

**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, 2022 - December 31, 2022**

# Table of Contents

	Page
Report Summary .....	i
I. INTRODUCTION & OVERVIEW .....	1
A. Goals of the Arbitration System .....	3
B. Format of This Report. ....	3
II. DEVELOPMENT AND CHANGES IN THE SYSTEM. ....	3
A. AOB Met with OIA Neutral Arbitrator who Accepts <i>Pro Per</i> Cases .....	3
B. AOB Convened <i>Pro Per</i> Sub-Committee. ....	3
C. AOB Convened <i>Rules</i> Sub-Committee. ....	4
D. AOB Approved Rule Changes .....	4
E. AOB Extended Temporary Rule in Response to COVID-19. ....	5
F. AOB and OIA Continued Commitment to Improve Diversity of the OIA Panel of Neutral Arbitrators .....	5
G. Impact of COVID-19 on Cases Older than 18 Months. ....	5
III. PANEL OF NEUTRAL ARBITRATORS .....	7
A. Turnover and Size of the Panel. ....	7
B. Practice Background of Neutral Arbitrators .....	7
C. Participation of All Neutral Arbitrators .....	8
1. The Number Named on a List of Possible Arbitrators .....	9
2. The Number Who Served .....	9
3. The Number Who Wrote Awards .....	9
4. The Number Who Have Served After Making a Large Award .....	9
5. Comparison of Cases Closed by Neutral Arbitrators Selected Ten or More Times with Cases Closed by Other Neutral Arbitrators .....	10

IV.	DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA.....	11
A.	Types of Claims .....	11
B.	Length of Time Kaiser Takes to Submit Demands to the OIA.....	12
C.	Claimants With and Without Attorneys .....	12
V.	SELECTION OF THE NEUTRAL ARBITRATORS .....	12
A.	How Neutral Arbitrators are Selected.....	13
B.	Joint Selections vs. Strike and Rank Selections .....	14
C.	Status of Cases with Postponements.....	15
D.	Status of Cases with Disqualifications .....	16
E.	Length of Time to Select a Neutral Arbitrator .....	17
1.	Cases with No Delays.....	18
2.	Cases with Postponements .....	18
3.	Cases with Disqualifications.....	19
4.	Cases with Postponements and Disqualifications.....	19
5.	Average Time for All Cases .....	19
F.	Cases with Party Arbitrators.....	19
VI.	MAINTAINING THE CASE TIMETABLE .....	20
A.	Neutral Arbitrator’s Disclosure Statement .....	20
B.	Arbitration Management Conference .....	21
C.	Mandatory Settlement Meeting .....	21
D.	Hearing and Award.....	21
E.	Status of Open Cases .....	21
VII.	THE CASES THAT CLOSED.....	22
A.	How Cases Closed .....	23

1.	Settlements – 53% of Closures . . . . .	23
2.	Withdrawn Cases – 25% of Closures . . . . .	23
3.	Dismissed Cases – 5% of Closures. . . . .	23
4.	Summary Judgment – 11% of Closures . . . . .	24
5.	Cases Decided After Hearing – 6% of Closures. . . . .	24
	a. Who Won . . . . .	24
	b. How Much Claimants Won . . . . .	24
	c. How Long it Took. . . . .	25
6.	Video Hearings . . . . .	25
B.	Cases Using Special Procedures. . . . .	26
	1. Expedited Procedures . . . . .	26
	2. Complex Procedures. . . . .	27
	3. Extraordinary Procedures . . . . .	27
	4. Rule 28 Extensions . . . . .	27
VIII.	THE COST OF ARBITRATIONS . . . . .	28
	A. What Fees Exist in OIA Arbitrations . . . . .	28
	B. Options Claimants Have to Waive These Fees . . . . .	29
	1. How to Waive the \$150 Arbitration Filing Fee . . . . .	29
	2. How to Waive Both the Arbitration Filing Fee and the Neutral Arbitrator’s Fees and Expenses . . . . .	29
	3. How to Waive Only the Neutral Arbitrator’s Fees and Expenses . . . . .	30
	C. Number of Cases in Which Claimants Have Waived Their Fees . . . . .	30
	1. The \$150 Arbitration Filing Fee . . . . .	30
	2. The \$150 Arbitration Filing Fee and the Neutral Arbitrator’s Fees and Expenses . . . . .	30

3.	The Neutral Arbitrator’s Fee Allocation. . . . .	30
D.	The Fees Charged by Neutral Arbitrators. . . . .	31
IX.	EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM. . . . .	32
A.	The Parties Evaluate the Neutral Arbitrators . . . . .	32
B.	The Neutral Arbitrators Evaluate the OIA System. . . . .	33
C.	The Parties Evaluate the OIA System and Ease of Obtaining Medical Records . . . .	35
X.	THE ROLE OF THE ARBITRATION OVERSIGHT BOARD . . . . .	38
A.	Membership . . . . .	38
B.	Activities. . . . .	39
XI.	TRENDS AND DATA OVER THE YEARS OF OPERATION OF THE OIA . . . . .	40
A.	The Number of Demands for Arbitration . . . . .	40
B.	The Number of Neutral Arbitrators . . . . .	40
C.	The Number Who Served . . . . .	41
D.	The Number Who Wrote Awards. . . . .	41
E.	The Number Who Have Served After Making a Large Award . . . . .	41
F.	Types of Claims . . . . .	42
G.	Claimants Without Attorneys . . . . .	42
H.	Joint Selections vs. Strike and Rank Selections . . . . .	43
I.	Parties’ Use of Options During Selection of Neutral Arbitrator . . . . .	43
J.	How Cases Closed . . . . .	44
K.	Awards for Claimants . . . . .	45
L.	How Long it Took to Close . . . . .	45
M.	Payment of Neutral Arbitrator’s Fees. . . . .	46
N.	Evaluations of Neutral Arbitrators and the OIA System . . . . .	46

O.	Conclusion .....	47
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## **Exhibits**

Exhibit A:	Description of OIA Staff. ....	E-1
Exhibit B:	<i>Rules for Kaiser Permanente Member Arbitrations Administered by the Office of the Independent Administrator, Amended as of January 1, 2023, redlined</i> .....	E-3
Exhibit C:	Temporary Rules. ....	E-29
Exhibit D:	Qualifications for Neutral Arbitrators. ....	E-32
Exhibit E:	OIA Panel of Neutral Arbitrators .....	E-34
Exhibit F:	OIA Demographic Form and Report .....	E-40
Exhibit G:	List of Awards to Claimants .....	E-44
Exhibit H:	Party or Attorney Evaluation of Neutral Arbitrator .....	E-46
Exhibit I:	Questionnaire for Neutral Arbitrators. ....	E-51
Exhibit J:	Party or Attorney Evaluation of Arbitration System .....	E-54
Exhibit K:	Kaiser Arbitration Oversight Board Comments on the Annual Report ..	E-56

## **Charts And Tables**

Chart 1	Open Cases Over 18 Months .....	6
Table 1	Number of Neutral Arbitrators by Region .....	7
Table 2	Percentage of Practice Spent as a Neutral Arbitrator .....	8
Table 3	Percentage of Practice Spent as an Advocate .....	8
Table 4	Comparison of Cases Closed with Neutral Arbitrators Selected Ten or More Times vs. Cases Closed with Other Neutral Arbitrators. ....	10
Chart 2	Types of Claims .....	11
Chart 3	Claimants With and Without Attorneys .....	12
Chart 4	How Neutral Arbitrators were Chosen .....	14

Chart 5	Status of Cases with Postponements. . . . .	16
Chart 6	Status of Cases with Disqualifications . . . . .	17
Chart 7	Parties' Use of Options During Selection. . . . .	18
Chart 8	Status of Open Cases . . . . .	22
Chart 9	How Cases Closed . . . . .	25
Chart 10	Average Days for Cases to Close, by Manner of Disposition . . . . .	26
Chart 11	Length of Time in Days to Close Cases by Type of Procedure . . . . .	28
Chart 12	Neutral Arbitrators' Fee Allocation . . . . .	31
Table 5	Parties' Evaluations of Neutral Arbitrators . . . . .	32
Chart 13	Parties Would Recommend Their Arbitrator to Another Person . . . . .	33
Table 6	Neutral Arbitrators' Opinions Regarding the OIA System . . . . .	34
Chart 14	Neutrals Compare Cases in OIA & in Superior Court . . . . .	34
Table 7	Parties' Evaluations of the OIA System . . . . .	36
Chart 15	Parties Compare Cases in OIA & in Superior Court . . . . .	36
Table 8	Parties Compare the OIA System & Superior Court . . . . .	37
Chart 16	Year to Year Comparison of Number of Demands Received by the OIA. . . . .	40
Chart 17	Subsequent Service of NAs Who Made Large Awards . . . . .	42
Table 9	Year to Year Comparison of No Delay vs. Delays: Percentage and Average Number of Days to Select Neutral Arbitrators . . . . .	44
Table 10	Year to Year Comparison of How Cases Closed . . . . .	45
Table 11	Year to Year Comparison of Average Number of Days to Close, by Disposition . . . . .	46

## REPORT SUMMARY

This is the annual report for the Office of the Independent Administrator (OIA) for 2022. The OIA administers the arbitration system between Kaiser Foundation Health Plan, Inc., or its affiliates (Kaiser) and its members.<sup>1</sup> From the data and analyses in this report, readers may gauge how well the OIA system meets its goals of providing a fair, timely, and low cost arbitration process that protects the privacy of the parties.

### Status of Arbitration Demands

1. **Number of Demands for Arbitration.** The OIA received 470 demands, 3 less than last year and the lowest number of all time. See pages 11 and 40.
2. **Types of Claims.** Ninety-six percent (96%) of the cases involved allegations of medical malpractice. Less than one percent (<1%) presented benefit and coverage allegations. The remaining cases (3%) were based on allegations of premises liability and other torts. See page 11.
3. **Thirty-three Percent (33%) of Claimants Did Not Have Attorneys.** Claimants in 155 cases, or 33%, were not represented by counsel, a 7% increase from last year. On average, 25% of claimants are in *pro per*. See pages 12 and 42.

### How Cases Closed

4. **More than Half (53%) of Cases Settled.** The parties settled 53% of cases, 8% more than last year and the highest reported average. Twenty-nine cases settled at the Mandatory Settlement Meeting (MSM). See pages 23 and 44 – 45.
5. **Six Percent (6%) of Cases Went to Hearing.** Claimants prevailed in 46% of these cases, 12% more than last year and the highest reported average. The average award was \$4,901,115, and the range was from \$350,000 to \$25,638,059. See pages 24, 44 – 45, and Exhibit G.
6. **All but One Case were Heard by a Single Neutral Arbitrator.** Almost all of the hearings involved a single neutral arbitrator. One case was decided by a neutral arbitrator and two party arbitrators. See page 20.
7. **More than Half (56%) of Claimants Received Some Compensation.** Claimants received compensation either when their cases settled (53%) or when they were successful after a hearing (3%). See pages 23, 24, and 44 – 45.

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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. The OIA has administered the system since 1999.



8. **Almost One-Quarter (22%) Closed by Decision of the Neutral Arbitrator.** Six percent (6%) of cases closed after an arbitration hearing, 11% were closed through summary judgment, and 5% were dismissed by neutral arbitrators. See pages 23 – 24 and 44 – 45.
9. **One Quarter (25%) of Cases were Withdrawn.** Claimants withdrew 25% of cases. Thirty-six percent (36%) of these claimants were in *pro per*. See pages 23 and 44 – 45.

## Meeting Deadlines

10. **More than Half (55%) of the Neutral Arbitrators were Selected Without any Delay.** The *Rules* give parties the option to postpone the deadline to select a neutral arbitrator, but over half (55%) of the arbitrators were selected without the parties exercising this option. This year, the claimants made all but three of the requests for a 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 36 neutral arbitrators and Kaiser disqualified 11. See pages 15, 16 – 17 and 18.
11. **Average Length of Time to Select a Neutral Arbitrator was 63 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 111 days. In cases with only a disqualification, it was 50 days. In cases with both a postponement and disqualification it was 188 days. The overall average length of time to select a neutral arbitrator for all cases was 63 days, 5 days more than last year. See pages 18 – 19 and 43 – 44.
12. **On Average, Cases Closed in Just over Fourteen Months.** Cases closed, on average, in 433 days, 15 days more than last year. No case closed beyond the deadline required by the *Rules*. Seventy-seven percent (77%) of the cases closed within 18 months (the deadline for “regular” cases) and 52% closed in a year or less. See pages 22 – 23, 26, and 45 – 46.
13. **On Average, Cases With Hearings were Completed in Less than Three Years.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 1,022 days (34 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 470 days (under 16 months). See pages 25, 26, and 46.

## Panel of Neutral Arbitrators

14. **The Neutral Arbitrator Panel.** The OIA had 177 neutral arbitrators on its panel, 13 more than last year. Fifty-three percent (53%) of them, or 93, are retired judges. See page 7.
15. **Neutral Arbitrator Backgrounds.** The applications completed by the members of the OIA panel show that 111 arbitrators, or 63%, 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-one percent (91%) of the neutral arbitrators reported having medical malpractice experience. See page 8.
16. **More Than Half (58%) of Arbitrators Served on a Case.** Fifty-eight percent (58%) of the neutral arbitrators on the OIA panel served on a case. Arbitrators averaged two assignments each. Twenty neutral arbitrators, including those not on the OIA panel, decided the 26 awards made. Sixteen arbitrators (80%) wrote a single award. See pages 9 and 41.
17. **Majority of Neutral Arbitrators Selected by the Parties were Members of the OIA Panel (95%).** Seventy-seven percent (77%) of neutral arbitrators were selected through the strike and rank process. Twenty-three percent (23%) of the arbitrators were jointly selected. Of the joint selections, 18% were members of the OIA panel, and 5% were not members of the OIA panel. See page 14.
18. **Neutral Arbitrators Selected Again After Making Large Award.** Ten neutral arbitrators made awards for more than \$500,000. Six of the ten arbitrators have been selected to serve multiple times after making the award. See pages 9 - 10.

## Neutral Arbitrator Fees

19. **Kaiser Paid the Neutral Arbitrators' Fees in 97% of Closed Cases that had Fees.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. Kaiser paid the neutral arbitrators' fees in 97% of closed cases that had fees. See page 31.
20. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$200/hour to \$1,200/hour, with an average of \$638/hour. For the 381 cases that closed, and for which the OIA has information, the average fee charged by neutral arbitrators was \$8,705. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average fee was \$9,343. The average fee in cases decided after a hearing was \$59,634. See page 31.

## Evaluations

21. **Evaluations of Neutral Arbitrators by Parties.** When a case closes by neutral arbitrator action, the OIA sends the parties or their attorneys a form to evaluate the neutral arbitrator. Most attorneys who returned completed evaluations expressed satisfaction with the neutral arbitrators and would recommend them to others, with an average of 4.4 on a 5 point scale. *Pro pers* view neutral arbitrators less favorably, with a 1.0 average. This year, the overall average by all parties was 3.7. See pages 32 – 33.
22. **Evaluations of the OIA by Neutral Arbitrators.** When a case closes by neutral arbitrator action, the OIA sends the neutral arbitrator a questionnaire about the OIA system. 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 33 – 35.
23. **Evaluations of the OIA by Parties.** When a case closes, the OIA sends an evaluation to the parties or their attorneys asking them about the OIA system. Seventy-six percent (76%) of the responding parties and attorneys reported that the OIA system was the same as or better than the court system and 24% said it was worse. See pages 35 – 37.

## Development and Changes in the System

24. **The Arbitration Oversight Board (AOB) Met with OIA Neutral Arbitrator who Accepts *Pro Per* Cases.** The AOB continued discussions regarding the dissatisfaction experienced by *pro pers*, and met with an OIA neutral arbitrator to discuss ways in which the *pro per* experience could be improved. See pages 3 and 39.
25. **AOB Convened *Pro Per* Sub-Committee.** The AOB convened a *pro per* sub-committee to review OIA procedures and the information provided to *pro pers*. See pages 3 – 4 and 39.
26. **AOB Convened *Rules* Sub-Committee.** The *Rules* sub-committee met and has revised Rule 54 to provide more clear information to *pro pers*. The *Rules* sub-committee will reconvene in 2023 to discuss further rule changes. See pages 4, 39, and Exhibit B.
27. **AOB Approved Rule Changes.** The AOB approved seven proposals for rule changes. All approved changes took effect January 1, 2023. See pages 4 – 5, 39, and Exhibit B.

28. **AOB Extended Temporary Rule in Response to COVID-19.** The AOB extended Temporary Rule 4 with a slight modification. All other temporary rules have been lifted. See pages 5, 39, and Exhibit C.
29. **AOB and OIA Continued Commitment to Improve Diversity of the OIA Panel of Neutral Arbitrators.** The AOB and the OIA continued discussions about the ways in which the OIA could improve the diversity of the panel of neutral arbitrators. See pages 5 and 39.
30. **Impact of COVID-19 on Cases Older than 18 Months.** The AOB was interested in comparing open cases older than 18 months with those in prior years, both pre and post COVID-19. This information can be found in Chart 1 and will become part of the OIA statistics provided to the AOB quarterly as part of its oversight. See pages 5 – 6 and 39.

## Conclusion

The goal of the OIA is to provide a fair, timely, and low cost arbitration process that protects the privacy of the parties. To summarize:

- Neutral arbitrators are selected expeditiously, and the cases close within the deadlines set by the *Rules*.
- 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 OIA provides information on its website about its cases in compliance with California law. In addition, although no longer required by law, the OIA maintains a table about all its cases since January 1, 2003.
- The OIA has published annual reports since 1999 which are all available on the OIA website.

## I. INTRODUCTION & OVERVIEW

The Office of the Independent Administrator (OIA) issues this report for 2022.<sup>1</sup> It describes the arbitration system that handles claims brought by members of Kaiser Foundation Health Plan, Inc. (KFHP) against KFHP or its affiliates, collectively 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 also requires that Ms. Bell write an annual report. This 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 2022, the final section compares this year with earlier years.

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

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, 2023 (Rules)*. The *Rules* are available in English, Spanish, and Chinese.<sup>3</sup>

The *Rules* provide procedures for expeditiously selecting a neutral arbitrator and completing most cases within 18 months.<sup>4</sup> The 18-month timeline is displayed on the next page. Details about each step in the process are discussed in the body of this report.

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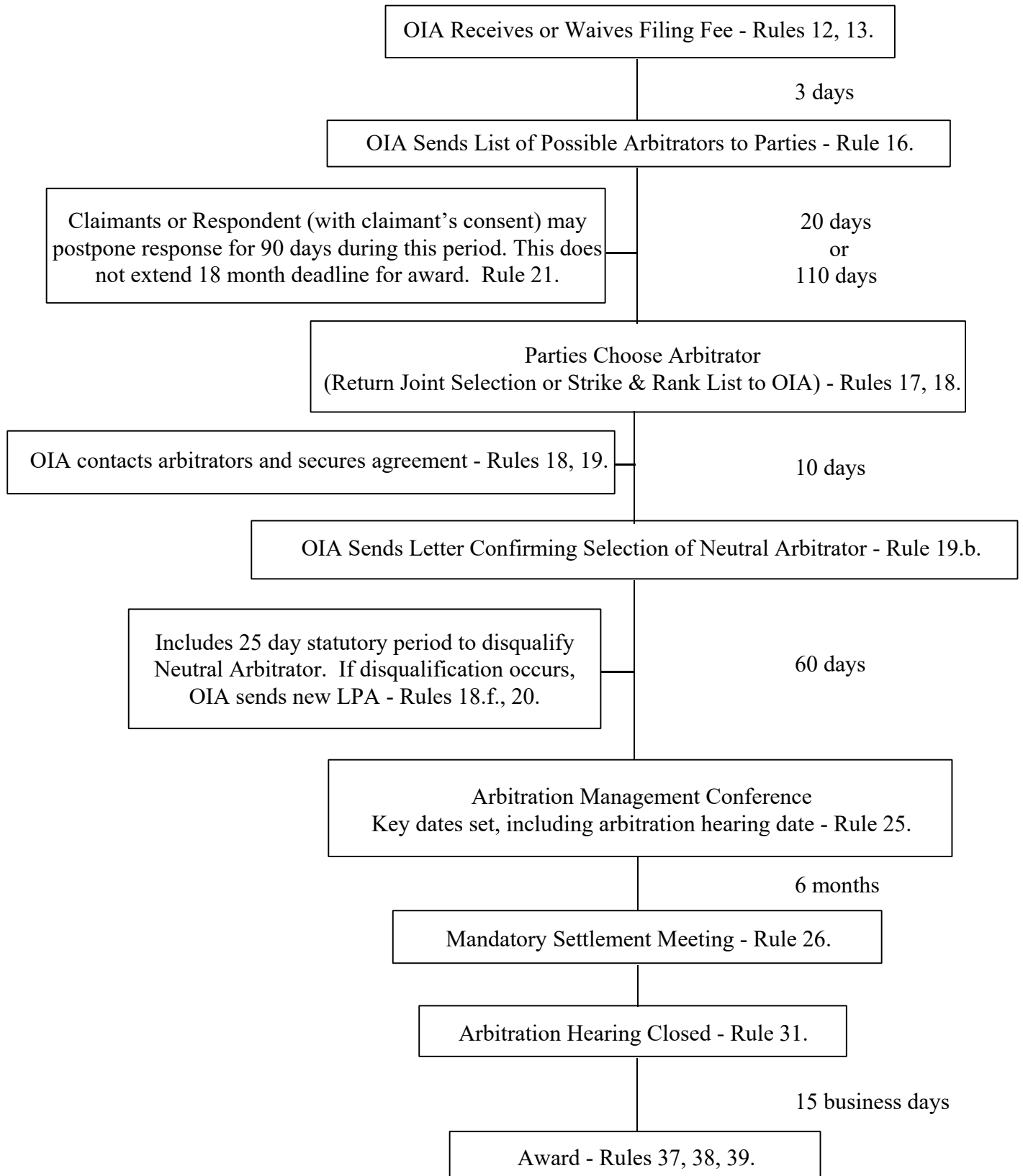
<sup>1</sup>This report, along with the prior annual reports, the *Rules*, various forms, and other information, including OIA disclosures, are available on the OIA website, [www.oia-kaiserarb.com](http://www.oia-kaiserarb.com). The OIA can be reached by calling 213-637-9847, faxing 213-637-8658, or 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 care service plan that arranges for health care services and other benefits for its enrolled members. Since 1971, it has required that its members use binding arbitration. Kaiser arranges for medical benefits by contracting with The Permanente Medical Group, Inc. (Northern California) and Southern California Permanente Medical Group. Hospital services are provided by contract with Kaiser Foundation Hospitals, a nonprofit corporation. Almost all of the demands for arbitration received by the OIA are based on allegations against these affiliates.

<sup>3</sup>The *Rules* were amended and the changes took effect January 1, 2023. A redlined copy is attached as Exhibit B. See Section II for a discussion of the changes.

<sup>4</sup>See Rule 24.a. The *Rules* also include provisions for cases to be expedited and for cases that need more than 18 months to complete. See Rules 24.b., 24.c., 28, and 33 – 36.

# Timeline for Arbitrations Using Regular Procedures



MAXIMUM OF 18 MONTHS\*

\*Unless Rule 24.b., 24.c., or 28 applies.

## **A. Goals of the Arbitration System**

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>5</sup>

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

Section II discusses developments and changes in the system. 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. The parties' evaluations of neutral arbitrators and the parties' and neutral arbitrators' evaluations of the OIA system are summarized in Section IX. Section X describes the AOB's membership and activities. Finally, Section XI compares the operation of the system over time.

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

## **A. AOB Met with OIA Neutral Arbitrator who Accepts *Pro Per* Cases**

The AOB and OIA continued discussions regarding the dissatisfaction experienced by claimants representing themselves (*pro pers*). The OIA suggested that the AOB may benefit from hearing from a neutral arbitrator who accepts *pro per* cases.<sup>6</sup> The purpose of the discussion was for the AOB to consider ways in which the *pro per* experience could be improved. The AOB met with neutral arbitrator Dan Deuprey in March. Mr. Deuprey gave a very comprehensive presentation, explaining his experiences with *pro pers*. The OIA was encouraged by Mr. Deuprey's presentation and incorporated some of his suggestions into an improved *pro per* handout. The OIA sends this handout to all *pro pers* when it receives their demands for arbitration. The changes were also incorporated into Rule 54 when the AOB amended the OIA *Rules*. See Section II.D, below.

## **B. AOB Convened *Pro Per* Sub-Committee**

The AOB convened a *pro per* sub-committee to review OIA procedures. The sub-committee understands the complexity of medical malpractice claims and that in almost all

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<sup>5</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 are available on the OIA website.

<sup>6</sup>Not all neutral arbitrators take *pro per* cases. Thirty-two percent (32%) do not.

instances a medical expert is required. The sub-committee discussed ways in which communication regarding summary judgments and the timeline could be strengthened. The OIA improved the *pro per* handout, adding more specific language involving motions for summary judgment.<sup>7</sup> It asked the OIA to research California laws schools that provide pro bono services for cases involving medical malpractice. There are none.<sup>8</sup> It asked the OIA to use the evaluations it receives to identify areas for improvement.<sup>9</sup> The OIA updated its evaluation to better identify the party completing it.<sup>10</sup> The OIA will create a handout for neutral arbitrators who accept *pro per* cases, identifying some of the key suggestions of Mr. Deuprey. At this time, the *pro per* sub-committee is satisfied with the modifications and has no further recommendations.

### **C. AOB Convened *Rules* Sub-Committee**

The AOB convened a *Rules* sub-committee. In 2005, the AOB spent considerable time revising the OIA's *pro per* handout which was eventually incorporated into Rule 54. In 2022, the *Rules* sub-committee met and revised Rule 54 to improve its clarity for *pro pers*. Among other improvements, it provides more frequently asked questions and specific information regarding motions for summary judgment.

The *Rules* sub-committee will reconvene in 2023 to discuss proposals to Rule 9 and Rule 39.

### **D. AOB Approved Rule Changes**

The OIA presented the AOB with eight proposals for Rule changes. Six of the proposals were approved. Two pending proposals have been sent to the AOB's *Rules* sub-committee for further discussion and refinement. Kaiser also submitted a proposal for amendment to Rule 11 which was supported by the OIA and approved by the AOB. All approved changes took effect January 1, 2023 and are discussed briefly below.<sup>11</sup>

Rule 7 adds email to claimant and attorney's contact information in the Demand for Arbitration.

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<sup>7</sup>See discussion in Section II.A.

<sup>8</sup>There are 18 law schools in California that offer pro bono services; none provide assistance for medical malpractice cases.

<sup>9</sup>For specific suggestions offered by *pro pers*, see Section IX.C.

<sup>10</sup>The OIA discovered that for parties receiving an evaluation of the neutral arbitrator and the OIA evaluation, the party's role (claimant or respondent) was displayed on the neutral arbitrator evaluation only. This information is now captured on both evaluations.

<sup>11</sup>See Exhibit B for a redlined version of the *Rules*.



Rule 8 changes title of the rule to Serving a Demand for Arbitration (emphasis added) and is amended to correctly reference Kaiser Foundation Health Plan, Inc. for Southern California cases. (“Health Plan” is used throughout the remainder of the *Rules*.)

Rule 11 allows Kaiser to transmit all new cases to the OIA electronically.

Rule 17 includes the option of jointly selecting a neutral arbitrator by fax or email. It also removes an inaccurate reference to a procedure in Rule 17.d. which is correctly stated in Rule 19.b.

Rule 18 removes the reference to charging parties a fee for sending additional information which the OIA may have on file for arbitrators.

Rule 22 adds email to a party arbitrator’s contact information.

Rule 54 is revised to be stated more clearly and provide additional information for *pro pers*.

#### **E. AOB Extended Temporary Rule in Response to COVID-19**

On March 20, 2020, the OIA, in concurrence with the Chair of the AOB, enacted 11 temporary rules to address COVID-19 concerns.<sup>12</sup> All but one of the temporary rules were lifted in 2021 and 2022. Temporary Rule 4 remains in effect with a slight modification. It provides neutral arbitrators with the authority to serve decisions and/or orders electronically to the OIA, rather than by mail.

#### **F. AOB and OIA Continued Commitment to Improve Diversity of the OIA Panel of Neutral Arbitrators**

The AOB and the OIA continued discussions about the ways in which the OIA could improve the diversity of the panel of neutral arbitrators. The OIA is actively seeking women and individuals of color and has seen improved results. The OIA continues to participate in virtual events focused on diversity, access, and inclusion, and continues discussions with neutral arbitrators about how to increase diversity among the OIA panel.

#### **G. Impact of COVID-19 on Cases Older than 18 Months**

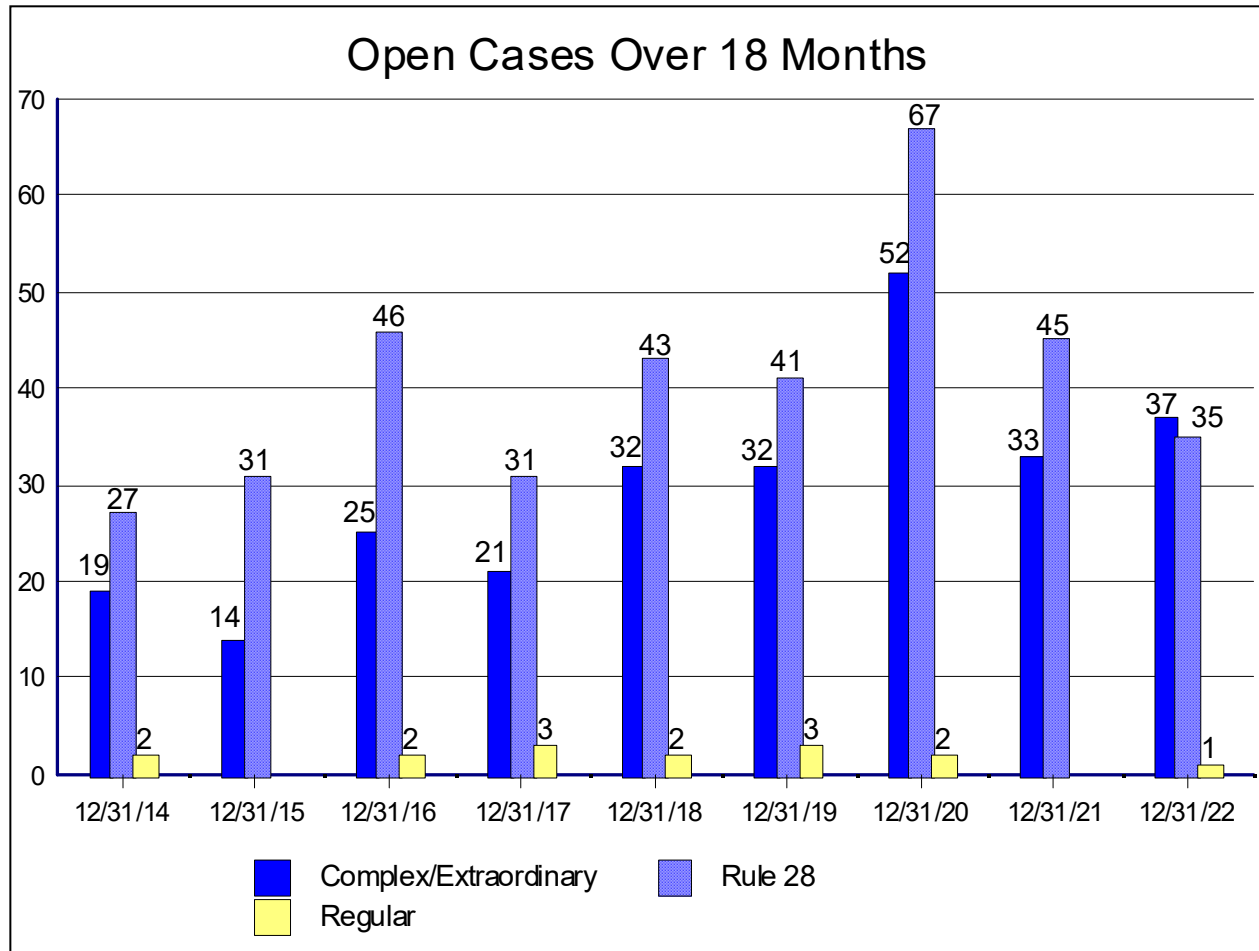
The AOB was interested in comparing open cases older than 18 months with those in prior years, both pre and post COVID-19. As shown in Chart 1, in 2020, the first year of the pandemic, the OIA had the highest number of these cases with Rule 28 extensions (67 cases),

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<sup>12</sup>See Exhibit C for a list of the temporary rules.

and complex and extraordinary designations (52 cases).<sup>13</sup> In 2021, the second year of the pandemic, the number of cases with extensions began to decrease. In 2022, 35 cases open more than 18 months had Rule 28 extensions and 37 cases were designated complex or extraordinary. This chart has now become part of the OIA statistics provided to the AOB quarterly as part of its oversight.<sup>14</sup>

**Chart 1**



<sup>13</sup>A neutral arbitrator may extend the deadline to close a case for good cause under Rule 28 or by designating the matter complex or extraordinary under Rule 24. See Section VII. B. for further information.

<sup>14</sup>The OIA originally provided the AOB with statistics from 2017. The graph now includes statistics from 2014, consistent with Section XI.

### III. PANEL OF NEUTRAL ARBITRATORS

#### A. Turnover and Size of the Panel

At the end of the year, there were 177 neutral arbitrators on the OIA panel. Of those, 93 were former judges, or 53%.

The neutral arbitrators are distributed into three geographic panels: Northern California, Southern California, and San Diego. See Table 1. Neutral arbitrators who agree to travel without charge may be listed on more than one panel. Exhibit D contains the qualifications for neutral arbitrators, and Exhibit E contains the names of the neutral arbitrators on each panel.

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

<b>Total Number of Arbitrators on the OIA Panel:</b>	<b>177</b>
<b>Northern California Total:</b>	<b>92</b>
<b>Southern California Total:</b>	<b>101</b>
<b>San Diego Total:</b>	<b>53</b>
<b>The three regions total 246 because 46 arbitrators are on more than one panel; 23 on all three panels, 1 on No. Cal &amp; So. Cal, and 22 on So. Cal &amp; San Diego.</b>	

During the year, eight arbitrators voluntarily left the panel<sup>15</sup> and two additional arbitrators were removed. The two were removed for failing to update their applications.<sup>16</sup> Twenty-four neutral arbitrators joined the panel. No applicant was rejected.

#### 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: 75% of the time acting as a neutral arbitrator, 6% 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.

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<sup>15</sup>For the arbitrators who provided reasons, the most common reason given for resigning was retirement.

<sup>16</sup>Neutral arbitrators are required to update their applications every two years. The OIA extended the deadline in hopes of receiving a response but neither neutral arbitrator responded.

More than half (63%) of the panel, 111 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**

<b>Percent of Time</b>	<b>0%</b>	<b>1 – 25%</b>	<b>26 – 50%</b>	<b>51 – 75%</b>	<b>76 – 99%</b>	<b>100%</b>
<b>Number of NAs</b>	4	31	16	3	12	111

On average, the members of the OIA panel spend 12% of their time as litigators. See Table 3 for the full distribution.

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

<b>Percent of Practice</b>	<b>Number of NAs Reporting Claimant Counsel Practice</b>	<b>Number of NAs Reporting Respondent Counsel Practice</b>
0%	152	153
1 – 25%	9	7
26 – 50%	9	10
51 – 75%	2	2
76 – 100%	5	5

Finally, while the qualifications do not require that members of the OIA panel have medical malpractice experience, 91% of them do. At the time they filled out or updated their applications, 161 reported that they had medical malpractice experience, while 16 did not. Of the 16 who reported no medical malpractice experience, 8 of them have since served as a neutral arbitrator in an OIA case and may now have acquired medical malpractice experience.

### **C. Participation of All Neutral Arbitrators<sup>17</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.

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<sup>17</sup>This section includes statistics for all neutral arbitrators selected, including those arbitrators who are not members of the OIA panel.

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

All but one of the neutral arbitrators on the OIA panel were named on at least one List of Possible Arbitrators (LPA) sent to the parties.<sup>18</sup> The average number of times Northern California arbitrators appeared on an LPA was 29. The range of appearances was 0 – 50 times.<sup>19</sup> In Southern California, the average number of appearances was 20. The range was 0 – 34.<sup>20</sup> In San Diego, the average number of appearances was eight. The range was 0 – 15.<sup>21</sup>

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

This year, 118 different neutral arbitrators were selected to serve in 432 cases. The majority (102) were members of the OIA panel (58%). The number of times an arbitrator on the OIA panel was selected ranges from 0 – 19. The neutral arbitrator with 19 selections was jointly selected 10 times. The average number of appointments for members of the panel was two.

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

Twenty neutral arbitrators wrote 26 awards. Sixteen arbitrators (80%) wrote a single award, while three wrote two each. One arbitrator wrote four awards, three in favor of Kaiser and one in favor of claimants.

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

Concerns have been raised as to whether Kaiser will allow neutral arbitrators who have made large awards to serve in subsequent arbitrations, since its attorneys could strike them from LPAs or disqualify them if selected. The OIA's annual reports describe what has happened to neutral arbitrators after making an award of \$500,000 or more.

This year, ten neutral arbitrators made awards for more than \$500,000. The awards ranged from \$654,044 to \$25,638,059. Six arbitrators made their first award this year. The

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<sup>18</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 *pro per* cases. Thirty-two percent (32%) of the panel will not hear *pro per* cases.

<sup>19</sup>The neutral arbitrator who was not listed on a Northern California LPA is also on the Southern California panel and was listed on an LPA for that panel.

<sup>20</sup>There were two neutral arbitrators not listed on a Southern California LPA. One of these arbitrators is also on the Northern and San Diego panels and was listed on an LPA in both regions. The other arbitrator is also on the San Diego panel and has not been named on either LPA but was recently admitted in November.

<sup>21</sup>The neutral arbitrator who was not listed on a San Diego LPA is discussed in footnote 20.

remaining four arbitrators had previously made large awards.<sup>22</sup> Six have been selected to serve multiple times after making the award. One was selected 16 times while another was jointly selected 8 times.<sup>23</sup>

**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 nine neutral arbitrators who were selected ten or more times this year. Table 4 shows the comparison of cases closed with these nine 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<sup>24</sup>**

Cases Closed 2021 – 2022	Cases with Neutral Arbitrators Selected 10 or More Times in 2022		Cases with Other Neutral Arbitrators	
Settled	120	53%	302	47%
Withdrawn	51	23%	157	25%
Summary Judgment	26	12%	87	14%
Awarded to Respondent	14	6%	33	5%
Awarded to Claimant	6	3%	23	4%
Dismissed	9	4%	37	6%
Total	226		639 <sup>25</sup>	

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<sup>22</sup>Two arbitrators had made two large awards and one had three.

<sup>23</sup>Of the four who were not selected, one retired in 2021 but has several pending cases.

<sup>24</sup>The totals may not add up to 100% due to rounding up or down.

<sup>25</sup>Two cases, representing less than 1%, were consolidated and are not included in these numbers.

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

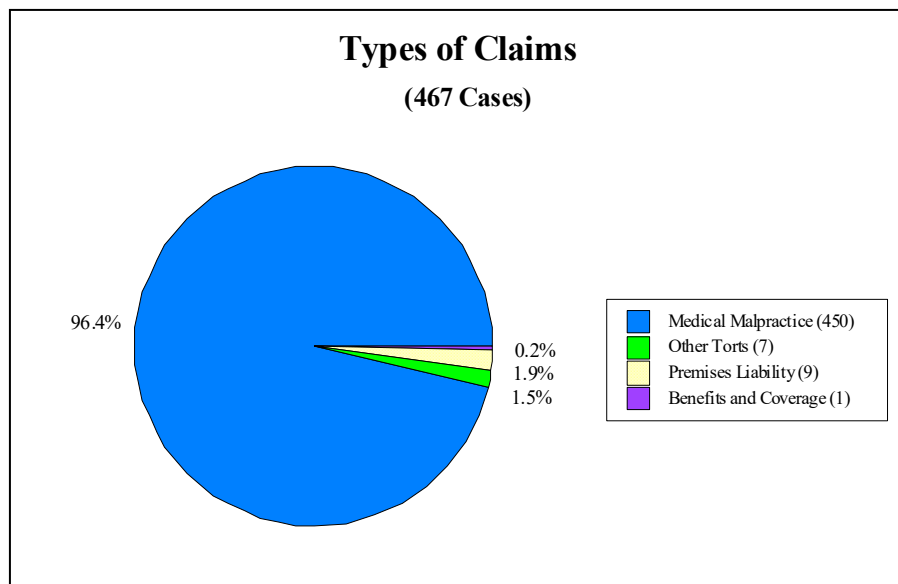
Kaiser submitted 470 demands for arbitration. Geographically, 253 came from Northern California, 182 came from Southern California, and 35 came from San Diego.<sup>26</sup>

##### A. Types of Claims

The OIA administered 467 new cases.<sup>27</sup> The OIA categorizes cases by the subject of their claim: medical malpractice (450 cases), premises liability (9 cases), other tort (7 cases), or benefits and coverage (1 case). Medical malpractice cases make up 96%. Benefits and coverage cases represent less than half of a percent.

Chart 2 shows the types of new claims the OIA administered during the year.

**Chart 2**



<sup>26</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>27</sup>A few demands submitted by Kaiser are “opt in” cases – based on a contract that required arbitration but not the use of the OIA. There were four “opt in” cases. One claimant chose to have the OIA administer the claim, one was returned to Kaiser for administration, and two were pending at the end of the year.

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

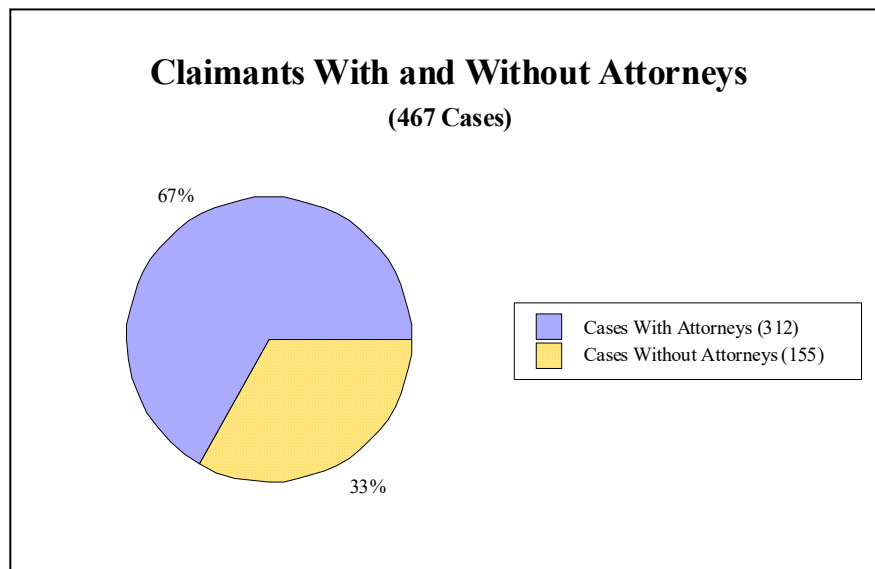
Rule 11 requires Kaiser to submit demands for arbitration to the OIA within ten days of receiving them. The average length of time that Kaiser took to submit demands to the OIA was five days. The range was 0 – 161 days.<sup>28</sup>

There were 34 cases in which Kaiser took more than 10 days to submit the demand. The average in these cases was 23 days, and the range was 11 – 161 days.

## C. Claimants With and Without Attorneys

Claimants were represented by counsel in 67% of new cases (312 of 467). In 33% of cases, the claimants represented themselves.

**Chart 3**



## V. SELECTION OF THE NEUTRAL ARBITRATORS

The selection of the neutral arbitrator, which is one of the most important steps of the arbitration process, occurs at the beginning. Section A describes the selection process in general. The next four 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 LPA; the cases in which the parties decided to postpone the selection of the neutral arbitrator; the cases in which the parties disqualified a neutral arbitrator; and the amount of time

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<sup>28</sup>The OIA has no information about why there was a delay in sending the case that took 161 days.



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 an LPA. The LPA contains 12 randomly computer-generated names of neutral arbitrators from the appropriate geographic panel.

Along with the LPA, the OIA provides the parties with password-protected access to information about the arbitrators named on the LPA.<sup>29</sup> The information includes each neutral arbitrator's application and fee schedule, and subsequent updates to the application, if any.<sup>30</sup>

The information also includes copies of any evaluations that have been submitted about the arbitrator by previous parties within the last five years, and any redacted awards or decisions the neutral arbitrator has written within the last five years.

The parties have 20 days to respond to the LPA.<sup>31</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>32</sup> Provided the person agrees to follow the *Rules* and completes the OIA Demographic Form<sup>33</sup>, the parties may jointly select anyone they want to serve as neutral arbitrator.

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

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<sup>29</sup>The OIA accommodates parties who request to receive the information by U.S. mail.

<sup>30</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 an update.

<sup>31</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>32</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.

<sup>33</sup>The AOB requested collection of demographic data from jointly selected neutral arbitrators not on the OIA panel. This data is included in the aggregate on the OIA website. See Exhibit F for the form and report.

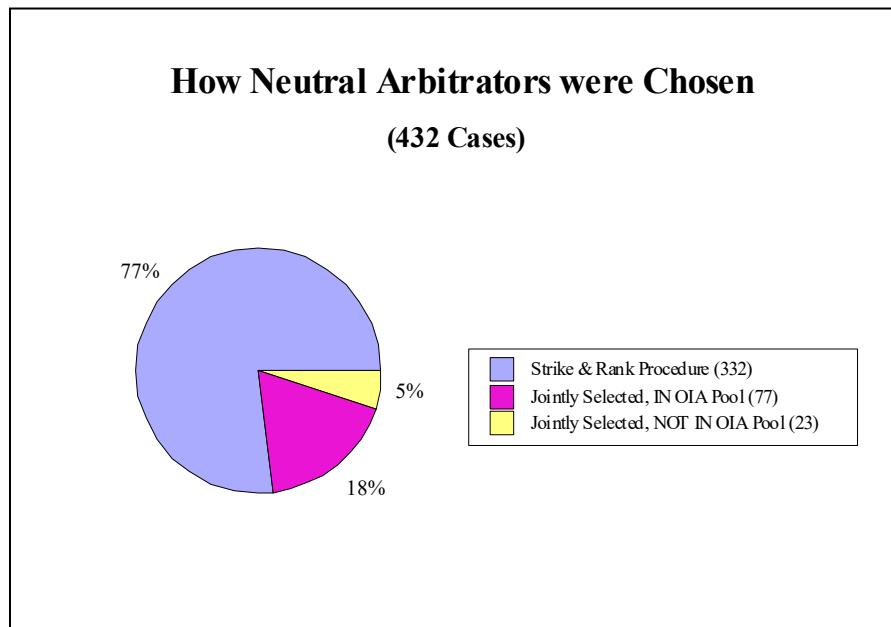
been stricken by either side and then totals the scores of the names that remain. The person with the best score<sup>34</sup> is asked to serve. This is called the “strike and rank” process.

Before a neutral arbitrator has been selected, claimant can request a postponement 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. Twenty-five cases either settled (12) or were withdrawn (13) without a neutral arbitrator in place.<sup>35</sup>

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

Of the 432 neutral arbitrators selected, 100, or 23%, were jointly selected by the parties and 332, or 77%, were selected by the strike and rank process. Of the neutral arbitrators jointly selected by the parties, 77, or 18%, were members of the OIA panel, though not necessarily on the LPA sent to the parties. In 23 cases, or 5%, the parties selected a neutral arbitrator who was not a member of the panel. See Chart 4. One neutral arbitrator who is not on the OIA panel accounts for 12 joint selections.

**Chart 4**



<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, four settled and eight were withdrawn. For represented cases, eight settled and five were withdrawn.

### C. Status of Cases with Postponements

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 30-day postponement at one point and a 60-day postponement later. There are times when parties request a postponement of less than 90 days.

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. A Rule 28 extension is generally short – two weeks if the case is settled or withdrawn.<sup>36</sup> If it is based on the parties stipulation to jointly select the neutral arbitrator or the claimant’s medical condition, it may be longer.

There were 198 cases where the parties obtained either a Rule 21 postponement, a Rule 28 extension of the time to return their LPAs, or both. In 170 of these cases, the parties obtained a Rule 21 postponement. The claimants made all but three of these requests. There were 18 cases that received Rule 21 postponements and Rule 28 extensions.<sup>37</sup> There were ten cases that received a Rule 21 postponement in prior years but received a Rule 28 extension this year.

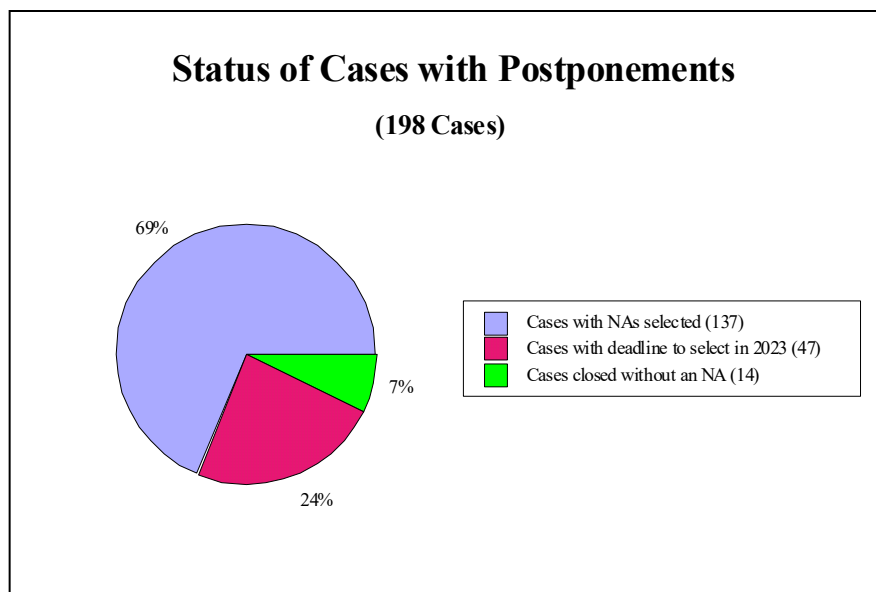
Chart 5 shows what happened in those 198 cases where the parties obtained a postponement of the deadline to return their LPA. Sixty-nine percent (69%), 137 cases, have a neutral arbitrator in place. Fourteen cases closed before a neutral arbitrator was selected but after a request for postponement was made. For the remaining 47 cases, the deadline to select a neutral arbitrator was after December 31, 2022.

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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.

<sup>37</sup>Claimants made all of the requests for Rule 21 postponement. The majority of Rule 28 extensions were made by parties stipulation.

**Chart 5**



**D. Status of Cases with Disqualifications**

Neutral arbitrators are required by state law to make various disclosures within ten days of their selection.<sup>38</sup> After they make these disclosures, the parties have 15 days to disqualify the neutral arbitrator.<sup>39</sup> Absent court action, there is no limit 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 26 cases. Claimants disqualified 36 neutral arbitrators and Kaiser disqualified 11. Nineteen cases had a single disqualification. Three cases had two disqualifications, one case had three disqualifications, and one case had four disqualifications. Two cases had six and nine disqualifications, respectively.<sup>40</sup> In 23 of the cases

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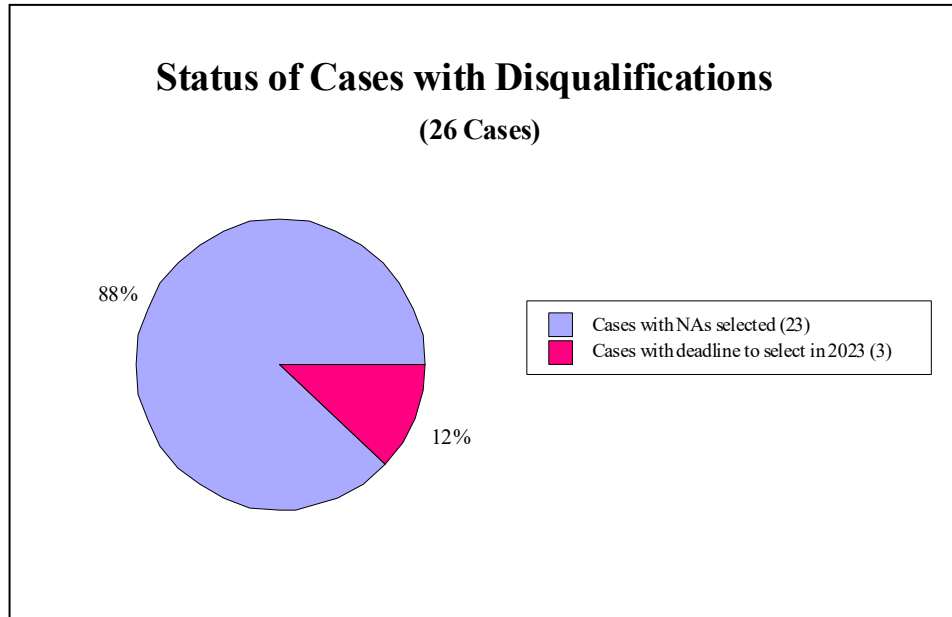
<sup>38</sup>See Rule 20 and California Code of Civil Procedure §1281.9, especially §1281.9(b). In the OIA system, the ten days are counted from the date of the letter confirming service which the OIA sends to the neutral arbitrator, with copies to the parties, after the neutral arbitrator agrees to serve.

<sup>39</sup>See Rule 20 and California Code of Civil Procedure §1281.91. Additionally, if the neutral arbitrator fails to serve the disclosures, the parties have 15 days after the deadline to serve disclosures to disqualify the neutral arbitrator.

<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).

with disqualifications, a neutral arbitrator had been selected. In three of the cases, the deadline to select a neutral arbitrator was after December 31, 2022.

**Chart 6**



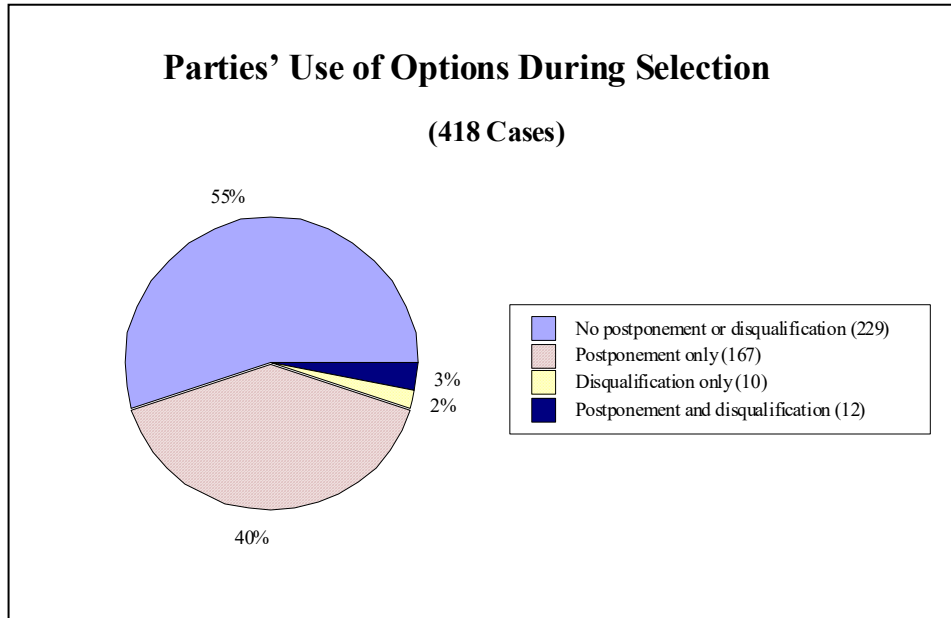
#### **E. Length of Time to Select a Neutral Arbitrator**

This section considers 418 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 may 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, the fifth section provides the overall average length of time to select a neutral arbitrator for all four categories. Chart 7 displays the categories.

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<sup>41</sup>Fourteen cases in which a neutral arbitrator was selected are not included in this section. In these cases, neutral arbitrators had previously been appointed, had begun acting as neutral arbitrators, and later recused themselves. These include cases where a neutral arbitrator died or retired. Because we count time from the first day that the arbitration process was initiated, these cases are not included in these computations of length of time to select a neutral arbitrator.

**Chart 7**



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

There were 229 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 these cases was 23 days, and the range was 1 – 35 days.<sup>42</sup> This category represents 55% of cases which selected a neutral arbitrator.

### **2. Cases with Postponements**

There were 167 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 these cases was 111 days, and the range was 21 – 203 days.<sup>43</sup> This category represents 40% of all cases which selected a neutral arbitrator.

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<sup>42</sup>In the case that took 35 days to select a neutral arbitrator, the OIA mistakenly missed the deadline to send the parties the LPA for 8 days.

<sup>43</sup>In the case that took 203 days to select a neutral arbitrator, the claimant attorney first obtained a 90-day postponement. The parties then stipulated to an additional 90-day postponement to jointly select a neutral arbitrator.

### 3. Cases with Disqualifications

There were ten 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>44</sup> The average number of days to select a neutral arbitrator was 50 days, and the range was 24 – 74 days. Disqualification only cases represent 2% of all cases which selected a neutral arbitrator.

### 4. Cases with Postponements and Disqualifications

There were 12 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 188, and the range was 119 – 367 days.<sup>45</sup> These cases represent 3% of all cases which selected a neutral arbitrator.

### 5. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases was 63 days. For purposes of comparison, the California Supreme Court stated in *Engalla vs. Permanente Medical Group*<sup>46</sup> that the pre-OIA 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>47</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.

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<sup>44</sup>The 96 days is comprised of the 33 days to select the first neutral arbitrator under the *Rules*; 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>45</sup>In the case that took 367 days to select a neutral arbitrator, the parties disqualified 10 neutral arbitrators (6 by the *pro per* claimant and 4 by Kaiser's attorney). The case is still pending the appointment of a neutral arbitrator.

<sup>46</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>47</sup>California Health & Safety Code §1373.19.

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.

One case that went to hearing was decided with party arbitrators. The case closed in 726 days with an award for Kaiser. Of the cases that remained open at the end of the year, parties have designated party arbitrators in four 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 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 with the *Rules*.<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 calendars a status reminder for 12 months. As discussed in Section VII, most cases close in just over 14 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

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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 arbitrators are not listed on any LPA and cannot be jointly selected by the parties.



are timely served, and that they include statutory disclosure reports provided by the OIA. No arbitrator was suspended for failing to timely serve disclosures.

## **B. Arbitration Management Conference**

Rule 25 requires neutral arbitrators to hold an Arbitration Management Conference (AMC) within 60 days of their selection. Neutral arbitrators 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 case. It also allows the OIA to see that the hearing has been scheduled within the time allowed by the *Rules*. No arbitrator was suspended for failing to return the AMC form.

## **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 238 cases that they held a MSM. Twenty-nine of them reported that the case had settled at the MSM. One case involved a *pro per* claimant. In 29 cases, neither party returned the MSM form by the end of the year.<sup>49</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*. No arbitrator was suspended for failing to schedule the hearing or timely serve an award.

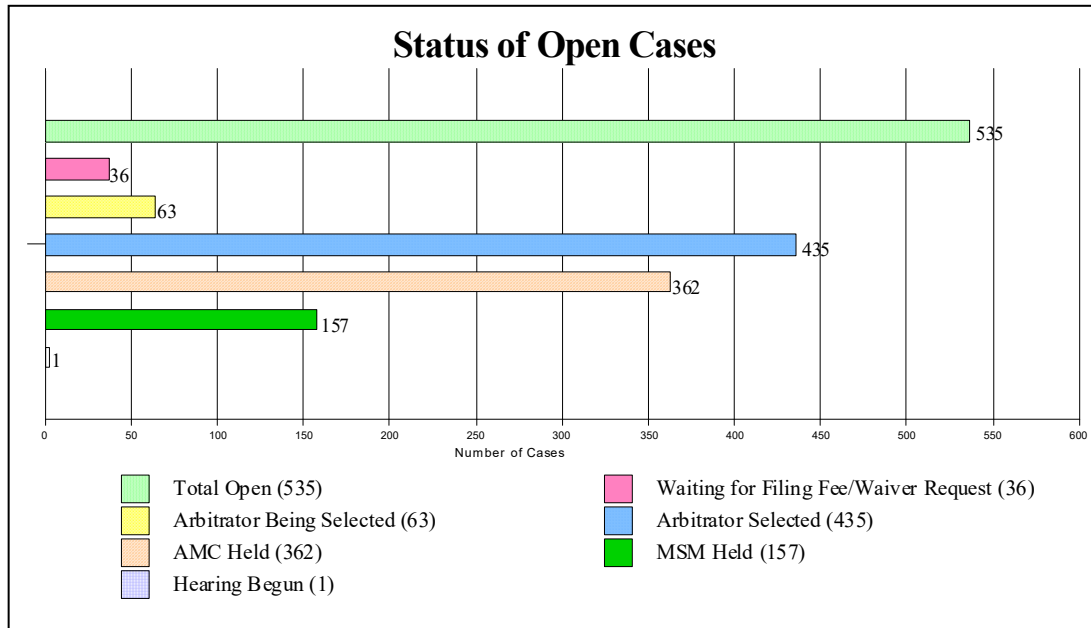
## **E. Status of Open Cases**

There were 535 open cases at the end of the year. In 36 cases, the LPA had not been sent because the filing fee had not yet been paid or waived. In 63 cases, the parties were in the process of selecting a neutral arbitrator. In 435 cases, a neutral arbitrator had been selected. Of these, the AMC had been held in 362. In 157 cases, the parties had held the MSM. In one case, the hearing had begun, but either there were additional hearing days or the OIA had not yet been served with the award. Chart 8 illustrates the status of open cases.

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<sup>49</sup>While the OIA contacts 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 8**



## VII. THE CASES THAT CLOSED

Cases close either because of action by the parties before the selection of a neutral arbitrator (cases that are settled or withdrawn), 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. It also discusses the number of hearings conducted by video and/or in-person. The discussion of cases that closed after a hearing also includes the results: who won and who lost. See Charts 9 and 10.

Thirty-one (31) cases closed after a demand for arbitration was served but before the filing fee was paid or waived. These cases included 19 (4%) that were abandoned,<sup>50</sup> 5 that were settled and 7 that were withdrawn. These cases account for 7% of the total number of closed cases (440), but are excluded from this section because the OIA does not begin measuring time until the fee is paid or waived.

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. Seventy-seven percent (77%) of the cases are closed within this period, and 52% closed 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 can classify the case as

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<sup>50</sup>Before cases are deemed abandoned for non-payment of the filing fee, claimants receive three notices from the OIA and each time are offered the opportunity to apply for fee waivers.

complex or extraordinary under Rule 24. The neutral arbitrator can also extend the deadline under Rule 28 for good cause.<sup>51</sup> See Chart 11.

## **A. How Cases Closed**

### **1. Settlements – 53% of Closures**

Settlements occurred in 217 cases. This represents 53% of closed cases. The average time to settle was 460 days. The range was 3 – 2,143 days.<sup>52</sup> In 16 settled cases, or 7%, the claimant was in *pro per*. Twenty-nine cases settled at the mandatory settlement meeting.

### **2. Withdrawn Cases – 25% of Closures**

Withdrawal notices were received in 102 cases.<sup>53</sup> This represents 25% of closed cases. In 37 of these cases, or 36%, the claimant was in *pro per*. The OIA categorizes a case as withdrawn when a claimant executes a notice of withdrawal form, writes a letter withdrawing the claim, or signs a dismissal without prejudice. When the OIA receives a “dismissal with prejudice,” the parties are contacted to ask whether the case was “withdrawn,” meaning voluntarily dismissed.

The average time it took for a party to withdraw a claim was 256 days. The range was 13 – 1,227 days.<sup>54</sup>

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

Neutral arbitrators dismissed 20 cases. Neutral arbitrators dismiss cases if the claimant fails to respond to hearing notices or otherwise conform to the *Rules* or applicable statutes.

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<sup>51</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. Eleven cases that closed were both complex and had a Rule 28 extension.

<sup>52</sup>The case that took 2,143 days to settle was designated complex 1 year after the neutral arbitrator was selected. During the arbitration hearing, claimant was hospitalized and was unable to participate further. The case was then deemed extraordinary to provide time for claimant to recover, but claimant died one year later. The case settled as to the third party respondent but was stalled as to Kaiser since a subsequent companion case was filed in court. The parties could not reach agreement whether to join the two cases or dismiss one in lieu of the other, so the arbitrator ordered the matters consolidated. Five months later, the case settled, nearly six years after the arbitration process began.

<sup>53</sup>One additional case closed as withdrawn and is not included in these numbers because notice was received after the report was created.

<sup>54</sup>The case that took 1,227 days to close was designated complex and involved a minor whose injuries needed to be ascertained. The hearing was continued several times before the matter was withdrawn by the claimant.

Sixteen (16) of these closed cases involved *pro pers*. The average number of days to close a case dismissed by a neutral arbitrator was 438 days. The range was 61 – 2,706 days.<sup>55</sup>

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

Summary judgment was granted in Kaiser's favor in 44 cases.<sup>56</sup> In 29 cases, or 66%, the claimant was in *pro per*. The reasons given by neutral arbitrators for granting motions for summary judgment were: failure to file an opposition (17 cases), failure to have an expert witness (13 cases), no triable issue of fact (7 cases), no causation (5 cases), and defective service of the demand for arbitration (2 cases).

The average number of days to close a case by summary judgment was 361 days. The range was 161 – 829 days.<sup>57</sup>

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

##### **a. Who Won**

Twenty-six cases (6%) proceeded through an arbitration hearing to an award. Judgment was for Kaiser in 14 of these cases, or 54%. In one case, the claimant was in *pro per*. The claimant prevailed in 12 cases, or 46%. None was a *pro per* claimant.

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

Twelve cases resulted in awards to claimants. The range was \$350,000 – \$25,638,059. The average amount of an award was \$4,901,115. A list of the awards made is attached as Exhibit G.

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<sup>55</sup>The case that took 2,706 days to be dismissed involved a minor whose injuries could not yet be ascertained. The parties agreed to a two-year stay in the proceedings. Thereafter, two different arbitrators recused themselves, and after the parties stipulated to several other extensions, the third arbitrator was appointed nearly five years later. The case was then impacted by COVID-19 (unable to retrieve medical records, inability to complete discovery, and unavailability of experts) which caused further delays. The neutral arbitrator dismissed the case after receiving no objection from claimant's attorney.

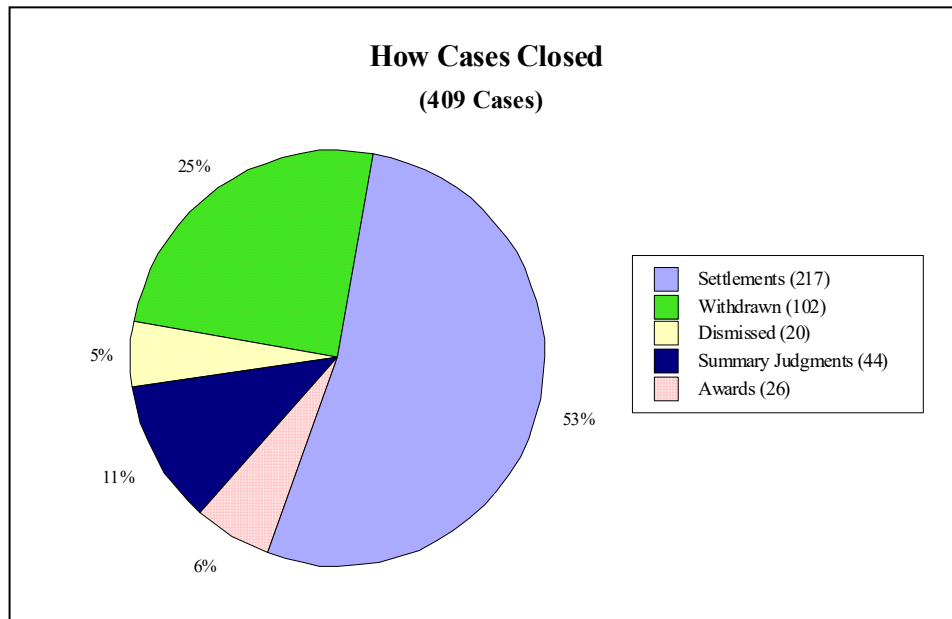
<sup>56</sup>One additional case closed by summary judgment and is not included in these numbers because the order was received after the report was created.

<sup>57</sup>In the case that closed in 829 days, the arbitrator extended the deadline to hold the arbitration management conference while the *pro per* claimant decided between hiring an attorney or withdrawing the case. The arbitrator extended the conference a second time to accommodate claimant attorney's review of the file. More than 1 ½ years later, the arbitrator retired and another arbitrator was selected after claimant obtained a 90-day postponement. The motion for summary judgment was heard three months later and granted.

### c. How Long it Took

The 26 cases that proceeded to a hearing, on average, closed in 1,022 days.<sup>58</sup> The range was 392 – 1,872 days.<sup>59</sup>

**Chart 9**



### 6. Video Hearings<sup>60</sup>

Of the 26 arbitration hearings, 8 were held by video, and 7 were held partially in-person and partially by video (58%). The remaining 11 hearings were held in-person.

Of the 44 summary judgments, 37 were held telephonically. Two were held by submission of documents, while the other five were held by video.

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<sup>58</sup>Three of them are considered “regular” cases and closed on average in 470 days (over 15 months). The deadline for “regular” cases is 18 months. See Rule 24.a.

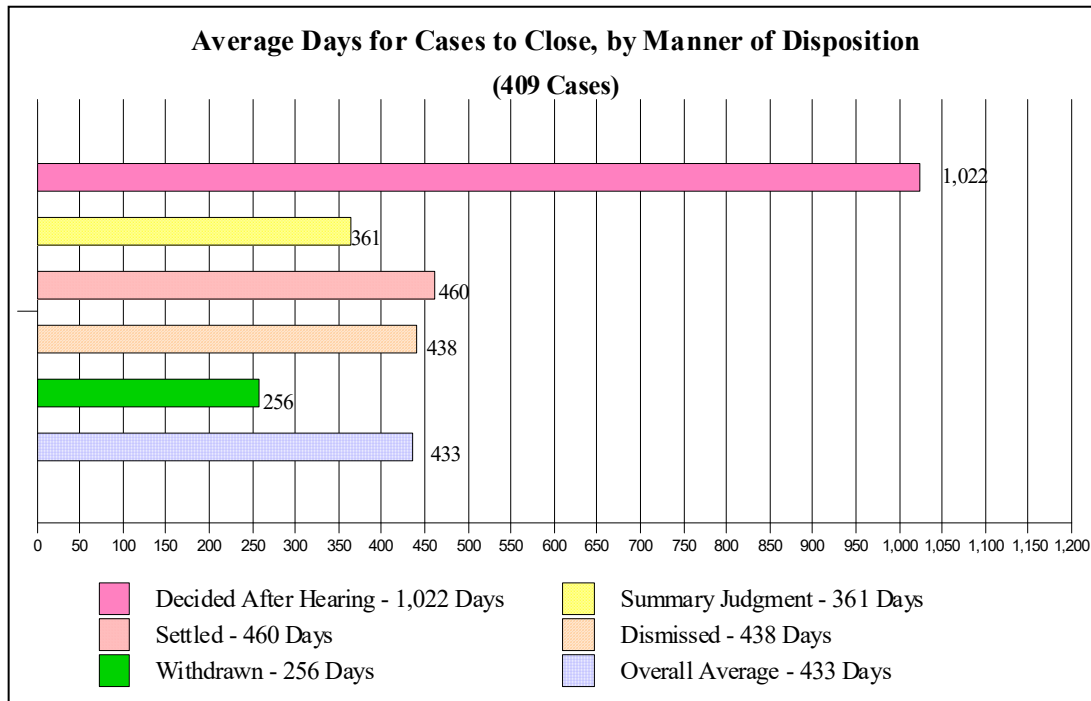
<sup>59</sup>The arbitration hearing in the case that took 1,872 days to close was continued 6 times over the course of 3 years. The bifurcated hearing went forward on liability but the damages portion was not heard until the following year, resulting in a judgment in favor of the claimant for \$3,923,915.

<sup>60</sup>The first case that reported a hearing (motion for summary judgment) held by video was on July 24, 2020. This year, neutral arbitrators reported conducting hearings by video or a combination of in-person and video in 21 cases.

Of the 20 cases dismissed by neutral arbitrators, 15 were held telephonically. One was held partially in-person and partially by video, and four by submission of documents.

As shown on Chart 10, cases closed on average in 433 days. The median was 358 days. The range was 3 – 2,706 days.<sup>61</sup> No case closed after its deadline, i.e., none was “late.”

**Chart 10**



## B. Cases Using Special Procedures

### 1. Expedited Procedures

Rules 33 – 36 include provisions for cases which need to be expedited. 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.

Claimants made ten requests for expedited procedures to the OIA. Kaiser objected to seven requests. The OIA granted six requests. The remaining four were denied<sup>62</sup> without

<sup>61</sup>The case that took 2,706 days to close is described in footnote 55.

<sup>62</sup>All four failed to provide a deadline to receive the award or sufficient reasons or evidence for the request under Rule 33.a.

prejudice to make the request to the neutral arbitrator. Of the six granted by the OIA, three have settled.

One request for expedited procedures was made to the neutral arbitrator. It was granted and the case has settled.

The OIA had one open expedited case pending from last year, and it has settled. In this case and three other expedited cases, the expedited deadline to complete the case was extended by Rule 28, and the cases are counted in that section.<sup>63</sup>

The remaining expedited case closed as settled in 127 days, 2 months before the deadline. At the end of the year, there were three open expedited cases.

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

## **2. Complex Procedures**

Rule 24.b. includes provisions for cases that need 24 – 30 months to be completed. There were 71 cases designated complex. Fifty complex cases (12%) closed.<sup>64</sup> The average length of time for complex matters to close was 527 days. The range was 91 – 880 days (29 months).<sup>65</sup>

## **3. Extraordinary Procedures**

Rule 24.c. includes provisions for cases that need more than 30 months for resolution. Twenty-three cases were designated extraordinary, and 18 cases (4%) closed. The average time to close an extraordinary case was 1,204 days. The range was 608 – 2,706 days (about 7 ½ years).<sup>66</sup>

## **4. Rule 28 Extensions**

Rule 28 allows neutral arbitrators to extend the deadline to close the case. This year, neutral arbitrators made Rule 28 determinations in 86 cases, and there were 88 cases with a Rule

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<sup>63</sup>See Section VII.B.4.

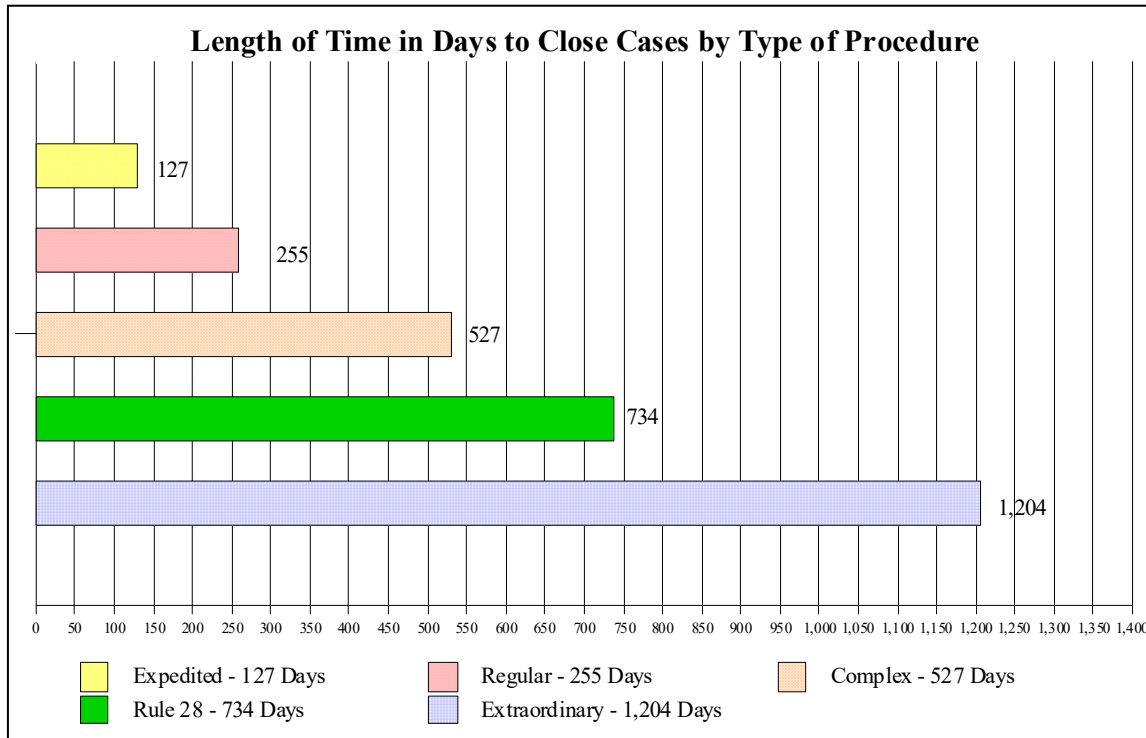
<sup>64</sup>Eleven cases were extended by Rule 28 and are counted in that section. See Section VII.B.4.

<sup>65</sup>In the complex case that took 880 days to close, the claimant attorney disqualified the first arbitrator. The arbitration hearing was continued three times to allow for an in-person hearing, requiring COVID-19 vaccination by all participants. The hearing went forward and resulted in a \$5,877,281 award for the claimant.

<sup>66</sup>The extraordinary case that took 2,706 days to close is described in footnote 55.

28 extension that closed. The average time to close cases with a Rule 28 extension was 734 days. The range was 68 – 1,957 days.<sup>67</sup>

**Chart 11**



## VIII. THE COST OF ARBITRATIONS

### A. What Fees Exist in OIA Arbitrations

In an OIA arbitration, in addition to attorney’s fees and fees for expert witnesses, a claimant must pay a \$150 arbitration filing fee<sup>68</sup> and half of the neutral arbitrator’s fees. State law provides that neutral arbitrator’s fees be divided equally between the claimant and the

<sup>67</sup>The case that took 1,957 days to close had been continued 9 times over the course of nearly 5 years when the arbitrator retired. The subsequent arbitrator was selected and the parties settled the case two months later.

<sup>68</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).



respondent.<sup>69</sup> State law also provides that if the claim for damages is more than \$200,000, the matter will be heard by an arbitration panel, which consists of three arbitrators – a neutral arbitrator and two party arbitrators.<sup>70</sup> In OIA arbitrations, parties may waive their right to party arbitrators and still proceed with a claim for damages for more than \$200,000.

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 choose which waiver(s) they want to submit.

## **B. Options Claimants Have to Waive These Fees**

There are three options 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.

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

Pursuant to state law, this waiver is available to claimants whose gross monthly income is less than three times the national poverty guidelines.<sup>71</sup> The OIA informs claimants of this waiver in the first notice sent to them. Rule 12 gives claimants 75 days to submit this form, from the date the OIA receives their demands for arbitration. The completed form is confidential and only the claimant and claimant's attorney know if a request for the waiver was made, granted or denied. The \$150 arbitration fee is waived when a claimant meets the income requirement.

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

Any claimant who claims extreme financial hardship may request this waiver. Claimant must disclose certain financial information. The fee waiver application is based on the form used by state court. Rule 13 requires the form to be served on both the OIA and Kaiser. Kaiser has the opportunity to object before the OIA grants or denies this waiver. 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.

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<sup>69</sup>California Code of Civil Procedure §1284.2.

<sup>70</sup>Party arbitrators are selected and paid for by each side.

<sup>71</sup>California Code of Civil Procedure §1284.3.

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

Rules 14 and 15 contain provisions to shift the claimant's portion of the neutral arbitrator's fees and expenses to Kaiser. 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>72</sup> No financial information is required.

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

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

The OIA received 32 requests to waive the \$150 filing fee. The OIA granted 27 and denied 5.<sup>73</sup> Nine 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.

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

The OIA decided 51 fee waiver requests. Kaiser objected to one. The OIA granted all 51 requests.

##### **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. We received fee information from neutral arbitrators for 381 cases that closed.

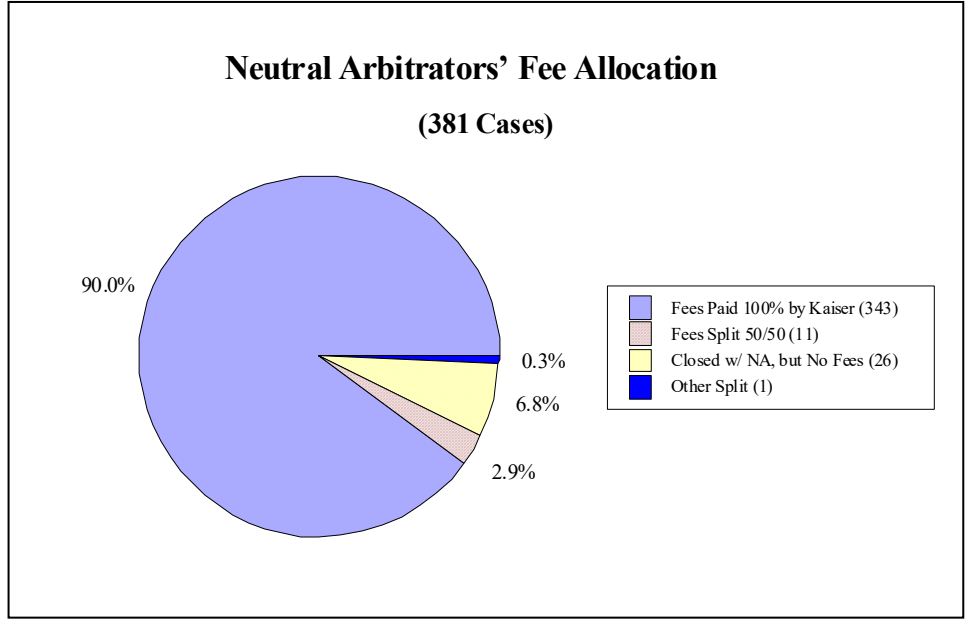
Kaiser paid 100% of the neutral arbitrators' fees and expenses in 343 cases. Fees were split 50/50 in 11 cases. One case had a different split, with claimant paying 1%. In 26 cases, no fees were charged. See Chart 12.

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<sup>72</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.

<sup>73</sup>Three had the other fee waiver granted, one paid the filing fee, and one was abandoned for failure to pay the filing fee. See Rule 12.

**Chart 12**



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

Neutral arbitrators on 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 ranged from \$200/hour – \$1,200/hour. The average hourly fee was \$638. Some neutral arbitrators also offered a daily fee. This range was \$1,000/day – \$12,000/day. The average daily fee was \$5,362.

In 355 cases where the neutral arbitrators charged fees, Kaiser paid 100% of the neutral arbitrators' fees in 97% of the cases. The average neutral arbitrator fee was \$9,343.<sup>74</sup> The range was \$295 – \$198,432. This excludes the 26 cases in which there were no fees. The average for all cases, including those with no fees, was \$8,705.

If only the cases where the neutral arbitrator wrote an award are considered, the average neutral arbitrator fee was \$59,634. The range was \$4,533 – \$198,432.

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<sup>74</sup>In four cases, arbitrator fees forms were received after the report was created and are not included in the average. The fees were \$1,750, \$2,035, \$2,330, and \$18,593; all paid for by Kaiser.

## IX. EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM

When cases close, the OIA sends forms to counsel for the parties and *pro per* claimants asking them questions about the OIA, arbitration process, and neutral arbitrator, if any. The OIA sends the neutral arbitrator a similar form asking them questions about the OIA and the arbitration process. 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 H, I, and J, respectively.

### 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 where the neutral arbitrator made a decision that concluded 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 arbitrator 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 parties filling out the forms are asked to identify themselves by category and how the case closed.

The OIA sent 194 evaluations and received 23 responses, or 12%. Five identified themselves as *pro per* claimants, seven as claimants' counsel, and 11 as respondents' counsel.

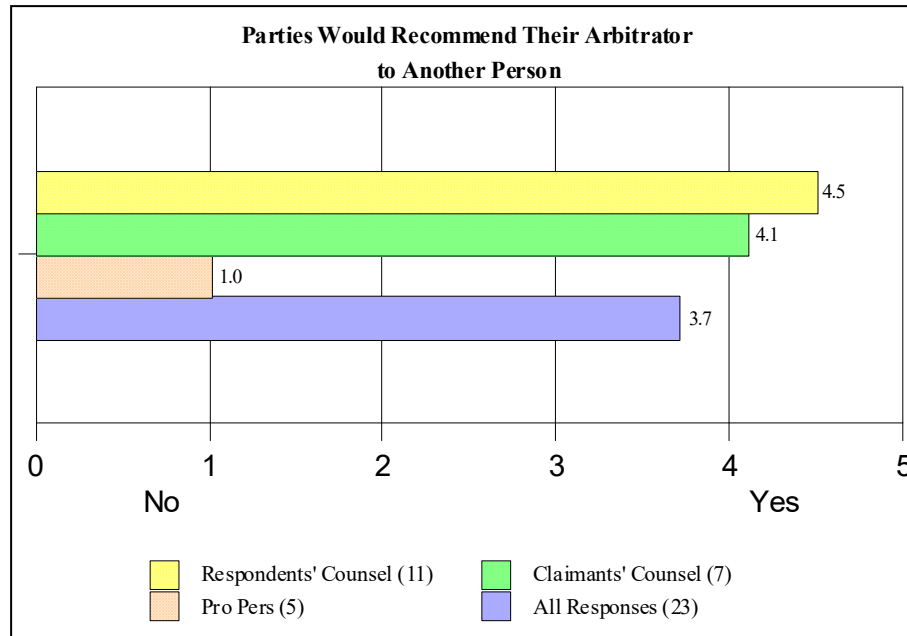
Table 5 highlights the average responses to some of the inquiries.

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

Question	Claimants' Counsel (7)	<i>Pro per</i> (5)	Respondents' Counsel (11)	Total (23)
Impartial and treated parties fairly	4.6	1.0	4.5	3.9
Treated parties with respect	5.0	1.0	4.7	4.1
Explained procedures and decisions clearly	5.0	1.0	4.5	4.0
Understood applicable law	5.0	1.0	4.7	4.1
Understood facts of the case	5.0	1.0	4.4	4.0
Fees reasonable for work performed	0.0	1.0	4.5	3.9
Would recommend this arbitrator	4.1	1.0	4.5	3.7

As shown in Chart 13, the average on all responses when asked whether they would recommend this arbitrator to another person with a similar case was 3.7.

**Chart 13**



**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 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 97 closed cases and received neutral arbitrator responses in all cases.

The arbitrators averaged 4.9 in saying that the procedures set out in the *Rules* had worked well in the specific case. The responses averaged 5.0 in saying that based on this experience they would participate in another arbitration in the OIA system. They averaged 5.0 in saying that the OIA had accommodated their questions and concerns in the specific case.

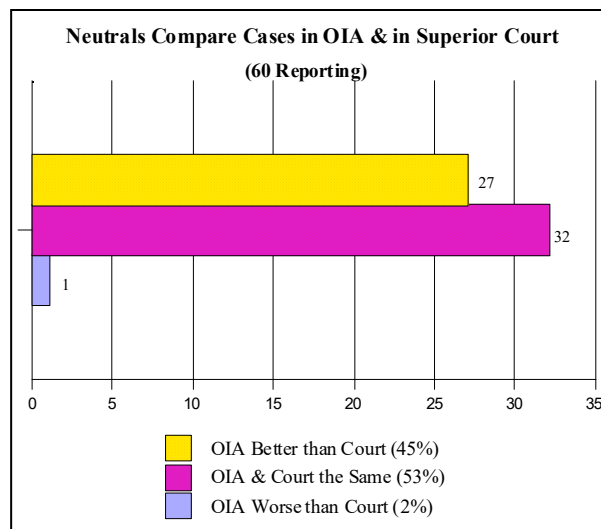
The questionnaires also includes two questions that ask arbitrators to check off features of the system which worked well or needed improvement in the specific case. The majority identified features of the OIA system that worked well. See Table 6.

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

Feature of OIA System	Works Well	Needs Improvement
Manner of neutral arbitrator's appointment	70	0
Early management conference	63	0
Availability of expedited proceedings	26	0
Award within 15 business days of hearing closure	28	8
Claimants' ability to have Kaiser pay neutral arbitrator	67	1
System's Rules overall	71	0
Hearing within 18 months	30	1
Availability of complex/extraordinary proceedings	26	1

Finally, the questionnaires ask the arbitrators whether they would rank the OIA experience as better, worse, or about the same as a similar case tried in court. Sixty arbitrator arbitrators made the comparison. Twenty-seven arbitrators, or 45%, said the OIA experience was better. Thirty-two arbitrators, or 53%, said it was about the same. One arbitrator (2%) who said the OIA experience was worse may have done so by mistake.<sup>75</sup> See Chart 14.

**Chart 14**



<sup>75</sup>The neutral arbitrator checked all of the features as working well and checked none that needed improvement, commenting that in court, there are too many delays.

Several neutral arbitrators commented that no improvement is needed, noting that the OIA is prompt, responsive and helpful. One arbitrator appreciated the OIA’s reminders, and hoped they continue. Another highlighted a benefit of the system is having a date certain for arbitration, making it less costly for the parties. Most commended the system itself as more efficient and less cumbersome than court.

While the majority of the comments were compliments of the system, many neutral arbitrators expressed frustration with their *pro per* cases. Arbitrators complained about the unnecessary delays, the *pro pers* inability to navigate the system or to follow the *Rules*. One arbitrator informed the OIA that, in the future, he/she will provide information and suggestions concerning *pro pers*.

Arbitrators asked for more time for awards, suggesting that 30 days be the standard. A few complained about the delay in collecting their fees from Kaiser, one noting that it can take 60-90 days. One suggested that the OIA provide court reporters for arbitration hearings and make transcripts available to the arbitrator. Another asked for rule changes that cover guardian ad litem for matters without a prior court case, while another requested no changes to the *Rules* until after the current pandemic subsidies, and courts have resumed to a “new normal.”

### **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 parties, on a scale from 1 to 5, whether they agree or disagree. A “5” is the highest level of agreement.

The OIA sent 796 evaluations and received 60 responses, or 8%. Ten identified themselves as *pro per* claimants, 18 as claimants’ counsel, and 26 as respondents’ counsel. Six did not specify a side.<sup>76</sup>

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

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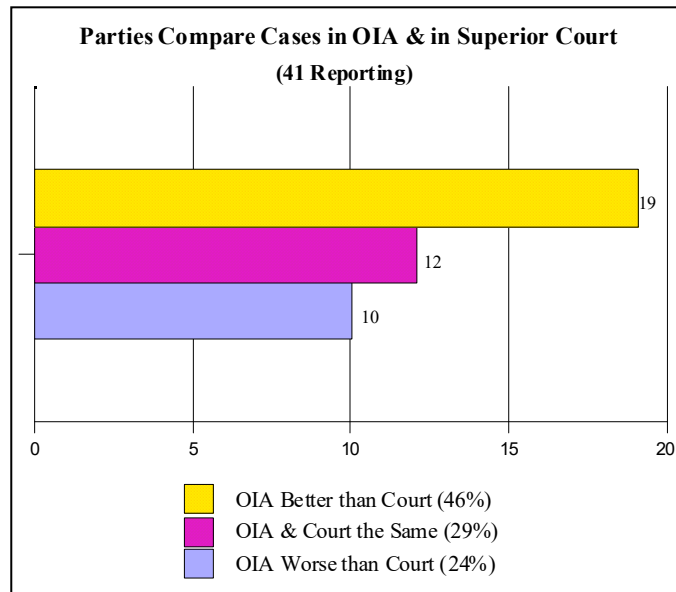
<sup>76</sup>See Section II.B for how the OIA updated the evaluation to better identify the party completing it.

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

Question	Claimants' Counsel (18)	<i>Pro per</i> (10)	Respondents' Counsel (26)	Not Specified (6)	Total (60)
Procedures worked well	4.5	2.1	5.0	5.0	4.5
Obtaining medical records went well	3.8	1.0	5.0	4.8	4.2
OIA responsive to questions/concerns	4.6	2.9	5.0	5.0	4.6

The form also asks the parties if they have had a similar experience in Superior Court and, if so, to compare the two. Of the 41 people who made the comparison, 19 said it was better. Twelve said it was the same. Ten said it was worse.<sup>77</sup> See Chart 15 and Table 8 for the breakdown.

**Chart 15**



<sup>77</sup>Of the ten people who said the OIA experience was worse, four may have done so by mistake as they responded with all “5’s” and in two instances commented that there is no need for improvement. Four responded with complaints about *pro pers* and that similar cases would have closed sooner in court, and two complained that arbitration is inherently unfair.



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

	<b>Made Comparison</b>	<b>Better</b>	<b>Worse</b>	<b>About the Same</b>
Claimants' Counsel	14	6	1	7
<i>Pro per</i>	3	0	2	1
Respondents' Counsel	18	9	6	3
Not Specified	6	4	1	1
Total	41	19	10	12

The most common complaint concerned obtaining medical records. Several complained that they did not receive full sets of records, each specifically noting missing items, for example fetal monitoring strips, nurses records, video surveillance or audio tests. Some reported never receiving them even after involving the arbitrator. One complained that waiting 2 ½ months is too long, while another reported that their private personal information was not redacted.

Most *pro pers* complained about arbitration in general, with some stating that the arbitration system should be disbanded. One suggested that the OIA create positions to assist members with hiring an attorney or not allow *pro pers* to continue without representation. Another specifically suggested that the OIA create guidelines regarding the arbitration process. Although some complimented the OIA, others noted that the OIA was unable to help with their specific situation.

Most attorneys praised the OIA as responsive and timely, and noted that the arbitration system is much more efficient than court. Claimant attorneys complained about mandatory arbitration suggesting the option for members to opt-out and proceed in court with a jury. A few suggested that the OIA limit the number of new cases a neutral arbitrator can have. One complained about receiving too many emails from the OIA, the neutral arbitrator, and the respondent attorney, and suggested one point of contact. Respondent attorneys complained that their cases involving *pro per* claimants would have been dismissed much sooner in court. Some attorneys sought clarification of rules regarding service of non-Kaiser entities.<sup>78</sup>

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<sup>78</sup>The rules sub-committee will be addressing Rule 9 regarding service.

## **X. 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.

The membership of the AOB is a distinguished one and includes well respected members of the community. Pursuant to the AOB bylaws, 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:

**Carlos Camacho**, Staff 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.

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

**Tony Rodriguez**, Vice President and Assistant General Counsel, Litigation / Legal Department, Kaiser Foundation Hospitals / 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.

**Roxana Heidi Yoonessi-Martin**, MD, JD, Compliance Officer and Lead Counsel, Southern California Permanente Medical Group, Pasadena.

## **B. Activities**

The AOB oversees the OIA's administration of the cases in the arbitration system. In quarterly meetings, it reviews and makes recommendations on regular and quarterly reports from the OIA. The AOB also makes requests for supporting information as needed.

The AOB met with neutral arbitrator Dan Deuprey, to consider ways in which the *pro per* experience could be improved. The AOB convened both a *pro per* sub-committee and a *Rules* sub-committee. It unanimously approved seven Rule changes<sup>79</sup> and sent two other proposals to the sub-committee for further review and refinement. It extended a slightly modified Temporary Rule 4<sup>80</sup> in response to the COVID-19 pandemic and requested quarterly updates regarding the status of cases open over 18 months.

The AOB continued its commitment to improve the diversity of the OIA panel of neutral arbitrators. The AOB receives quarterly reports regarding the demographics of the panel of neutral arbitrators. It also receives quarterly reports regarding the OIA's efforts in recruitment.

The needs of *pro pers* in the system was a main topic of concern this year. The AOB approved revisions to Rule 54 to be stated more clearly and to make it easier for *pro pers* to understand.

Finally, the AOB reviews the draft annual report and provides comments. Exhibit K is the AOB Comments on the Annual Report for 2022.

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<sup>79</sup>Six proposals were from the OIA, and one proposal was from Kaiser.

<sup>80</sup>See Exhibit C for a list of the temporary rules.

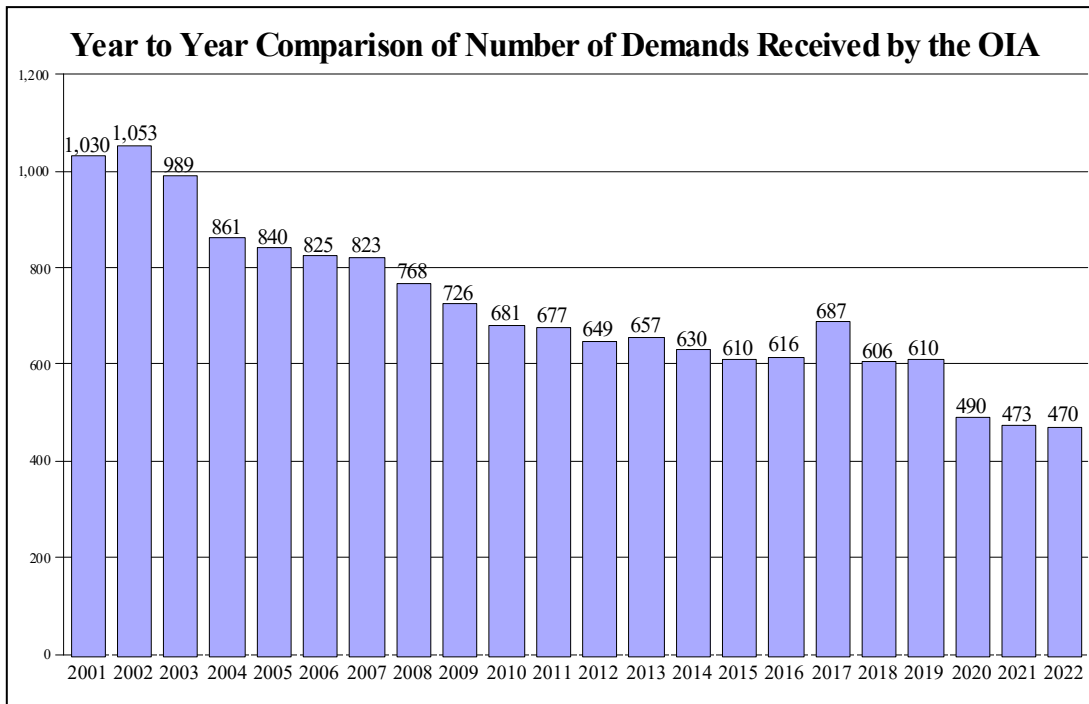
## XI. TRENDS AND DATA OVER THE YEARS OF OPERATION OF THE OIA<sup>81</sup>

Using the data that the OIA has published in prior reports, this section considers the operation of the OIA over time.

### A. The Number of Demands for Arbitration

In 2022, the OIA received 470 demands for arbitration, 3 less than last year and the lowest number of all time but not the lowest decline in a given year. Chart 16 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 16**



### B. The Number of Neutral Arbitrators

There were 177 neutral arbitrators on the OIA panel, 13 more than last year when the panel contained 164 arbitrators. The panel has ranged from 326 in 2006 to 164 in 2021. On average, 40% have been retired judges. This year 53% are retired judges, 8% more than last year. The composition of the panel of neutral arbitrators includes those who have plaintiff's side

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<sup>81</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.

experience and those who have defendant's side experience. This year, 91% 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>82</sup> Fifty-eight percent (58%) of neutral arbitrators served this year, 4% less than last year, and 6% more than the lowest percentage over all time (52% in 2018).

### **D. The Number Who Wrote Awards<sup>83</sup>**

The number of neutral arbitrators who have written awards ranged from 22 (in 2020) to 93 (in 2004), with 68 – 91% writing a single award. This year, 20 neutral arbitrators wrote 26 awards. For all neutral arbitrators who wrote awards in 2022, 80% wrote a single award.

### **E. The Number Who Have Served After Making a Large Award<sup>84</sup>**

Since 2000, 115 different neutral arbitrators have made 162 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 eleven were not. The awards have ranged from \$500,000 to \$25,638,059.

As Chart 17 illustrates, most neutral arbitrators who have made awards of \$500,000 or more served again. Specifically, 88 neutral arbitrators served 2,316 times after making their awards for \$500,000 or more. In almost half of these cases (1,023), the parties jointly selected the neutral arbitrator.<sup>85</sup>

Of the 27 neutral arbitrators who were not selected after making their awards, 4 were never on the OIA panel and 19 left the panel. The remaining four arbitrators have not served again.

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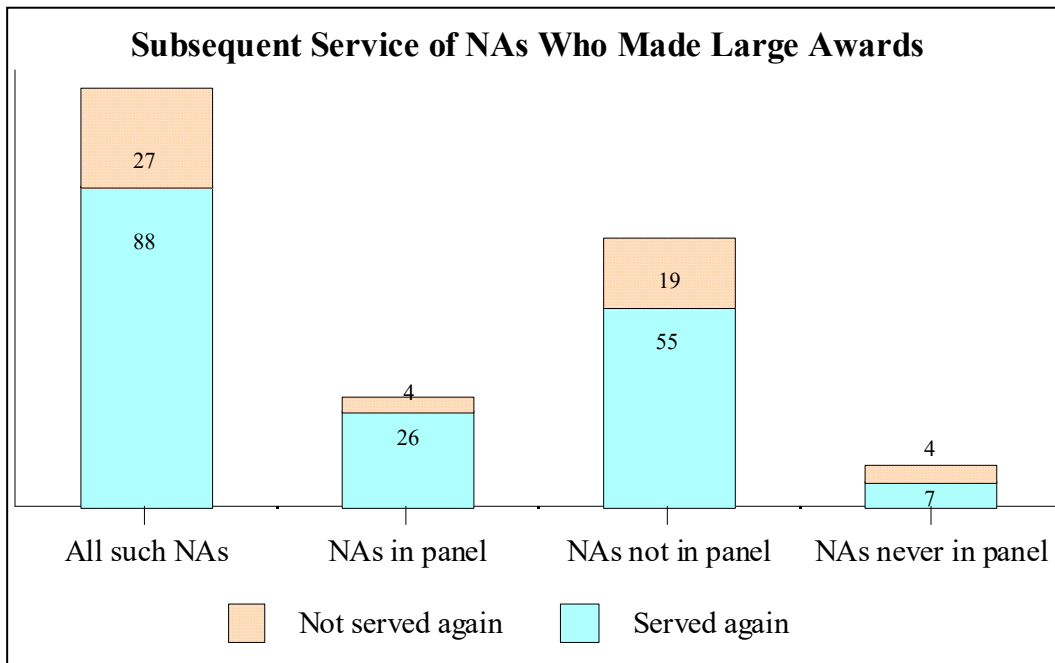
<sup>82</sup>By contrast, compared to 2003, this year there were 519 fewer demands for arbitration and 110 fewer neutral arbitrators on the panel.

<sup>83</sup>The OIA began comparing this data in 2003.

<sup>84</sup>The OIA received its first award over \$500,000 in 2000.

<sup>85</sup>Thirty neutral arbitrators who made such awards were selected in 124 cases in 2022. In 46 of these cases, they were jointly selected.

**Chart 17**



**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>86</sup> This year, 96% of the cases involved allegations of medical malpractice. Benefit claims are generally less than two percent (<2%).

**G. Claimants Without Attorneys**

On average, 25% of claimants are in *pro per*. This year and in 2020, 33% of claimants did not have an attorney.<sup>87</sup> Dealing with the concerns raised by *pro per* claimants has been a continuing issue for the OIA, the AOB, and neutral arbitrators. The AOB approved changes to Rule 54.<sup>88</sup> It has been revised to be stated more clearly and provides additional information for *pro pers*.<sup>89</sup>

<sup>86</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.” Kaiser now provides information as to the type of claim being made.

<sup>87</sup>By contrast, in 2004 only 17% of claimants did not have an attorney.

<sup>88</sup>See Exhibit B, Rule 54.

<sup>89</sup>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.

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

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 parties can also timely disqualify neutral arbitrators after their selection. The OIA gives both parties the same access to 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. This year, 23% were jointly selected by the parties, 12% less than the highest percentage in 2015, when it was 35%. The percentage of neutral arbitrators jointly selected who are members of the OIA panel has ranged from 55% (2011) to 84% (2014).<sup>90</sup> This year, 77% 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>91</sup> Claimants made almost all of the postponements (99%, 7,140 out of 7,202) and the majority of disqualifications (77%, 1,133 out of 1,475).

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, maintaining the lowest average for 4 years in a row. For all cases where a neutral arbitrator was selected this year, it took 63 days, 5 days more than last year.

See Table 9 for year to year comparison of days to select neutral arbitrators since 2014.

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<sup>90</sup>There have been 17 cases in which the neutral arbitrator was selected by court order.

<sup>91</sup>A member of the OIA staff contacts the parties to remind them of the deadline to respond to 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**

	2014	2015	2016	2017	2018	2019	2020	2021	2022
No delay	25 days 47%	25 days 44%	24 days 51.7%	24 days 51.7%	24 days 51%	23 days 55%	23 days 46%	23 days 58%	23 days 55%
Only Postponement	108 days 46%	109 days 47%	110 days 40.9%	104 days 40.8%	104 days 42%	109 days 40%	108 days 48%	107 days 38%	111 days 40%
Only Disqual.	66 days 3%	62 days 4%	64 days 3.7%	61 days 3.4%	54 days 3%	55 days 2%	67 days 2%	54 days 3%	50 days 2%
Postponement & Disqual.	178 days 4%	173 days 5%	158 days 3.7%	165 days 4.1%	144 days 4%	149 days 3%	210 days 4%	149 days 2%	188 days 3%
Total Selections	71 days	73 days	66 days	64 days	63 days	62 days	72 days	58 days	63 days

**J. How Cases Closed**

The most common way cases close has always been settlement. This year 53% of cases settled, 8% more than last year and the highest reported average. This is followed by cases withdrawn by the claimant, 21 – 28%. This year 25% were withdrawn. Six percent (6%) of cases were decided after hearing, 3% less than last year (9%). The same percentage were dismissed by neutral arbitrators (5%) as last year. The remaining cases (11%) were closed by summary judgment.

Of the cases that closed before the arbitration process was initiated, 19 (4%) were abandoned. The remaining ones were settled (5) or withdrawn (7).<sup>92</sup>

Table 10 displays how cases have closed since 2014.

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<sup>92</sup>These cases account for 7% of the total number of closed cases (440), but are excluded from this section because the OIA does not begin measuring time until the fee is paid or waived.



**Table 10 - Year to Year Comparison of How Cases Closed<sup>93</sup>**

	2014	2015	2016	2017	2018	2019	2020	2021	2022
Settlements	46%	44%	44%	47%	46%	45%	45%	45%	53%
Withdrawn	27%	26%	25%	25%	23%	26%	27%	26%	25%
Dismissed	3%	3%	3%	4%	5%	5%	5%	5%	5%
Summary Judgment	13%	10%	12%	11%	13%	11%	14%	13%	11%
Awards	9%	10%	9%	8%	6%	8%	4%	9%	6%

**K. Awards for Claimants**

In those cases in which the claimant won after a hearing, the average award was \$579,684. 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. This year was the largest average at \$4,901,115, and the largest award was \$25,638,059.

Since 2010, the average percentage of cases in which claimants prevailed after a hearing was 35%.<sup>94</sup> This year, 46% of claimants prevailed, 12% more than last year, and the highest percentage of all time.

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

The lowest average for all cases to close was 281 days in 2001. This year it took 433 days, 15 days more than last year. See Table 11.

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<sup>93</sup>The totals may not add up to 100% due to rounding up or down.

<sup>94</sup>Up until 2009, lien cases were included in this percentage. No new lien cases were received this year.

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

	2014	2015	2016	2017	2018	2019	2020	2021	2022
Settlements	334 days	344 days	376 days	383 days	357 days	386 days	376 days	418 days	460 days
Withdrawn	226 days	227 days	255 days	249 days	230 days	238 days	267 days	305 days	256 days
Summary Judgment	344 days	371 days	363 days	372 days	356 days	388 days	363 days	403 days	361 days
Awards	510 days	584 days	589 days	598 days	653 days	676 days	660 days	784 days	1,022 days
All Cases	323 days	342 days	363 days	368 days	343 days	366 days	356 days	418 days	433 days

The OIA closely follows each case that is open after 15 months to make sure that the case remains in compliance with the *Rules*. Forty cases over all time have closed beyond the deadline set by the *Rules*. None closed late in 2022.

**M. Payment of Neutral Arbitrator’s Fees<sup>95</sup>**

California law provides that, absent any other arrangement by the parties, the fees of the neutral arbitrator will be divided equally between the parties. The *Rules*, however, provide several ways to shift those fees to Kaiser.<sup>96</sup> This year, 97% of the fees were paid by Kaiser compared to 81% in 2004.

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

Since 2000, the OIA has sent the parties forms to evaluate their neutral arbitrators.<sup>97</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. This year, the overall average decreased from 4.2 last year to 3.7 (on a 1 – 5 scale) for whether the parties would recommend the arbitrator to others. In 2014, this average was 3.9, and in 2004, it was 4.7.

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

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<sup>95</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>96</sup>See Sections VIII.B.2. and 3.

<sup>97</sup>In 2013, the OIA began sending neutral arbitrator evaluations only in cases in which the neutral arbitrator made a decision that concluded the case.

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, 76% of the parties who answered the question rated the OIA system the same as or better than the state court system. This is the lowest average of all time. It is 20% lower than the highest average (96%) in 2018.

## **O. Conclusion**

The goals of the arbitration system as outlined by the Blue Ribbon Panel 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.

The annual reports provide more information about arbitrations than any other arbitration provider. 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>98</sup>

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 and updates; evaluations received from the parties within the last five years; and redacted decisions by OIA neutral arbitrators within the last five years.

Parties may jointly select any neutral arbitrator, so long as the arbitrator 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.

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<sup>98</sup>No names of individual claimants or respondents are included, only corporate entities.

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 of providing a fair, timely, and low cost arbitration process that respects the privacy of the parties.