 57 – 217 days.<sup>44</sup> These cases represent 3% of all cases which selected a neutral arbitrator.

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<sup>42</sup>In the case that took 768 days to select a neutral arbitrator with just a postponement, the claimant's attorney first obtained a 90 day postponement. The parties then stipulated to stay the arbitration pending the resolution of a court action involving a co-defendant. Once the court action was complete, the stay was lifted and the parties jointly selected a neutral arbitrator.

<sup>43</sup>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.

<sup>44</sup>In the case that took 217 days to select a neutral arbitrator, the *pro per* claimant first obtained a 90 day postponement and then disqualified five neutral arbitrators.

## 5. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases was 62 days. For purposes of comparison, the California Supreme Court stated in *Engalla vs. Permanente Medical Group*<sup>45</sup> that the old Kaiser system averaged 674 days to select a neutral arbitrator.

### F. Cases with Party Arbitrators

In medical malpractice cases, if the amount of damages exceeds \$200,000, a California statute gives parties a right to proceed with three arbitrators: one neutral arbitrator and two party arbitrators.<sup>46</sup> The parties may waive this right. The Blue Ribbon Panel (BRP) that gave rise to the OIA questioned whether the value added by party arbitrators justified their expense and the delay associated with two more participants in the arbitration process. The BRP, therefore, suggested that the system create incentives for cases to proceed with a single neutral arbitrator.

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

Few party arbitrators are used in the OIA system. Two of the 46 cases that went to hearing were decided with party arbitrators.<sup>47</sup>

Of the cases that remained open at the end of the year, parties have designated party arbitrators in three cases.

## VI. MAINTAINING THE CASE TIMETABLE

This section summarizes the methods for monitoring compliance with deadlines and then looks at the actual compliance at various points during the arbitration process. The OIA monitors its cases in two different ways.

First, through its software, the OIA tracks whether 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 the OIA that a key event has taken place by its deadline, the OIA contacts them and asks for

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<sup>45</sup>15 Cal. 4<sup>th</sup> 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903. The California Supreme Court’s criticism of the then self-administered Kaiser arbitration system led to the creation of the Blue Ribbon Panel.

<sup>46</sup>California Health & Safety Code §1373.19.

<sup>47</sup>These two cases closed in 759 and 828 days respectively. In both cases, Kaiser prevailed.



confirmation that it has occurred. In most cases, the events have occurred and arbitrators confirm in writing. When it has not, it is rapidly scheduled. In instances where the event has not occurred and/or confirmation is not received, the OIA suspends the neutral arbitrator from receiving new cases until confirmation is received and the case is in compliance.<sup>48</sup>

Second, the OIA looks at cases overall and their progress toward closing on time. When a case enters the system, the OIA computer system calendars a status reminder for 12 months. As discussed in Section VII, most cases close within 12 months. For those that remain open, the OIA contacts the neutral arbitrators to ensure that the hearing is still on calendar and the case is on track to be closed in compliance with the *Rules*. In addition, the Independent Administrator holds monthly meetings to discuss the status of all cases open more than 15 months.

#### **A. Neutral Arbitrator's Disclosure Statement**

Once neutral arbitrators have been selected, California law requires that they make written disclosures to the parties within ten days. The *Rules* require neutral arbitrators to serve the OIA with a copy of these disclosures. The OIA monitors all cases to ensure that disclosures are timely served, and they include disclosure reports provided by the OIA that are required by California law. No neutral was suspended for failing to timely serve disclosures.

#### **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.<sup>49</sup> Neutrals are also required to return an AMC form to the OIA within five days of the conference. The schedule set forth on the form establishes the deadlines for the rest of the case. It also allows the OIA to see that the case has been scheduled to finish within the time allowed by the *Rules*; usually 18 months. Receipt of the form is therefore important. Four neutral arbitrators were suspended for failing to return an AMC form. All complied by the end of the year.

#### **C. Mandatory Settlement Meeting**

Rule 26 instructs the parties to hold a Mandatory Settlement Meeting (MSM) within six months of the AMC. It states that the neutral arbitrator should not be present at this meeting. The OIA provides the parties with an MSM form to complete and return, stating that the meeting took place and its result. The OIA received notice from the parties in 295 cases that they held a MSM. Forty-seven of them reported that the case had settled at the MSM. Five of these cases

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<sup>48</sup>When neutral arbitrators are suspended, the OIA removes the neutral arbitrators' names from the OIA panel – until they take the necessary action. Suspended neutrals are not listed on any LPA and cannot be jointly selected by the parties.

<sup>49</sup>Exhibit B, Rule 25.

involved a *pro per* claimant. In 35 cases, neither party returned the MSM form to the OIA by the end of the year.<sup>50</sup>

#### **D. Hearing and Award**

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*. Three neutral arbitrators were suspended for failing to schedule an arbitration hearing, but all promptly complied.

Three neutral arbitrators, one in two different cases, were suspended for failing to issue orders extending the deadline to serve the award. All promptly complied.

One neutral arbitrator was suspended for failing to return the questionnaire as required by Rule 48 and to provide the amount of the fee and the fee allocation required by California Code of Civil Procedure §1281.96, but promptly complied.

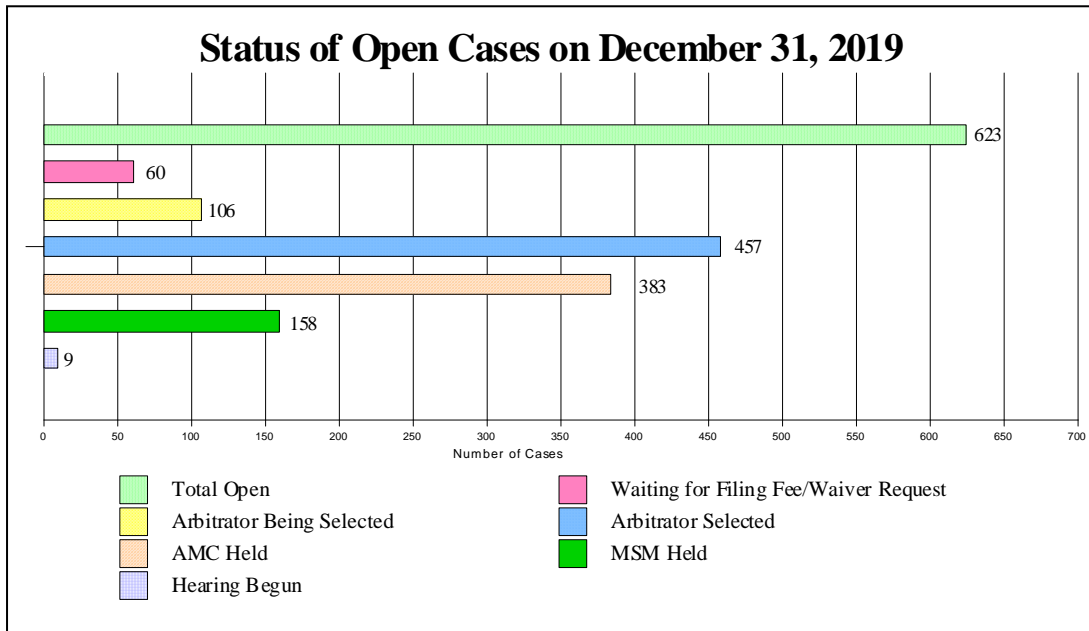
#### **E. Status of Open Cases on December 31, 2019**

There were 623 open cases. In 60 cases, the LPA had not been sent because the filing fee had not yet been paid or waived. In 106 cases, the parties were in the process of selecting a neutral arbitrator. In 457 cases, a neutral arbitrator had been selected. Of these, the AMC had been held in 383. In 158 cases, the parties had held the MSM. In nine cases, the hearing had begun, but either there were additional hearing days or the OIA had not yet been served with the award. Chart 7 illustrates the status of open cases.

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<sup>50</sup>While the OIA sends letters to the parties requesting the MSM form, it has no power to compel them to report or to meet. A neutral arbitrator, on the other hand, can order the parties to meet if a party complains that the other side refuses to do so.

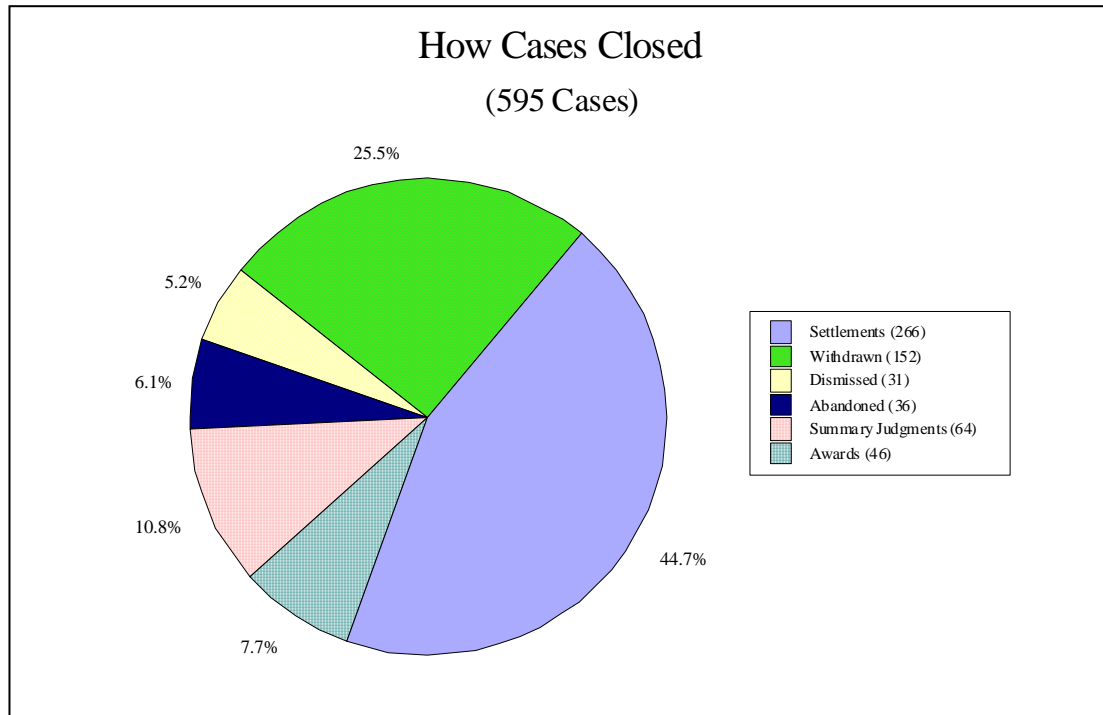
**Chart 7**



**VII. THE CASES THAT CLOSED**

Cases close either because of action by the parties (cases that are settled, withdrawn, or abandoned for non-payment of the filing fee), or action of the neutral arbitrator (cases are dismissed, summary judgment is granted, or cases are decided after a hearing). This discussion looks at each of these methods, how many closed, and how long it took. The discussion of cases that closed after a hearing also includes the results: who won and who lost. Chart 8 displays how the 595 cases closed.

**Chart 8**



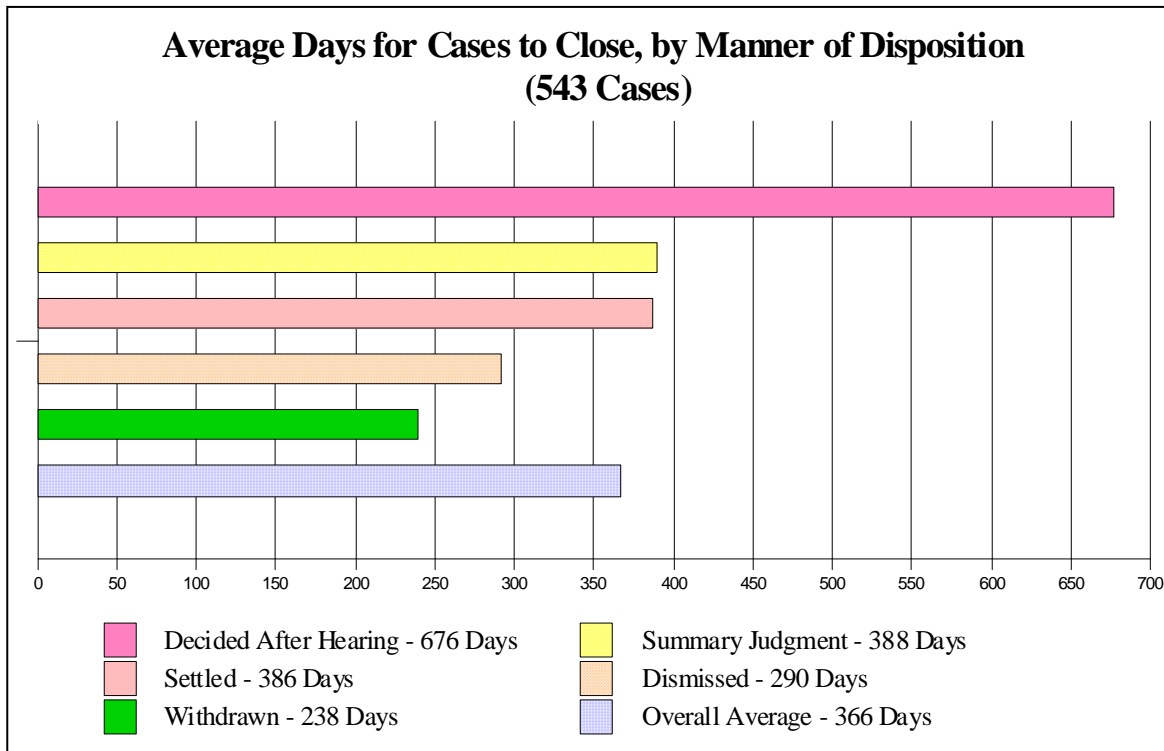
As shown on Chart 9, cases closed on average in 366 days.<sup>51</sup> The range was 2 – 2,219 days.<sup>52</sup> No case closed after its deadline, i.e., none was “late.”

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<sup>51</sup>Chart 9 refers to 543 closed cases, not 595, because the OIA does not begin measuring the time until the fee is either paid or waived. This excludes 36 abandoned cases and 16 cases that were withdrawn or settled before the fee was paid.

<sup>52</sup>In the case that took 2,219 days to close, the first neutral arbitrator died almost 1 year after the case was initiated. The next neutral arbitrator granted years of Rule 28 extensions to the *pro per* claimant, and was suspended 3 times for failing to follow the *Rules*. The arbitration hearing was eventually scheduled and began in 2017. It continued with several non-consecutive dates in 2018 and eventually closed in 2019, with an award for Kaiser.

Chart 9



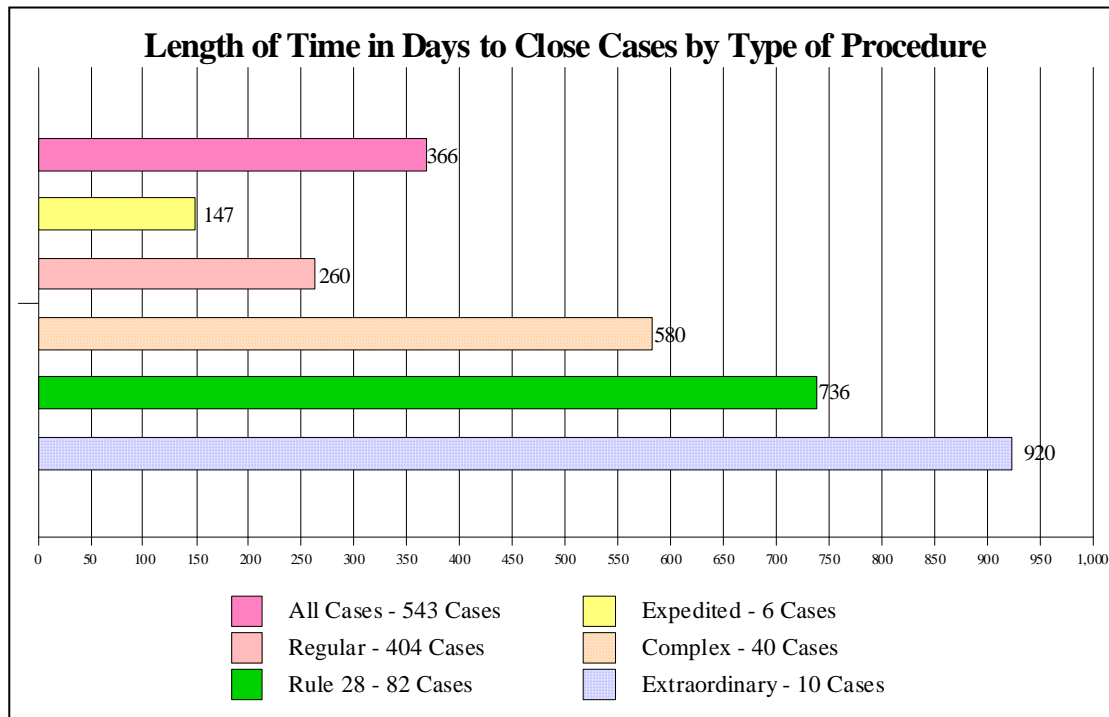
The second half of this section discusses cases that applied special Rules to either have the cases decided faster or slower than most. Under the *Rules*, cases must ordinarily be closed within 18 months. Eighty-two percent (82%) of the cases are closed within this period, and 59% close in a year or less. If a claimant needs a case decided in less time, the case can be expedited. If the case needs more than 18 months, the neutral arbitrator and/or parties can classify the case as complex or extraordinary under Rule 24. Under Rule 28 the neutral arbitrator can also order the deadline to be extended for good cause.<sup>53</sup>

Chart 10 shows the average time to close by type of procedure.

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<sup>53</sup>A complex case can also be the subject of a Rule 28 extension if it turns out the case requires more than 30 months to close. Seventeen cases that closed were both complex and had a Rule 28 extension.

**Chart 10**



**A. How Cases Closed**

**1. Settlements – 45% of Closures**

Settlements occurred in 266 cases. This represents 45% of closed cases. The average time to settle was 386 days. The range was 2 – 1,337 days.<sup>54</sup> In 26 settled cases, or 10%, the claimant was in *pro per*. Forty-seven cases settled at the mandatory settlement meeting.

**2. Withdrawn Cases – 26% of Closures**

Withdrawal notices were received in 152 cases. In 57 of these cases, or 38%, the claimant was in *pro per*. Withdrawals take place for many reasons. We categorize a case as withdrawn when a claimant executes a notice of withdrawal form, 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 contact the parties to ask whether the case was “withdrawn,” meaning voluntarily dismissed, or “settled” and enter the closure accordingly. Twenty-six percent (26%) of closed cases were withdrawn.

<sup>54</sup>The case that took 1,337 days to settle was designated complex because it involved a minor who required a special needs trust that needed court approval. This approval took over five months.

The average time it took for a party to withdraw a claim was 238 days. The range was 9 – 1,212 days.<sup>55</sup>

### **3. Abandoned Cases – 6% of Closures**

Claimants failed to either pay the filing fee or obtain a fee waiver in 36 cases.<sup>56</sup> These cases were deemed abandoned for non-payment. In 32 of the 36 cases, the claimants were in *pro per*. Before claimants are excluded from this system for not paying the filing fee, they receive three notices from the OIA and each time are offered the opportunity to apply for fee waivers.

### **4. Dismissed Cases – 5% of Closures**

Neutral arbitrators dismissed 31 cases. Neutral arbitrators dismiss cases if the claimant fails to respond to hearing notices or otherwise conform to the *Rules* or applicable statutes. Twenty-eight (28) of these closed cases involved *pro pers*.

### **5. Summary Judgment – 11% of Closures**

Summary judgment was granted in Kaiser's favor in 64 cases. In 44 cases, or 69%, the claimant was in *pro per*. The most common reasons given by neutral arbitrators were: failed to have an expert witness (21 cases), failed to file an opposition (26 cases), exceeded the statute of limitations (6 cases), and no triable issue of fact (10 cases).

The average number of days to close a case by summary judgment was 388 days. The range was 181 – 1,058 days.<sup>57</sup>

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<sup>55</sup>In the case that was withdrawn after 1,212 days, the claimant's attorney obtained a 90 day postponement to jointly select a neutral arbitrator. Two months before the twice continued arbitration hearing, the claimant's attorney filed a motion to be relieved as counsel. Days before the motion was to be heard, the claimant withdrew the case.

<sup>56</sup>The arbitration filing fee is \$150 regardless of the number of claimants or claims. This is significantly lower than court filing fees except for small claims court. If a Kaiser member's claim is within the small claims court's jurisdiction, the claim is not subject to arbitration. Both the OIA and Kaiser inform these claimants of their right to go to small claims court.

<sup>57</sup>The case that closed in 1,058 days after a motion for summary judgment involved a claimant who also filed an action in Superior Court involving a vehicle accident resulting in medical care which was the subject of this arbitration. The neutral arbitrator stayed the arbitration proceedings pending the completion of the court case. Once concluded, it took the parties ten months to agree on the arbitration hearing dates, and two months before the summary judgment was scheduled, the claimant's attorney withdrew as counsel of record.

## **6. Cases Decided After Hearing – 8% of Closures**

### **a. Who Won**

Forty-six cases (8%) proceeded through a full arbitration hearing to an award. Judgment was for Kaiser in 32 of these cases, or 70%. In three cases, the claimant was in *pro per*. The claimant prevailed in 14 cases, or 30%. None was a *pro per* claimant.

### **b. How Much Claimants Won**

Fourteen cases resulted in awards to claimants. The range was \$51,000 - \$5,258,636. The average amount of an award was \$846,223. A list of the awards made is attached as Exhibit E.

### **c. How Long it Took**

The 46 cases that proceeded to a hearing, on average, closed in 676<sup>58</sup> days. The range was 196 – 2,219 days.<sup>59</sup> Cases that go to a hearing are the most likely to employ the special procedures discussed in the next section to give the parties more time to complete the case.

## **B. Cases Using Special Procedures**

### **1. Expedited Procedures**

The *Rules* include provisions for cases which need to be expedited, that is, resolved in less time than 18 months. Grounds for expediting a case include a claimant's illness or condition raising substantial medical doubt of survival, a claimant's need for a drug or medical procedure, or other good cause.<sup>60</sup>

Claimants made 10 requests for expedited procedures to the OIA. Four requests were granted, five were denied<sup>61</sup> without prejudice to make the request to the neutral arbitrator, and one settled before a decision was made. Kaiser objected to four of these requests; one was granted over Kaiser's objection and the others were denied.

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<sup>58</sup>Twenty-one of them are considered "regular" cases and closed in 435 days (less than 15 months). The deadline for "regular" cases is 18 months. See Rule 24(a).

<sup>59</sup>The case that took 2,219 days to close after hearing is discussed in footnote 52.

<sup>60</sup>Exhibit B, Rules 33 – 36.

<sup>61</sup>The most common reason to deny the request is claimant's failure to provide reasons for the request under OIA Rule 33(a) and/or a failure to include a length of time in which an award is sought pursuant to Rule 34(a).



Six requests for expedited procedures were made to the neutral arbitrator. One request was previously denied by the OIA, but it and four other requests were granted by the neutral arbitrator. One request was denied. Kaiser objected to one request, but it was granted.

The OIA had 11 open expedited cases pending during the year.<sup>62</sup> Six expedited cases closed.<sup>63</sup> Five settled and one went to hearing and resulted in a \$51,000 award for claimant. The average for these cases to close was 147 days, and the range was 38 – 248 days. Four expedited cases remained open at the end of the year.

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

## **2. Complex Procedures**

The *Rules* also include provisions for cases that need more time to be completed. In complex cases, the parties believe that they need 24 – 30 months.<sup>64</sup> The designation does not have to occur at the beginning of a case. It may be made as the case proceeds and the parties develop a better sense of what evidence they need. There were 77 cases designated complex. Forty complex cases closed.<sup>65</sup> The average length of time for complex matters to close was 580 days. The range was 240 – 897 days (nearly 30 months).<sup>66</sup>

## **3. Extraordinary Procedures**

Extraordinary cases need more than 30 months for resolution.<sup>67</sup> Thirteen cases were designated extraordinary, and ten cases closed. The average time to close an extraordinary case was 920 days. The range was 351 – 1,220 days (about 3 ½ years).<sup>68</sup>

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<sup>62</sup>Two cases made their requests the prior year.

<sup>63</sup>One cases was extended by Rule 28 and is counted in that section. See Section VII.B.4.

<sup>64</sup>Exhibit B, Rule 24(b).

<sup>65</sup>Seventeen cases were extended by Rule 28 and are counted in that section. See Section VII.B.4.

<sup>66</sup>In the complex case that took 897 days to close, the twice continued arbitration hearing went forward nearly 1 year later and resulted in a \$714,000 award for claimant.

<sup>67</sup>Exhibit B, Rule 24(c).

<sup>68</sup>The extraordinary case that took 1,220 days to close was designated extraordinary due to the unusual circumstances and complications in the acquisition of the complete set of medical records. The case settled shortly before the scheduled arbitration hearing.

#### **4. Rule 28 Extensions**

Rule 28 allows neutral arbitrators to extend the deadline to close the case if good cause warrants it. Neutral arbitrators made Rule 28 determinations of good cause in 72 cases. Eighty-two cases with a Rule 28 extension closed. The average time to close cases with a Rule 28 extension was 736 days. The range was 246 – 2,219 days.<sup>69</sup>

According to the neutral arbitrator orders granting the extensions, the claimant's side requested five, the respondent's side requested one, and the parties stipulated five times. Nine orders noted that there was no objection. Fifty-nine orders stated there was good cause or extraordinary circumstances. Where neutral arbitrators gave specific reasons, the most common reason was scheduling conflicts.

### **VIII. THE COST OF ARBITRATIONS**

#### **A. What Fees Exist in OIA Arbitrations**

Whether in court or in private arbitration, parties face 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 be divided equally between the claimant and the respondent.<sup>70</sup> In addition, state law provides that if the claim is for more than \$200,000, the matter will be heard by an arbitration panel, which consists of three arbitrators – a single neutral arbitrator and two party arbitrators, one selected and paid for by each side. Parties may waive their right to party arbitrators.

The OIA system provides mechanisms for a claimant to obtain a waiver of either the \$150 arbitration filing fee and/or the claimant's portion of the neutral arbitrator's fees and expenses. When claimants ask for a waiver, they receive information about the different types of waivers and the waiver forms. The claimants can thus choose which waiver(s) they want to submit.

#### **B. Mechanisms Claimants Have to Avoid These Fees**

There are three mechanisms for waiving some or all fees previously described. The first two are based on financial need and required by statute. The third is open to everyone.

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<sup>69</sup>The case that took 2,219 days to close is discussed in footnote 52.

<sup>70</sup>California Code of Civil Procedure §1284.2.

## **1. How to Waive the \$150 Arbitration Filing Fee**

This waiver is available to individuals whose gross monthly income is less than three times the national poverty guidelines. The OIA informs claimants 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.<sup>71</sup> 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, granted or denied. If claimants' income meets the guidelines, the \$150 arbitration fee is waived.

## **2. How to Waive Both the Arbitration Filing Fee and the Neutral Arbitrators' Fees and Expenses**

This type of fee waiver, which is required by state law, depends upon the claimants' ability to afford the cost of the arbitration filing fee and the neutral arbitrators' fees. Claimants must disclose certain information about their income and expenses. The fee waiver application is based on the form used by state court for waiver of the filing fee 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 grants or denies this waiver.<sup>72</sup> If this waiver is granted, claimant does not have to pay either the neutral arbitrator's fees or the \$150 arbitration filing fee. A claimant who obtains this waiver is allowed to have a party arbitrator, but must pay for the party arbitrator.

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

The *Rules* also contain provisions to shift the claimants' portion of the neutral arbitrators' fees and expenses to Kaiser.<sup>73</sup> For claims under \$200,000, the claimant must agree in writing not to object later that the arbitration was unfair because Kaiser paid the fees and expenses of the neutral arbitrator. For claims over \$200,000, the claimant must also agree not to use a party arbitrator.<sup>74</sup> No financial information is required. The waiver forms are served on Kaiser, the neutral arbitrator, and the OIA.

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<sup>71</sup>California Code of Civil Procedure §1284.3; Exhibit B, Rule 12.

<sup>72</sup>See Exhibit B, Rule 13.

<sup>73</sup>See Exhibit B, Rules 14 and 15.

<sup>74</sup>If the claimant waives his/her right to a party arbitrator but Kaiser wants to proceed with party arbitrators, Kaiser will pay all of the neutral arbitrator's fees and expenses.

## **C. Number of Cases in Which Claimants Have Waived Their Fees**

### **1. The \$150 Arbitration Filing Fee**

The OIA received 45 forms to waive the \$150 filing fee. The OIA granted 38 and denied 6.<sup>75</sup> Twenty-three of these claimants also submitted and received a waiver of the filing fee and a waiver of the neutral arbitrators' fees and expenses discussed in the next section. By obtaining the waiver of the filing fee, the neutral arbitrator selection process can begin immediately.

### **2. The \$150 Arbitration Filing Fee and the Neutral Arbitrators' Fees and Expenses**

The OIA received 63 completed fee waiver applications with no objections from Kaiser. One request was pending from last year. The OIA granted 58 waivers, denied 1, and 1 case closed before the waiver was decided.<sup>76</sup> Four requests are pending.

### **3. Neutral Arbitrators' Fee Allocation**

State law requires arbitration providers, such as the OIA, to disclose neutral arbitrators' fees and fee allocations for closed cases.<sup>77</sup> We received fee information from neutral arbitrators for 494 cases that closed.

Kaiser paid 100% of the neutral arbitrators' fees and expenses in 423 cases. Fees were split 50/50 in 38 cases.<sup>78</sup> In 31 cases, no fees were charged. See Chart 11.

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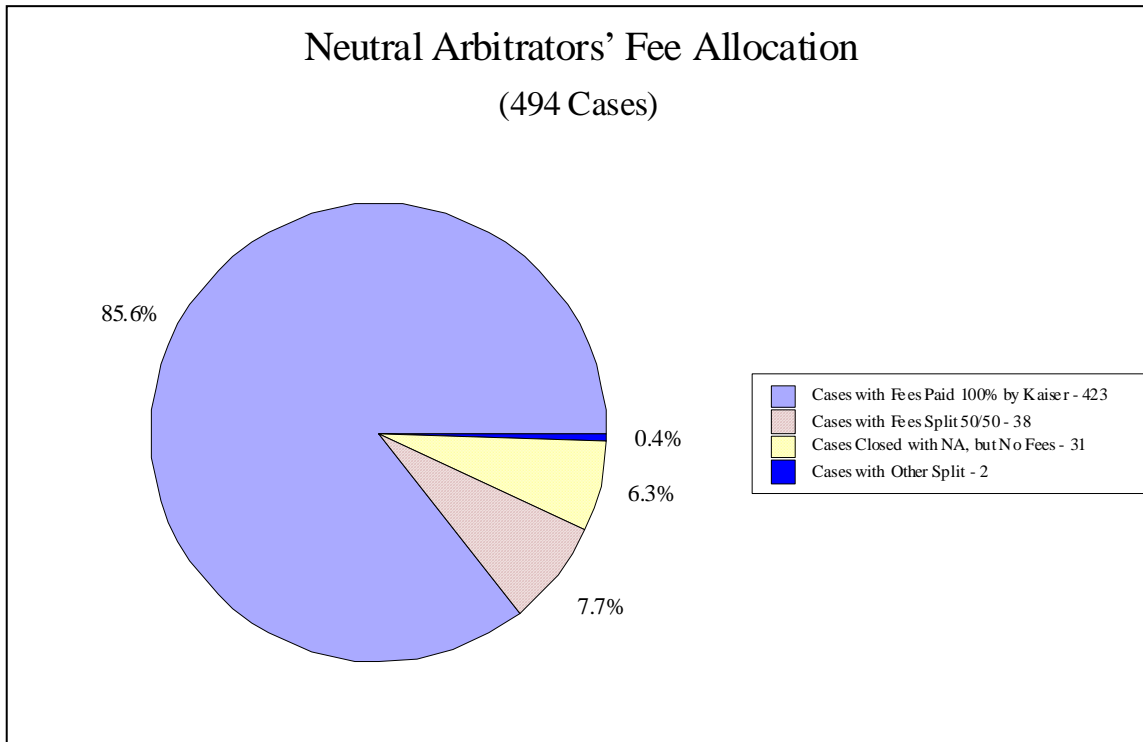
<sup>75</sup>Two had the other fee waiver granted, two paid the filing fee, one submitted a second request providing additional information and it was granted, and one was abandoned for not paying the filing fee.

<sup>76</sup>Claimant submitted a second request providing additional information and it was granted.

<sup>77</sup>California Code of Civil Procedure §1281.96. This information is available on the OIA website.

<sup>78</sup>Two cases had a different split, with claimants paying 24% and 30%, respectively.

**Chart 11**



**D. The Fees Charged by Neutral Arbitrators**

Members of the OIA panel set their own fees. They are allowed to raise their fees once a year, but the increases do not affect cases on which they have begun to serve. The fees range from \$150/hour – \$1,500/hour. The average hourly fee was \$540. Some neutral arbitrators also offer a daily fee. This range was \$1,050/day – \$15,000/day. The average daily fee was \$4,772.

In 463 cases where the neutral arbitrators charged fees, Kaiser paid all of the neutral arbitrators' fees in 91% of the cases. The average neutral arbitrator fee was \$8,295. The range was \$200 – \$103,000. This excludes the 31 cases in which there were no fees. The average for all cases, including those with no fees, was \$7,774.

The arbitrators' fees described in the prior paragraph include many cases where the neutral arbitrator performed relatively little work. If only the cases where the neutral arbitrator wrote an award are considered, the average neutral arbitrator fee was \$36,093. The range was \$5,100 – \$87,042.

## **IX. ANALYSIS OF LIEN CASES**

This section applies only to lien cases. In lien cases, Kaiser makes the demand against a member to recoup the costs of medical care it provided where Kaiser asserts the member has recovered something from a third party, such as in a car accident.

### **A. Demands for Arbitration Submitted by Kaiser to the OIA**

Kaiser submitted two demands for arbitration based on liens from Northern California and Southern California. It took Kaiser 49 days and 9 days, respectively, to submit the demands to the OIA. One member was represented by counsel.

### **B. Selection of the Neutral Arbitrators**

Two neutral arbitrators were selected in lien cases. One neutral was selected for a lien case received last year. Both were selected by strike and rank, and one obtained both a 90 day and Rule 28 extension to select a neutral.

In the case with postponements, it took 133 days to select a neutral arbitrator. The other case took 27 days. Neither case is proceeding with party arbitrators.

### **C. Maintaining the Case Timetable**

There were three lien cases open. Two cases were proceeding with neutral arbitrators. Both held the AMC. One case settled before the selection of a neutral arbitrator.

In one case, the OIA received notice that the parties held the MSM. It did not settle. In this same case, the OIA received a complex designation.

### **D. The Case that Closed**

One lien case closed. It settled in 18 days.

### **E. The Cost of Lien Arbitrations**

The case that settled in 18 days closed before the selection of a neutral arbitrator so there is no neutral arbitrator fee information.

## **X. EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM**

When cases close, the OIA sends forms to counsel for the parties, *pro per* claimants and neutral arbitrators asking them questions about the neutral arbitrator, the arbitration process, the OIA, or all of the above. This section discusses the highlights of the responses we received from the parties and the arbitrators. The copies of the forms are set out in Exhibits F, G, and H, respectively. This section considers all evaluations returned in all cases, including liens.

### **A. The Parties Evaluate the Neutral Arbitrators**

The OIA sends neutral arbitrator evaluations to counsel for the parties or *pro per* claimants only in cases in which the neutral arbitrator made a decision that ended the case.

The form asks parties to evaluate their experience with the neutral arbitrator in 11 different categories including fairness, impartiality, respect shown for all parties, timely response to communications, understanding of the law and facts of the case, and fees charged. Most important, they are asked whether they would recommend this neutral to another person with a similar case. The inquiries appear in the form of statements, and all responses appear on a scale with 5 being agreement and 1 disagreement. The evaluations are anonymous, though the people filling out the forms are asked to identify themselves by category and how the case closed.

The OIA sent 296 evaluations and received 95 responses, or 32%. Seventeen identified themselves as claimants, 17 as claimants' counsel, and 58 as respondents' counsel. Three did not specify a side.

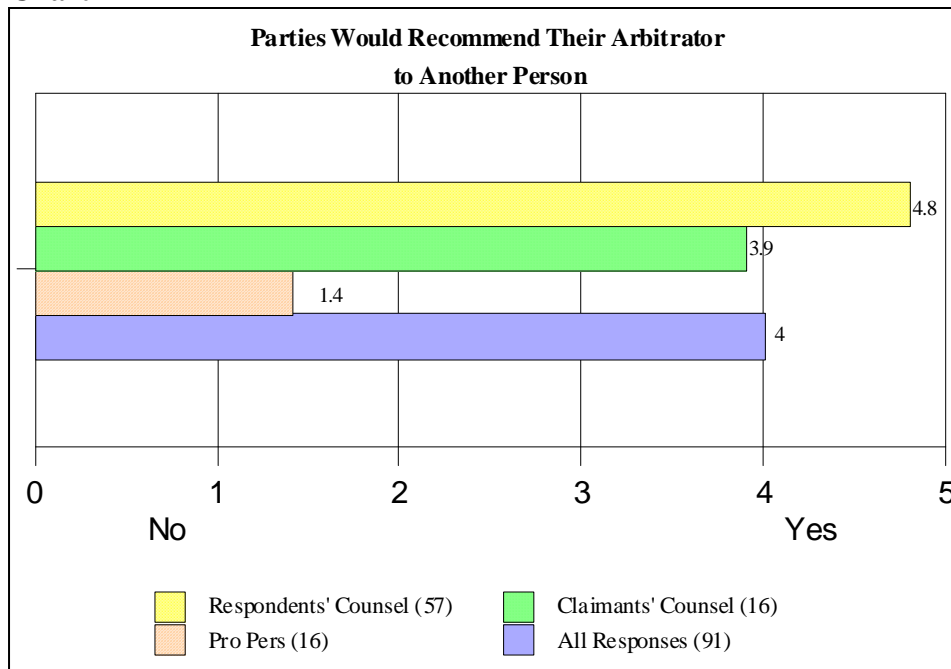
Table 5 highlights the average responses to some of the inquiries.

**Table 5 - Parties' Evaluations of Neutral Arbitrators**

Question	Claimants' Counsel	Pro per	Respondents' Counsel	Not Specified	Total
<b>Impartial and treated parties fairly</b>	4.1	1.8	4.8	2.5	4.1
<b>Treated parties with respect</b>	4.8	3.0	4.9	4.3	4.6
<b>Explained procedures and decisions clearly</b>	4.4	2.2	4.9	4.0	4.3
<b>Understood applicable law</b>	4.1	2.3	4.8	3.7	4.3
<b>Understood facts of the case</b>	4.2	2.1	4.9	4.0	4.2
<b>Fees reasonable for work performed</b>	5.0	2.5	4.9	0	4.6
<b>Would recommend this neutral</b>	3.9	1.4	4.8	2.5	4.0

As shown in Chart 12, the average on all responses when asked whether they would recommend this neutral to another person with a similar case was 4.0.

**Chart 12**





## 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. As with the evaluations sent to the parties to evaluate the neutral arbitrators, the OIA sends these forms to neutral arbitrators in cases where the neutral arbitrator closed the case. The OIA sent questionnaires in 148 closed cases and received 156 responses.<sup>79</sup>

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

The questionnaires also includes two questions that ask arbitrators to check off features of the system which worked well or needed improvement in the specific case. The vast majority identified features of the OIA system that worked well. See Table 6.

**Table 6 - Neutral Arbitrators' Opinions Regarding the OIA System**

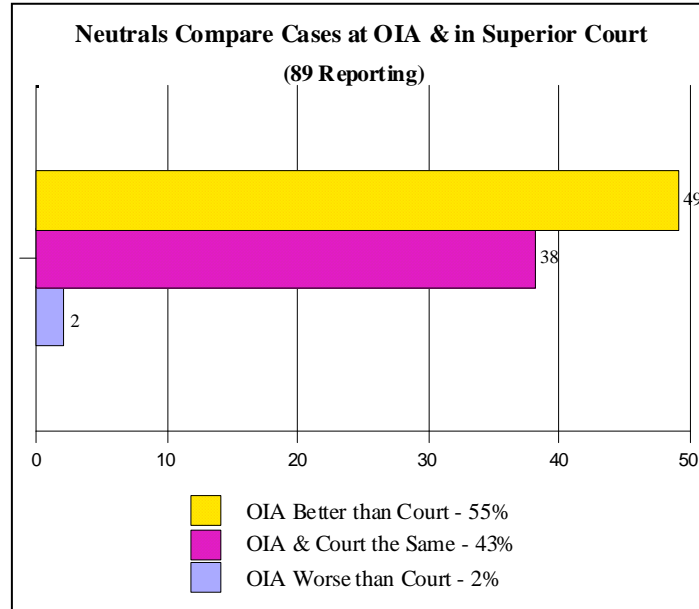
<b>Feature of OIA System</b>	<b>Works Well</b>	<b>Needs Improvement</b>
Manner of neutral arbitrator's appointment	108	1
Early management conference	98	0
Availability of expedited proceedings	42	3
Award within 15 business days of hearing closure	47	4
Claimants' ability to have Kaiser pay neutral arbitrator	95	1
System's Rules overall	108	5
Hearing within 18 months	48	1
Availability of complex/extraordinary proceedings	29	0

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<sup>79</sup>Some of the responses are questionnaires sent the prior year but received in 2019.

Finally, the questionnaires ask the neutrals whether they would rank the OIA experience as better, worse, or about the same as a similar case tried in court. Eighty-nine neutral arbitrators made the comparison. Forty-nine neutrals, or 55%, said the OIA experience was better. Thirty-eight neutrals, or 43%, said it was about the same. Two neutrals (2%) said the OIA experience was worse.<sup>80</sup> See Chart 13.

**Chart 13**



Most neutral arbitrators praised the OIA as responsive and helpful. They also praised the system as more efficient than court with easier access to parties, acknowledging less barriers, and more flexibility overall.

While the majority of the comments praised the system, many neutral arbitrators mentioned difficulties with *pro pers*. They complained about the amount of time needed to explain the *Rules* and procedures, about their need for additional assistance from the OIA, and about problems in the context of billing. One specifically asked that the OIA require *pro per* claimants to provide phone numbers and email addresses before sending cases to neutral arbitrators.

There were several neutrals who asked for more time for awards, one suggested eliminating the use of faxing in lieu of emailing, and two specifically asked that we create a mediation program or offer options for mediation.

<sup>80</sup>One neutral arbitrator did not provide reasons for why the OIA experience was worse but the other neutral was frustrated that the OIA does not have a procedure or Rule for addressing the appointment of a guardian ad litem in OIA arbitrations.

Neutral arbitrators also praised the flexibility of the *Rules* but asked for Rule changes that specifically covered certain circumstances - - judgment on the pleadings; guardian ad litem; bifurcation of issues; interim awards; and service deadlines. The OIA will monitor these situations and if necessary will propose Rule changes to the AOB.

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

The OIA sends the parties an additional one page evaluation of the OIA system which includes a question about the ease of obtaining medical records. The form is similar to, but shorter than, the form sent to the neutral arbitrators.

As with the other forms, this asks the recipients, on a scale from 1 to 5, whether they agree or disagree. A “5” is the highest level of agreement.

The OIA sent 1,030 evaluations and received 192 responses, or 19%. Twenty-one identified themselves as *pro per* claimants, 58 as claimants’ counsel, and 99 as respondents’ counsel. Fourteen did not specify a side.

Table 7 highlights the average responses for some of the inquiries.

**Table 7 - Parties’ Evaluations of the OIA System**

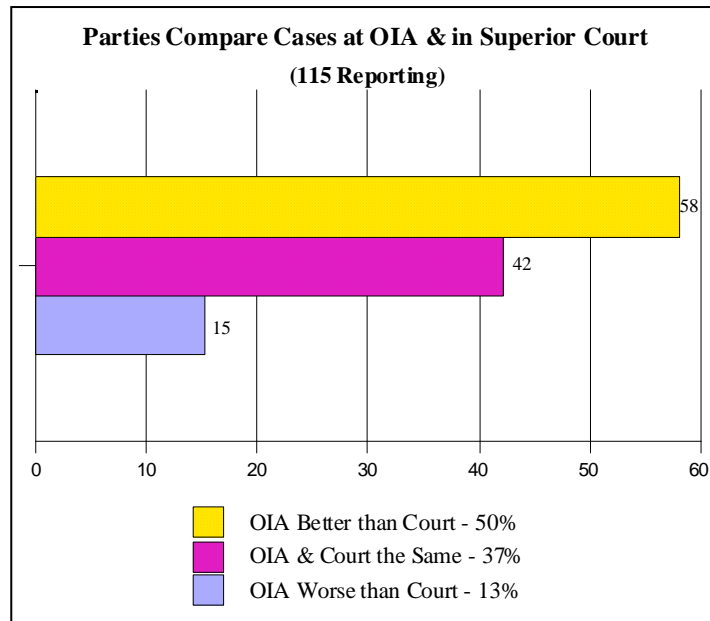
<b>Question</b>	<b>Claimants’ Counsel</b>	<b><i>Pro per</i></b>	<b>Respondents’ Counsel</b>	<b>Not Specified</b>	<b>Total</b>
<b>Procedures worked well</b>	3.9	2.3	4.9	4.6	4.3
<b>Obtaining medical records went well</b>	4.0	2.2	5.0	4.6	4.3
<b>OIA responsive to questions/concerns</b>	4.6	3.3	5.0	4.8	4.7

The form also asked the parties if they have had a similar experience in Superior Court and, if so, to compare the two. Of the 115 people who made the comparison, 58 said it was better. Forty-two said it was the same. Fifteen said it was worse.<sup>81</sup> See Chart 14 and Table 8 for the breakdown.

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<sup>81</sup>Of the fifteen people who said the OIA experience was worse, five responded with complaints about the lack of jury trial, a system which favors Kaiser or its attorneys, or the relaxed nature of the proceedings which allowed for the admissibility of new evidence mid-hearing.

**Chart 14**



**Table 8 - Parties Compare the OIA System & in Superior Court**

	<b>Made Comparison</b>	<b>Better</b>	<b>Worse</b>	<b>About the Same</b>
<b>Claimants' Counsel</b>	48	22	11	15
<b>Pro per</b>	5	2	2	1
<b>Respondents' Counsel</b>	56	31	2	23
<b>Not Specified</b>	6	3	0	3
<b>Total</b>	115	58	15	42

Although the parties also praised the OIA system as more efficient than court with easier access to neutral arbitrators, the most common complaint concerned obtaining medical records. Those who responded said that getting records from Kaiser is time-consuming, confusing and not standardized. Some complained about the delay, which took several months, and others said that they never received them, despite repeated requests. Others complained that the process for obtaining mental health records is even more difficult and should be made easier.

There were complaints about the lack of a jury trial or the inability to appeal a neutral's decision. A few suggested mandatory mediation before arbitration, and one suggested a Rule change providing a deadline for payment of settlement or award. There were requests for more time to respond to the LPA, one calling the OIA deadline "draconian."

There were several requests from *pro pers* to provide better explanation of their obligations under the *Rules*, and complaints that the system is inherently biased, unfair, and favors attorneys not *pro pers*. One suggested Rule changes to address incarcerated claimants.

## **XI. THE ROLE OF THE ARBITRATION OVERSIGHT BOARD**

### **A. Membership**

The AOB is chaired by Richard Spinello, retired Executive Director of Financial Risk and Insurance, Children's Hospital of Orange County. The vice-chair is Donna Yee, retired Chief Executive Officer of the Asian Community Center of Sacramento Valley.

Dr. Bruce R. Merl, the Director of Medical-Legal Affairs for The Permanente Medical Group has retired after 17 years of service on the AOB. His replacement is in progress.

The membership of the AOB is a distinguished one, comprised of Kaiser Foundation Health Plan members, employers, labor representatives, plaintiff attorneys, defense attorneys, physicians, and other well respected members of the community. No more than four may be Kaiser affiliated. Changing the *Rules* requires the agreement of two-thirds of all the members of the AOB, as well as a majority of the non-Kaiser related board members.

The current membership of the AOB in alphabetical order, are:

**Carlos Camacho**, Grant Director for Orange County Labor Federation, AFL-CIO, Orange County.

**Doris Cheng**, medical malpractice attorney representing claimants, San Francisco.

**Patrick Dowling**, MD, MPH, Professor and Chair Family Medicine, David Geffen School of Medicine at UCLA, Los Angeles.

**Sylvia Drew Ivie**, Special Assistant to the President, Charles R. Drew University of Medicine and Science, Los Angeles.

**Beong-Soo Kim**, Vice President and Assistant General Counsel, Kaiser Foundation Health Plan, Pasadena.

**Margaret B. Martinez**, MPH, Chief Executive Officer of Community Health Alliance of Pasadena, dba Chap Care, Pasadena.

**Honorable Carlos R. Moreno**, former California Supreme Court Justice, Los Angeles.

**Kenneth Pivo**, retired medical malpractice attorney representing respondents, Santa Ana.

**Kennedy Richardson**, retired Litigation Practice Manager, Kaiser Foundation Health Plan, Oakland.

**Richard Spinello**, retired Executive Director of Financial Risk and Insurance, Children's Hospital of Orange County.

**John Swartzberg**, MD, FACP, Clinical Professor, *Emeritus*, University of California Berkeley School of Public Health, Berkeley.

**Donna L. Yee**, MSW, PhD, retired Chief Executive Officer of the Asian Community Center of Sacramento Valley, Sacramento.

## **B. Activities**

The AOB takes an active role. It meets quarterly to review the operation of the OIA and to receive reports from OIA staff. This includes quarterly reports of statistics similar to those included in the annual report. It reviews the statistics and makes requests for supporting information when the need arises.

The AOB re-convened the Rules sub-committee to address the remaining OIA proposals for Rule changes. The sub-committee moved two Rule changes forward and the AOB approved them. After additional modifications were made by Kaiser to the OIA proposal, the sub-committee did not reach consensus. The proposal and two other Kaiser proposed Rule changes were presented to the AOB. The proposals were discussed and did not receive the requisite number of votes to pass. See Section II for a description of the Rule changes made and Exhibit B for a redlined copy of the amended *Rules*.

The AOB discussed the Blue Ribbon Panel's recommendation that an independent audit of the OIA be undertaken no less than every five years. The audit reviews a random sample of

case files and evaluates the OIA's compliance with the *Rules*. It also confirms the statistics in prior annual reports. The AOB has contracted with the auditors that conducted the 2014 audit. The plan is to have the OIA audit conducted in March 2020.

The AOB had several discussions about the ways in which the OIA could increase the diversity of the OIA panel of neutral arbitrators. During these conversations, the AOB passed a resolution to recognize that one of its strategic objectives is to have the OIA collect data on diversity and inclusion.<sup>82</sup> The AOB will analyze the data and determine what particular interventions, if any, are needed. Additionally, the AOB requested that the OIA contact minority bar association leaders and provide information about the OIA and offer to attend any upcoming events in an effort to recruit new members to the panel.

It also finalized a Rule change that had been temporarily approved by the Chair in order to comply with regulatory language pursuant to the Health & Safety Code, and it discussed what changes are needed by the OIA if a California senate bill dealing with consumer arbitration becomes law.<sup>83</sup>

Finally, the AOB reviews the draft annual report and comments upon it. Exhibit I is the AOB Comments on the Annual Report for 2019.

## **XII. TRENDS AND DATA OVER THE YEARS OF OPERATION OF THE OIA<sup>84</sup>**

This report describes a mature arbitration system which is continuously improving. The OIA publishes this report on its website and sends copies to those who request it. The annual reports provide more information about arbitrations than any other arbitration provider.<sup>85</sup> The OIA website provides a searchable database of all its cases since January 1, 2003, in addition to the sortable database about cases received in the past five years as required by state law.<sup>86</sup>

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<sup>82</sup>Pursuant to state law, the OIA will be required to collect and post on the OIA website the demographic data of all arbitrators as self-reported by the arbitrators. The AOB has asked that in addition to the state law requirement, that the OIA recognize the value in collecting the data on its website.

<sup>83</sup>The Governor approved the bill on October 13, 2019.

<sup>84</sup>Unless otherwise noted, this section compares data over the years since 2001, the first time the OIA reported on a calendar year. Prior reports covered partial years.

<sup>85</sup>A member of the National Academy of Science's Committee on Science, Technology, and Law published an article largely based on the OIA's annual reports. "Can Mandatory Arbitration of Medical Malpractice Claims be Fair? The Kaiser Permanente System," published in the November, 2015 *Dispute Resolution Journal*, Vol. 70, No. 3.

<sup>86</sup>No names of individual claimants or respondents are included, only corporate entities.

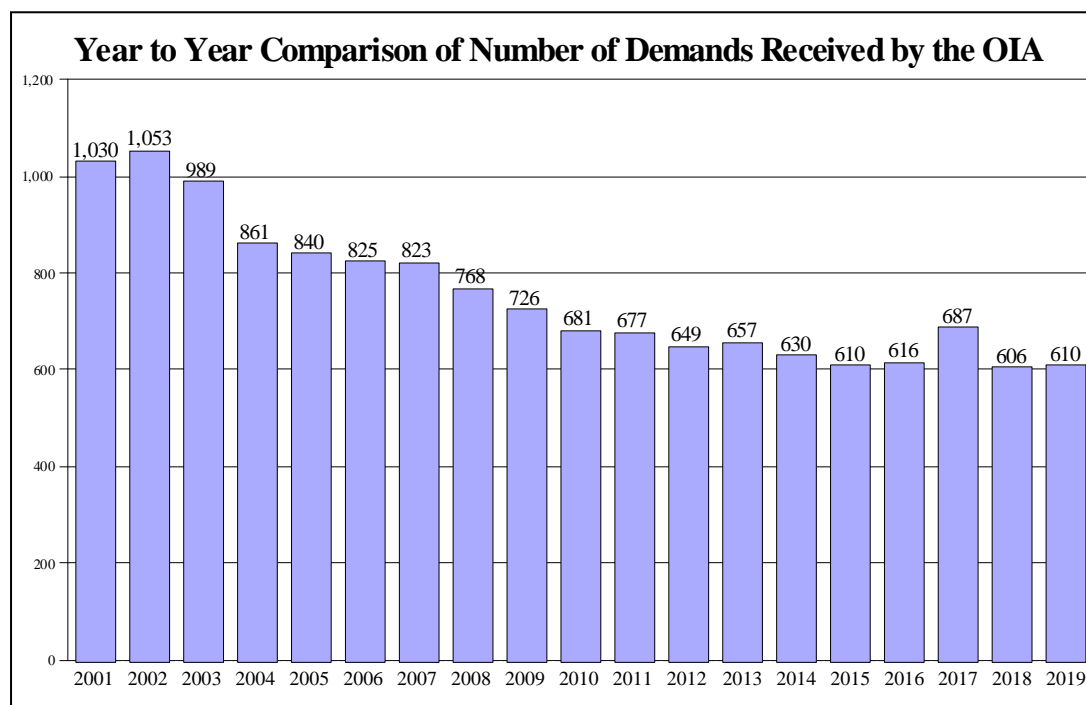
Redacted decisions issued by the OIA neutral arbitrators within the last five years are also available on the OIA website. The OIA posts this information for the parties and the public.

Using the data that the OIA has published in prior reports, this section considers the operation of the OIA over time. As in the preceding sections, lien cases are not considered in Sections G through L.

### A. The Number of Demands for Arbitration

In 2019, the OIA received 610 demands for arbitration, 4 more than last year and the same number of demands as received in 2015. Chart 15 shows the sharpest decline of demands received occurred between 2003 and 2004 (a decrease of 128) with the largest increase from 2016 to 2017 (an increase of 71).

**Chart 15**



### B. The Number of Neutral Arbitrators

This year, the number of neutral arbitrators has decreased, in large part because neutrals were required to update their applications. Forty-two neutrals left the panel, leaving 193 neutral arbitrators – 32 fewer than last year when the panel contained 225 neutrals. The panel has ranged from 326 in 2006 to this year’s new low of 193. On average, 39% have been retired judges. This year 43% are retired judges. The composition of the panel of neutral arbitrators includes those who have plaintiff’s side experience and those who have defendant’s side experience. This year, 92% report medical malpractice experience.



### **C. The Number Who Served**

The percentage of neutral arbitrators who have served in any given year remains consistent with the number of demands. It reached a high of 70% in 2003, when the OIA received 989 demands for arbitration and had 287 neutral arbitrators on its panel.<sup>87</sup> Sixty percent (60%) of neutral arbitrators served this year, an increase from last year, when 52% of neutrals served, the lowest percentage over all time.

### **D. The Number Who Wrote Awards<sup>88</sup>**

The number of neutral arbitrators who have written awards has ranged from 34 (in 2018) to 93 (in 2004). This year 35 neutrals wrote awards. The vast majority of those neutral arbitrators, 68 – 87%, only wrote a single award in any year. For all neutral arbitrators who wrote awards in 2019, 74% wrote a single award.

### **E. The Number Who Have Served After Making a Large Award<sup>89</sup>**

Since 2000, 104 different neutral arbitrators have made 144 awards of \$500,000 or more in favor of claimants. Most of the neutral arbitrators who made the awards were members of the OIA panel, but ten were not. The awards have ranged from \$500,000 to \$15,007,152.

As Chart 16 illustrates, most neutral arbitrators who have made awards of \$500,000 or more served again. Specifically, 81 neutral arbitrators served 1,978 times after making their awards for \$500,000 or more. In almost half of these cases (905), the parties jointly selected the neutral arbitrator.<sup>90</sup>

Of the 23 neutral arbitrators who were not selected after making their awards for \$500,000 or more, 4 were never on the OIA panel and 17 left the panel. Two of the neutral arbitrators who made such awards and were still on the panel have not served again.

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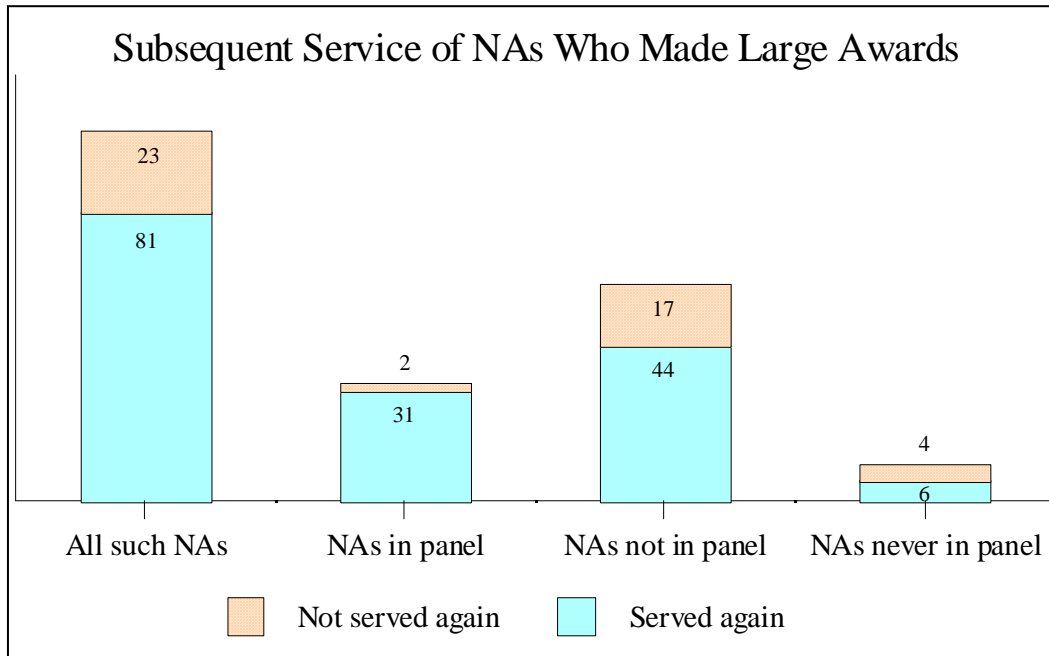
<sup>87</sup>By contrast, compared to 2003, this year there were 379 fewer demands for arbitration and 94 fewer neutral arbitrators on the panel.

<sup>88</sup>The OIA began comparing this data in 2003.

<sup>89</sup>The OIA received its first award over \$500,000 in 2000.

<sup>90</sup>Twenty-six neutral arbitrators who made such awards were selected in 144 cases in 2019. In 74 of the cases, they were jointly selected.

**Chart 16**



**F. Types of Claims**

The large majority of demands for arbitration are, and have always been, claims that allege medical malpractice. This has ranged from 86 – 97%.<sup>91</sup> This year, like last year, 95% of the cases involved allegations of medical malpractice. Benefit claims are generally less than two percent (2%).

**G. Claimants Without Attorneys**

The average percentage of cases with claimants who are not represented by an attorney is 25%. This year, 31% of claimants did not have an attorney, slightly lower than last year.<sup>92</sup> Dealing with the concerns raised by *pro per* claimants has been a continuing issue for the OIA, the AOB, and neutral arbitrators. Both the AOB and the OIA have revised forms and the “*pro per* handout” to make them easier for *pro pers* to understand. See Exhibit B, Rule 54. The OIA is also readily available by phone and email to answer questions from *pro per* claimants about the filing fee, neutral arbitrator selection, the *Rules*, and related items.

<sup>91</sup>The range may actually be smaller because during the early years, a large percentage of demands gave no specifics and were categorized as “unknown.” Now, Kaiser provides information as to the type of claim being made.

<sup>92</sup>By contrast, compare last year’s new high of 32% to 2004, when only 17% of claimants did not have an attorney.

## **H. Joint Selection vs. Strike and Rank Selection**

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 parties can jointly select anyone who agrees to follow the *Rules*, and a party can also timely disqualify neutral arbitrators after the selection. The OIA gives both parties identical information about the neutral arbitrators. This includes evaluations of the neutral arbitrators by the parties in earlier cases.

The parties select neutral arbitrators by the strike and rank process in a majority of cases. The percentage of neutral arbitrators chosen by joint selection has ranged from 26% (2003 and 2013) to 35% (2015). The percentage of neutral arbitrators jointly selected who are members of the OIA panel has ranged from 55% (2011) to 84% (2014).<sup>93</sup> This year, 76% of the neutral arbitrators jointly selected are members of the OIA panel.

## **I. Parties' Use of Options During Selection of Neutral Arbitrator**

The parties in 34 – 57% of the cases used postponement and disqualification allowing more time to select a neutral arbitrator.<sup>94</sup> Claimants made almost all of the postponements (99%, 6,552 out of 6,595) and the vast majority of disqualifications (77%, 1,033 out of 1,344).

The length of time to select a neutral arbitrator has remained consistent: 23 – 27 days for cases with no postponements. This year, it took 23 days, the lowest average since 2001. See Table 9 for year to year comparison of days to select neutral arbitrators since 2011.

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<sup>93</sup>There have only been 16 cases in which the neutral arbitrator was selected by court order.

<sup>94</sup>A member of the OIA staff contacts the parties to remind them of the deadline to return the LPA. When contacting claimants or their attorneys, the OIA reminds them that they may seek a postponement if they are not able to return their responses by the deadline.

**Table 9 - Year to Year Comparison of No Delay vs. Delays:  
Percentage and Average Number of Days to Select Neutral Arbitrators**

	2011	2012	2013	2014	2015	2016	2017	2018	2019
No delay	25 days 43%	24 days 52%	24 days 48%	25 days 47%	25 days 44%	24 days 51.7%	24 days 51.7%	24 days 51%	23 days 55%
Only Postponement	111 days 49%	108 days 42%	108 days 45%	108 days 46%	109 days 47%	110 days 40.9%	104 days 40.8%	104 days 42%	109 days 40%
Only Disqual.	72 days 2%	63 days 2%	59 days 2%	66 days 3%	62 days 4%	64 days 3.7%	61 days 3.4%	54 days 3%	55 days 2%
Postponement & Disqual.	160 days 6%	175 days 4%	162 days 5%	178 days 4%	173 days 5%	158 days 3.7%	165 days 4.1%	144 days 4%	149 days 3%
Total Selections	75 days	66 days	69 days	71 days	73 days	66 days	64 days	63 days	62 days

The average number of days to select a neutral arbitrator for all cases has consistently dropped since 2015 when it took 73 days. This year it took 62 days. While less than half of the claimants use procedures contained in the *Rules* and California law to delay selecting a neutral arbitrator, the time to select a neutral arbitrator remains timely and is many times faster than the pre-OIA system.

#### **J. How Cases Closed**

The most common way cases close has always been settlement, 40 – 49%. This is followed by cases withdrawn by the claimant, 21 – 28%. This year 45% of cases settled and 26% were withdrawn. This year more cases were decided after hearing (8%) than last year (6%). Slightly less cases were abandoned (6%) this year and, consistent with last year, the same percentage were dismissed by neutral arbitrator (5%). The remaining cases were closed by summary judgment. Table 10 displays the statistics since 2011.

**Table 10 - Year to Year Comparison of How Cases Closed<sup>95</sup>**

	2011	2012	2013	2014	2015	2016	2017	2018	2019
Settlements	44%	44%	44%	46%	44%	44%	47%	46%	45%
Withdrawn	26%	26%	27%	27%	26%	25%	25%	23%	26%
Abandoned	3%	3%	5%	4%	6%	6%	5%	7%	6%
Dismissed	4%	3%	3%	3%	3%	3%	4%	5%	5%
Summary Judgment	11%	11%	9%	13%	10%	12%	11%	13%	11%
Awards	11%	13%	11%	9%	10%	9%	8%	6%	8%

**K. The Results After Hearing**

In those cases in which the claimant won after a hearing, the awards have ranged from a single dollar to \$15,007,152. The average is \$500,333. Because the number of cases in any given year is small, the yearly averages can fluctuate greatly from year to year. The lowest average, \$156,001 was in 2001, when the largest award was \$1,100,000. The largest average, \$1,282,547, was in 2015, which had an award of \$11,640,000. This year, the average was \$846,223, and the largest award was \$5,258,636.

Since 2010, the average percentage of cases in which claimants prevailed after a hearing is 35%.<sup>96</sup> In 2019, 30% of claimants prevailed after a hearing while in 2017, 45% prevailed.

**L. How Long it Took to Close**

The lowest average for all cases to close was 281 days in 2001. This year it reached 366 days, almost as high as the 368 days in 2017. The overall average for all categories increased this year. See Table 11.

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<sup>95</sup>The totals may not add up to 100% due to rounding up or down.

<sup>96</sup>Up until 2009, lien cases were included in this percentage. They are now excluded and reported separately in Section IX.

**Table 11 - Year to Year Comparison of Average Number of Days to Close, by Disposition**

	2011	2012	2013	2014	2015	2016	2017	2018	2019
Settlements	326 days	330 days	318 days	334 days	344 days	376 days	383 days	357 days	386 days
Withdrawn	268 days	240 days	241 days	226 days	227 days	255 days	249 days	230 days	238 days
Summary Judgment	346 days	343 days	336 days	344 days	371 days	363 days	372 days	356 days	388 days
Awards	555 days	558 days	538 days	510 days	584 days	589 days	598 days	653 days	676 days
All Cases	339 days	340 days	325 days	323 days	342 days	363 days	368 days	343 days	366 days

The OIA closely follows each case that is still open after 15 months to make sure that the case remains in compliance with the *Rules*. Because of this type of diligence by the neutral arbitrators and the OIA, only 40 cases over all time have closed beyond the deadline set by the *Rules*. None closed late in 2019.

**M. Cost of Arbitration<sup>97</sup>**

California law provides that, absent any other arrangement by the parties, the fees of the neutral arbitrator will be divided evenly between the parties. The *Rules*, however, provide several ways to shift those fees to Kaiser. In 87% of all cases, including liens, that had fees since January 1, 2003, the fees were paid by Kaiser. This year, 91% of the fees were paid by Kaiser, excluding liens. This is most easily and most commonly done by the claimants signing a form and agreeing not to use party arbitrators. Claimants may also request a waiver based on financial hardship, which exempts them from paying the \$150 filing fee or waiving the right to party arbitrators. California law also allows claimants who meet certain criteria to avoid paying the \$150 filing fee.<sup>98</sup>

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<sup>97</sup>The OIA began reporting this data in 2003 when California law required provider organizations, like the OIA, to report the amount of a neutral arbitrator’s fees and the allocation on their websites.

<sup>98</sup>Unlike California Superior Courts, the filing fee has not increased during the OIA’s operation and is lower than court filing fees (other than small claims court).

## **N. Evaluations of Neutral Arbitrators and the OIA System**

Since 2000, the OIA has been sending the parties evaluations of the neutral arbitrators.<sup>99</sup> The evaluations ask, among other things, whether the neutral arbitrator treated the parties with respect and whether the parties would recommend the arbitrator to others. The responses to the evaluations have generally been quite positive, especially from the attorneys. This year, the overall average decreased from 4.5 last year to 4.0 (on a 1 – 5 scale) for whether the parties would recommend the arbitrator to others. Compare this average with a 3.9 in 2014 versus a 4.7 in 2004.

The OIA also asks neutral arbitrators to evaluate the OIA system. The questions ask them to identify whether particular features are useful or not, whether the OIA is helpful or responsive, and to compare the OIA system with the court system. The arbitrators' evaluations have always been positive. This year, 98% of the neutral arbitrators who answered the question rated the OIA system the same as or better than the state court system.

In 2009, the OIA began asking parties to evaluate the OIA system and the ease of obtaining medical records. The form is similar to the form sent to neutral arbitrators and also asks parties to compare the OIA system to court. This year, 87% of the parties who answered the question rated the OIA system the same as or better than the state court system. The parties' same rating of the OIA ranged from a low of 86% (2013) to a high of 96% (2018).

## **O. Conclusion**

The goals of the arbitration system as outlined by the BRP are set out in Rule 1. They provide for a fair, timely, and low cost arbitration process that respects the privacy of the parties. The *Rules* and OIA procedures were created with these goals in mind. This report describes the ways in which the *Rules* and OIA meet these goals. Some of the highlights are:

Neutral arbitrators are selected expeditiously, and cases close faster than the BRP recommendation.

The arbitration filing fee is lower than in court, and parties can and do shift the cost of neutral arbitrators to Kaiser.

The OIA provides parties with neutral arbitrators' applications; any updates and evaluations received from the parties; and redacted decisions by OIA neutral arbitrators within the last five years are posted on the OIA website.

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<sup>99</sup>In 2013, the OIA began sending neutral arbitrator evaluations only in cases in which the neutral arbitrator made a decision that ended the case.

Parties may jointly select any neutral arbitrator, so long as the neutral agrees to follow the *Rules*.

Either party can timely disqualify the neutral arbitrator after the selection.

OIA arbitrations are confidential; names of individual claimants and respondents are not disclosed.

The information in this report is collected and published on the OIA website to allow the AOB and the public to determine how well the arbitration system meets the goals in Rule 1.