

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, 2016 - December 31, 2016

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REPORT SUMMARY

This is the annual report for the Office of the Independent Administrator (OIA) for 2016. It discusses the arbitration system between Kaiser Foundation Health Plan and its affiliated groups of physicians and hospitals (collectively Kaiser) and its members.¹ Since 1999, the OIA has administered such arbitrations, and its Independent Administrator is Marcella A. Bell. From the data and analyses in this report, readers may gauge how well the OIA system meets its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protects the privacy of the parties.

Status of Arbitration Demands

The total number of demands for arbitration increased from the previous year. Most of the claims were for medical malpractice. More claimants were without attorneys, proceeding in *pro per*, than last year.

- 1. Number of Demands for Arbitration.** The OIA received 616 demands, 6 more than last year. The number of demands increased in Northern California by 25, remained relatively the same in Southern California, and decreased by 21 in San Diego. Twenty (20) lien cases were received, 5 less than last year. See pages 9, 33, and 45.
- 2. Types of Claims.** Ninety-two percent (92%) of the cases involved allegations of medical malpractice. Less than one percent (1%) presented benefit and coverage allegations. Lien cases made up three percent (3%). The remaining cases were based on allegations of premises liability and other torts. See page 9. Because lien cases differ significantly from cases brought by members, they are reported separately in Section IX.
- 3. Twenty-Eight Percent (28%) of Claimants are Without Attorneys.** Claimants in 166 cases (28%) were not represented by counsel, 2% higher than last year. See pages 10 and 47.

How Cases Closed

The parties themselves resolved the majority of their claims. Neutral arbitrators decided the remaining cases, almost always with a single neutral arbitrator.

¹Kaiser 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.

4. **Three-Quarters (75%) of Cases Closed by the Parties' Action.** The parties settled 44% of the cases. Fifty (50) cases settled at the Mandatory Settlement Meeting, 2 more than last year, and in 5 cases claimants were in *pro per*. Claimants withdrew 25% and abandoned another 6% by failing to pay the filing fee or get the fee waived. See pages 25 - 26, and 50 - 51.
5. **Nearly One-Quarter (24%) Closed by Decision of Neutral Arbitrator.** Nine percent (9%) of cases closed after an arbitration hearing, twelve percent (12%) were closed through summary judgment, and three percent (3%) were dismissed by neutral arbitrators. In the cases that went to an arbitration hearing, claimants prevailed in 37%. See pages 26 - 27, and 51.
6. **Almost Half (48%) of Claimants Received Some Compensation.** Claimants receive compensation either when their cases settle (44%) or when they are successful after a hearing (3%). The average award was \$859,489, and the range was from \$100 to \$8,812,879. See pages 25, 27, and 51.
7. **Nearly All Cases (98%) Heard by a Single Neutral Arbitrator Instead of a Panel.** Most of the hearings involved a single neutral arbitrator rather than a panel composed of one neutral and two party arbitrators. A panel of three arbitrators decided only 1 of the 52 cases that went to hearing. See page 19.

Meeting Deadlines

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

8. **More Than Half (52%) of Neutral Arbitrator Selections Proceeded Without any Delay.** The *Rules* give parties the option to postpone the deadline to select a neutral arbitrator, but more than half (52%) of the neutrals were selected without the parties exercising this option. Of the cases with requests received this year, the claimants made all of the requests for 90 day postponement. California law gives parties the opportunity to timely disqualify neutral arbitrators. A neutral arbitrator was disqualified in only 4% of cases. Claimants disqualified 39 neutral arbitrators and Kaiser disqualified 21. Parties exercised both the postponement and disqualification options in the remaining cases. See pages 13 - 15 and 17 - 18.
9. **Average Length of Time to Select Neutral Arbitrator is 66 Days.** The time to select a neutral arbitrator in cases with no delay decreased by one day (24 days). The time to select a neutral with a 90 day postponement increased by one day (110 days). It increased by two (2) days in cases with only a disqualification (64 days), but decreased by 15 days in cases with both a postponement and disqualification (158 days). The overall average length of time to select a neutral arbitrator for all cases decreased by 7 days (66 days). See pages 18 - 19, and 48 - 50.

10. **On Average, Cases Closed in Twelve Months.** Cases closed, on average, in 363 days, 21 days longer than last year. No case closed beyond the deadline required by the *Rules*. Eighty-five percent (85%) of the cases closed within 18 months (the deadline for “regular” cases) and 56% closed in a year or less. See pages 23 - 24, 51, and Table 10.
11. **On Average, Hearings Completed in Less than Twenty Months.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 589 days (less than 20 months). This average includes cases that were designated “complex” or “extraordinary” or that received a Rule 28 extension because they needed extra time. “Regular cases” closed in 449 days (15 months). See page 27.

Pool of Neutral Arbitrators

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

12. **The Neutral Arbitrator Pool.** The OIA has 249 neutral arbitrators in its pool, 13 fewer than last year. Thirty-nine percent (39%) of them, or 98, are retired judges. See page 4.
13. **Neutral Arbitrator Backgrounds.** The applications filled out by the members of the OIA pool show that 137 arbitrators, or 55%, 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. More than 90% of the neutral arbitrators report having medical malpractice experience. See pages 5 - 6.
14. **More Than Half (59%) of Arbitrators Served on a Case.** Fifty-nine percent (59%) of the neutral arbitrators in the OIA pool served on a case. Arbitrators averaged two (2) assignments each. Forty-seven (47) different neutrals, including arbitrators not in the OIA pool, decided the 52 awards made. Eighty-seven (87%) of the neutral arbitrators only wrote a single award. See pages 7 and 46.
15. **Majority of Neutral Arbitrators (70%) Selected by Strike and Rank.** Seventy percent (70%) of neutral arbitrators were selected through the strike and rank process, and 29% were jointly selected by the parties.² Seventy-eight percent (78%) of the arbitrators jointly selected were members of the OIA pool. In the

²One (1) neutral arbitrator was selected by court order.

other cases, the parties chose a neutral arbitrator who was not a member of the OIA pool. See pages 12 - 13.

Neutral Arbitrator Fees

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

- 16. Kaiser Paid the Neutral Arbitrators' Fees in 84% of Cases Closed.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed, Kaiser paid the entire fee for the neutral arbitrators in 84% of those cases that had fees. See page 32.
- 17. Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$150/hour to \$880/hour, with an average of \$471. For the 483 cases that closed and for which the OIA has information, the average fee charged by neutral arbitrators was \$6,990. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was \$7,469. The average fee in cases decided after a hearing was \$29,944. See pages 32 - 33.

Evaluations

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

- 18. Positive Evaluations of Neutral Arbitrators by Parties.** Most parties who responded to the OIA evaluation expressed satisfaction with the neutral arbitrators and would recommend them to others, with an average of 4.2 on a 5 point scale. *Pro pers* view neutral arbitrators less favorably. See page 38.
- 19. Positive Evaluations of the OIA by Neutral Arbitrators.** Sixty percent (60%) of the neutral arbitrators reported that the OIA experience was better than a court system, 40% said it was about the same, and none said it was worse. See page 40.
- 20. Positive Evaluations of the OIA by Parties.** Sixty-three percent (63%) of the responding parties and attorneys reported that the OIA system was better than the court system, 30% said it was the same, and 7% said it was worse. See pages 41 - 42.

Development and Changes in the System

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

21. **Change in Membership of the AOB.** Dr. Cornelius Hopper became the chair of the AOB, and Richard Spinello became the vice-chair. See pages 4 and 42.
22. **Senate Bill Regarding Consumer Arbitration.** The OIA and AOB discussed at length how a senate bill could affect consumer arbitrations, particularly what OIA *Rules* and procedural changes would have been needed had the bill become law. The Governor vetoed the bill on September 25, 2016.³ See pages 4 and 44.
23. **OIA Rule Changes Explored.** The OIA and AOB explored changes to the OIA *Rules*. Some of the potential changes are in response to suggestions from parties and neutral arbitrators on evaluations submitted at the conclusion of cases. See pages 4 and 44. Some are based on suggestions from the OIA. The AOB decided to convene a sub-committee to address possible modifications in the coming year.

Conclusion

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

- Neutral arbitrators are selected expeditiously, and the cases close faster than in court.
- Parties can, and do, disqualify neutral arbitrators they do not like.
- The filing fee is lower than in court, and parties can and do shift the costs of the neutral arbitrators to Kaiser.
- OIA arbitrations are confidential, and neither the OIA nor neutral arbitrators publish the names of individual claimants or respondents involved in them.
- Neutral arbitrators on the OIA panel have plaintiff, defendant, and judicial backgrounds. The cases are distributed among them.
- Neutral arbitrators and the OIA system receive positive evaluations.
- The OIA publishes the annual reports and information about its cases in compliance with California law. This information is available on the website for the parties and the public.

³Senate Bill-1078 Civil Procedure: Arbitration (2015-2016).

A Note About Numbers

We often give average, mode, and range. Here are definitions of those terms:

Average: The mean. The sum of the score of all items being totaled divided by the number of items included.

Mode: The single most commonly occurring number in a given group.

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

Please note: In some cases, there is more than one mode. As percentages are rounded, the total is not always exactly 100%.

I. INTRODUCTION & OVERVIEW

The Office of the Independent Administrator (OIA) issues this report for 2016.¹ It describes the arbitration system that handles claims brought by Kaiser members against Kaiser Foundation Health Plan, Inc. (Kaiser) or its affiliates.² Marcella A. Bell, an attorney, is the Independent Administrator. Under her contract with the Arbitration Oversight Board, the OIA maintains a pool of neutral arbitrators to hear Kaiser cases and independently administers arbitration cases between Kaiser and its members. The contract requires that Ms. Bell write an annual report describing the arbitration system. The report describes the goals of the system, the actions being taken to achieve them, and the degree to which they are being met. While this report mainly focuses on what happened in the arbitration system during 2016, the final section compares 2016 with earlier years.

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

The arbitrations are controlled by the *Rules for Kaiser Permanente Member Arbitrations Administered by the Office of the Independent Administrator Amended as of January 1, 2016 (Rules)*. The *Rules* consist of 54 rules in a 21 page booklet and are available in English, Spanish, and Chinese.³ Some important features include:

Procedures for selecting a neutral arbitrator expeditiously;⁴

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

Procedures to adjust these deadlines when required;⁶ and

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

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

³The *Rules* are attached as Exhibit B.

⁴Exhibit B, Rules 16 and 18.

⁵Exhibit B, Rule 24.

⁶Exhibit B, Rules 24, 28 and 33.

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

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

A. Goals of the Arbitration System Between Members and Kaiser⁸

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.

B. Format of This Report

Section II discusses developments in 2016. Sections III and IV look at the OIA's pool of neutral arbitrators, and the number and types of cases the OIA received. The parties' selection of neutral arbitrators is discussed in Section V. That is followed by Section VI on the monitoring of open cases and Section VII which analyzes how cases are closed and the length of time to close. Section VIII discusses the cost of arbitration in the system. Sections IV.B. through VIII exclude lien cases.⁹ Section IX then presents all the analyses for lien cases. The parties' evaluations of their neutral arbitrators and the parties' and neutral arbitrators' evaluations of the OIA system are summarized in Section X.¹⁰ Section XI describes the AOB's membership and activities during 2016. Finally, Section XII then compares the operation of the system over time.

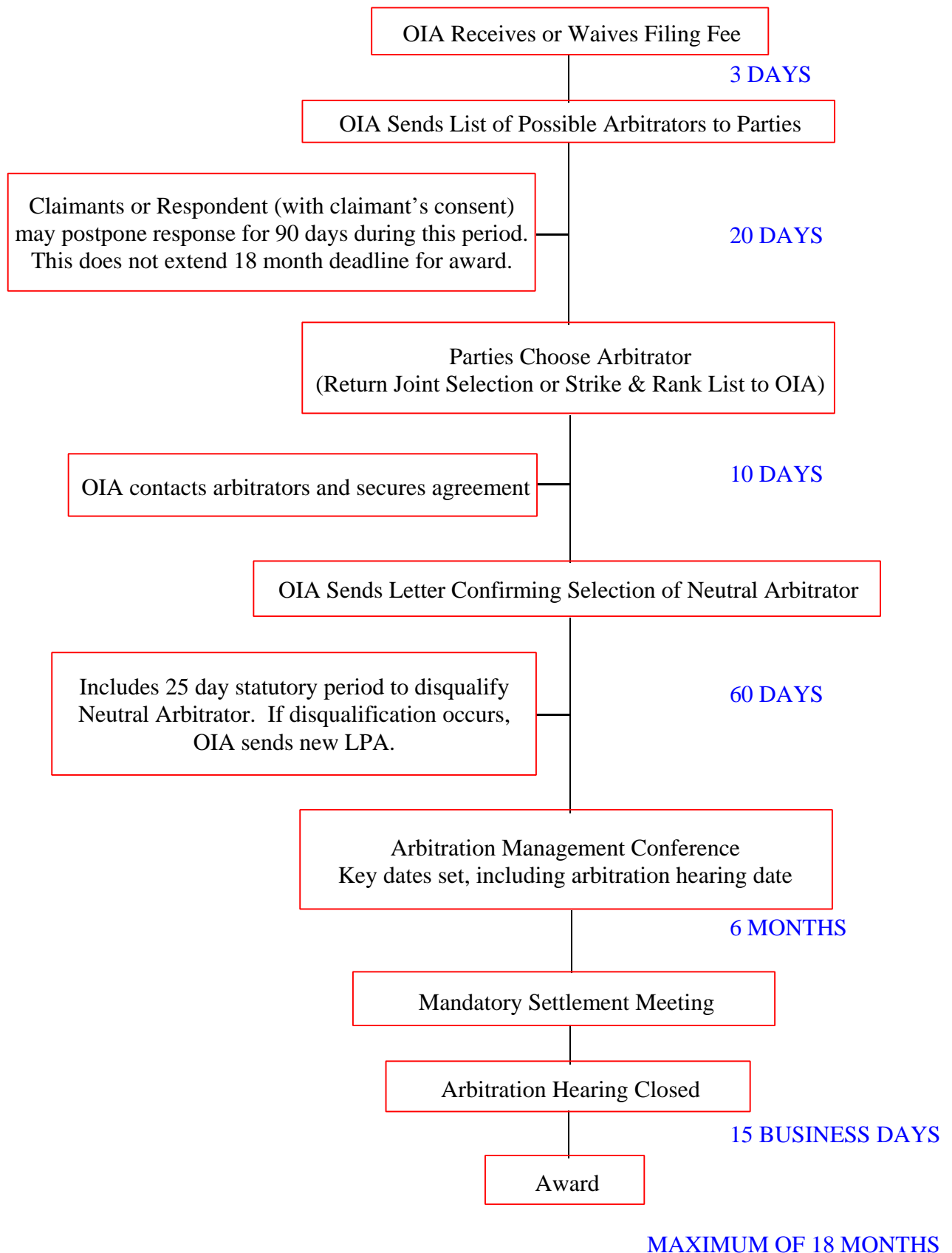
⁷Exhibit B, Rules 14 and 15; *see also* Section VIII.

⁸For a discussion of the history and development of the OIA and its arbitration system, please see prior reports. The OIA was created in response to the recommendation of a Blue Ribbon Panel (BRP) and began operating March 28, 1999. 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 is available on the OIA website. In addition, a separate document that sets out the status of each recommendation is available on the website.

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

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

Timeline for Arbitrations Using Regular Procedures



II. DEVELOPMENT AND CHANGES IN THE SYSTEM IN 2016

A. Change in Membership of the AOB

Dr. Cornelius Hopper, the former vice-chair, became the chair, and Richard Spinello, who oversaw the 2014 OIA audit, became the vice-chair.¹¹

B. Senate Bill Regarding Consumer Arbitration

The OIA and AOB discussed at length how a senate bill could affect consumer arbitrations, particularly what changes would have been needed by the OIA had the bill become law. The Governor vetoed the bill on September 25, 2016.¹²

C. OIA Rule Changes Explored

The OIA and AOB explored changes to the OIA *Rules*. Some of the potential changes are in response to suggestions from parties and neutral arbitrators on evaluations submitted at the conclusion of cases. See Section X. Some are based on suggestions from the OIA. As a result, the AOB decided to convene a sub-committee to address possible modifications in the coming year.

III. POOL OF NEUTRAL ARBITRATORS

A. Turnover in 2016 and the Size of the Pool at Year-End

On December 31, 2016, there were 249 people in the OIA's pool of neutral arbitrators. Of those, 98 were former judges, or 39%.

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

¹¹Dr. David Werdegar, who established and then chaired the AOB, retired from both the AOB and as the chair at the end of 2015.

¹²Senate Bill-1078 Civil Procedure: Arbitration (2015-2016).

Table 1 - Number of Neutral Arbitrators by Region

Total Number of Arbitrators in the OIA Pool:	249
Southern California Total:	129
Northern California Total:	121
San Diego Total:	69
<p>The three regions total 319 because 55 arbitrators are in more than one panel; 37 in So. Cal & San Diego, 2 in No. Cal & So. Cal, 1 in No. Cal. and San Diego, and 15 in all three panels</p>	

At the beginning of the year, the OIA pool of neutral arbitrators contained 262 names. During the year, 28 arbitrators left the pool and 12 joined the pool.¹³ No applicant was rejected.¹⁴

B. Practice Background of Neutral Arbitrators

The neutral arbitrator application requires applicants to estimate the amount of their practice spent in various professional endeavors. On average, neutral arbitrators in the OIA pool spend their time as follows: 76% of his or her time acting as a neutral arbitrator, 15% as a claimant (or plaintiff) attorney, 10% as a respondent (or defense) attorney, 15% in other forms of employment, including non-litigation legal work, teaching, mediating, etc., and 2% acting as a respondent’s party arbitrator, a claimant’s party arbitrator, or an expert.

More than half of the pool, 137 members, report that they spend 100% of their practice acting as neutral arbitrators. The full distribution is shown in Table 2.

Table 2 - Percentage of Practice Spent as a Neutral Arbitrator

Percent of Time	0%	1 – 25%	26 – 50%	51 – 75%	76 – 99%	100%
Number of NAs	7	67	17	4	15	137

¹³The application can be obtained by contacting the OIA or by downloading it from the OIA website.

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

The members of the OIA pool who are not full time arbitrators primarily work as litigators. See Table 3.

Table 3 - Percentage of Practice Spent as an Advocate

Percent of Practice	Number of NAs Reporting Claimant Counsel Practice	Number of NAs Reporting Respondent Counsel Practice
0%	189	191
1 – 25%	20	21
26 – 50%	20	22
51 – 75%	4	5
76 – 100%	15	10

Finally, while the qualifications do not require that members of the OIA pool have medical malpractice experience, 92% of them do. At the time they filled out or updated their applications, 229 reported that they had such experience, while 20 did not. Members of the pool who have served on a Kaiser case since they joined the pool may have acquired medical malpractice experience since their initial report to us.¹⁵

C. Number in the Pool of Arbitrators Who Served¹⁶

One of the recurring concerns expressed about mandatory consumer arbitration is the possibility of a “captive,” defense-oriented, pool of arbitrators. The theory is that Kaiser is a “repeat player,” but claimants are not; Kaiser, therefore, has the capacity to bring more work to arbitrators than claimants. A large pool of people available to serve as neutral arbitrators, and actively serving as such, is therefore an important tool to avoid this. If the cases are distributed among many neutrals, then no one depends on Kaiser for his or her income. The factors that can minimize possible bias are: 1) the large size of the OIA pool from which the OIA randomly compiles Lists of Possible Arbitrators, 2) the ability of parties to jointly select any arbitrator they choose, as long as the arbitrator agrees to follow the *Rules*,¹⁷ and 3) the ability of a party to timely disqualify any neutral arbitrator after selection.¹⁸

¹⁵Of the 20 who reported no medical malpractice experience in their applications, 12 of them have served as a neutral arbitrator in an OIA case.

¹⁶The procedure for selecting neutral arbitrators for individual cases is described below in Section V.A.

¹⁷See Section V.B.

¹⁸See Section V.D.

1. The Number of Neutral Arbitrators Named on a List of Possible Arbitrators

All neutral arbitrators in the OIA pool were named on at least one List of Possible Arbitrators (LPA) sent to the parties by the OIA. The average number of times Northern California arbitrators appear on a LPA is 25, and the mode is 24. The range of appearances is from 2 to 44 times.¹⁹ In Southern California, the average number of appearances is 23, and the mode is 23. The range is from 2 to 38. In San Diego, the average is 7, and the mode is 8. The range of appearances on the LPA is from 0 to 18.²⁰

2. The Number Who Served

This year, 167 different neutral arbitrators were selected to serve in 528 cases. The great majority (147) were members of the OIA pool. Thus, 59% of the OIA pool were selected to serve in a case. The number of times a neutral was selected ranges from 0 to 18. The neutral arbitrator at the highest end was jointly selected 14 times. The average number of appointments for members of the pool is 2, and the mode is 0.

3. The Number Who Wrote Awards

Forty-seven (47) different neutral arbitrators decided 52 awards. Forty-one (41) arbitrators wrote a single award, while 5 decided 2. One (1) neutral arbitrator wrote three (3) awards. The neutral arbitrator who decided three (3) cases wrote two (2) in favor of Kaiser and one (1) in favor of the claimant.

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

Concerns have been raised 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. Therefore, annual reports describe what has happened to neutral arbitrators after making an award of \$500,000 or more.

This year, neutral arbitrators made six (6) awards for more than \$500,000. The awards ranged from \$526,456.10 to \$8,812,878.50. Four (4) had previously made large awards. Three

¹⁹In addition to chance, the number of times a neutral arbitrator is listed is affected by how long a given arbitrator has been in the pool, the number of members in each panel, and the number of demands for arbitration submitted in the geographical area for that panel. Some neutral arbitrators have been in the OIA pool since it started, and one joined in November 2016. The number of times an arbitrator is selected also depends on whether the individual will hear cases when the claimant has no attorney (*pro per* cases). Twenty-five percent (25%) of the pool will not hear *pro per* cases.

²⁰The neutral arbitrator who was not listed on a San Diego LPA is also on the Southern California panel and was listed on an LPA for that panel.

(3) have been selected to serve again after making a large award, one (1) was selected six (6) times.²¹

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

Since 2007, the OIA has compared how cases closed between neutral arbitrators who serve the most often and other neutral arbitrators. There were ten (10) neutral arbitrators who were selected ten or more times this year. The OIA compared the cases these arbitrators closed in 2015 and 2016 with the other cases that closed in those years with neutral arbitrators in place. Table 4 shows the results.

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

Cases Closed 2015 – 2016	Cases with Neutral Arbitrators Selected 10 or More Times in 2016		Cases with Other Neutral Arbitrators	
Settled	92	47.2%	403	48.4%
Withdrawn	50	25.6%	192	23.0%
Summary Judgment	27	13.8%	102	12.2%
Awarded to Respondent	13	6.7%	66	7.9%
Awarded to Claimant	7	3.6%	36	4.3%
Dismissed	5	2.6%	31	3.7%
Other	1	.5%	3	.4%
Total	195		833	

²¹Of the 3 who were not selected again, 1 has retired, 1 made the award in February, and the other in November.

IV. DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA

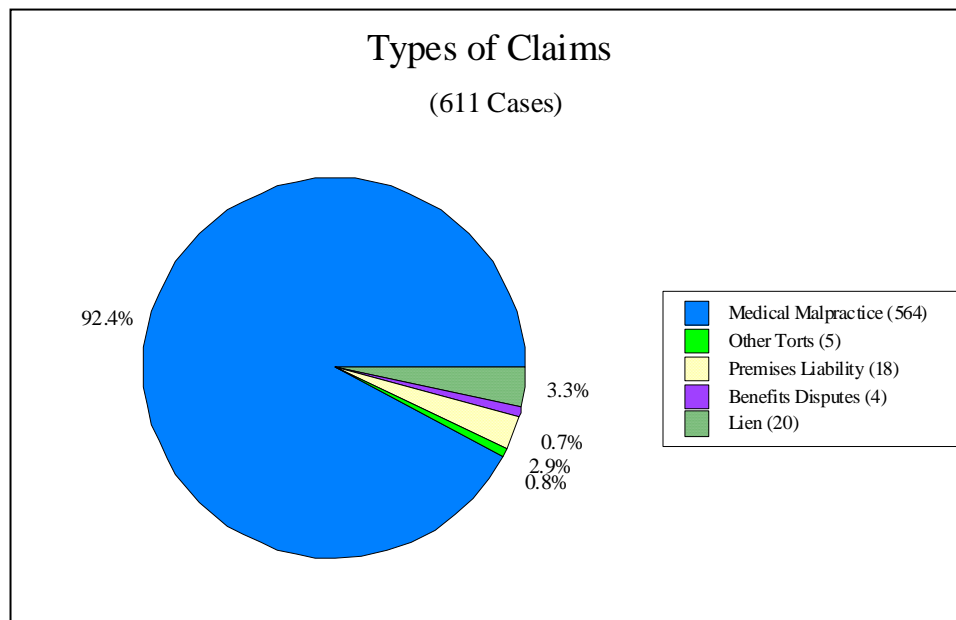
Kaiser submitted 616 demands for arbitration. Geographically, 303 demands for arbitration came from Northern California, 275 came from Southern California, and 38 came from San Diego.²²

A. Types of Claims

The OIA administered 611 new cases.²³ The OIA categorizes cases by the subject of their claim: medical malpractice, premises liability, other tort, lien, or benefits and coverage. Medical malpractice cases make up 92% (564 cases) in the OIA system. Benefits and coverage cases represent less than one percent (1%) of the system (4 cases).

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

Chart 1



²²The allocation between Northern and Southern California is based upon Kaiser’s corporate division. Roughly, demands based upon care given in Fresno or north are in Northern California, while demands based upon care given in Bakersfield or south are in Southern California or San Diego. Rule 8 specifies different places of service of demands for Northern and Southern California, including San Diego.

²³A few of these demands submitted by Kaiser do not proceed further in the system because they are “opt in” – based on a contract that required arbitration but not the use of the OIA. There were 16 “opt ins.” Eleven (11) of the claimants chose to have the OIA administer their claims; 3 were returned to Kaiser and 2 were pending at the end of the year.

As discussed in Section I.B., the rest of this report, with the exception of Sections IX and X, excludes lien cases from its analysis and concentrates on what happened in 2016. Lien cases are discussed in Section IX.

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

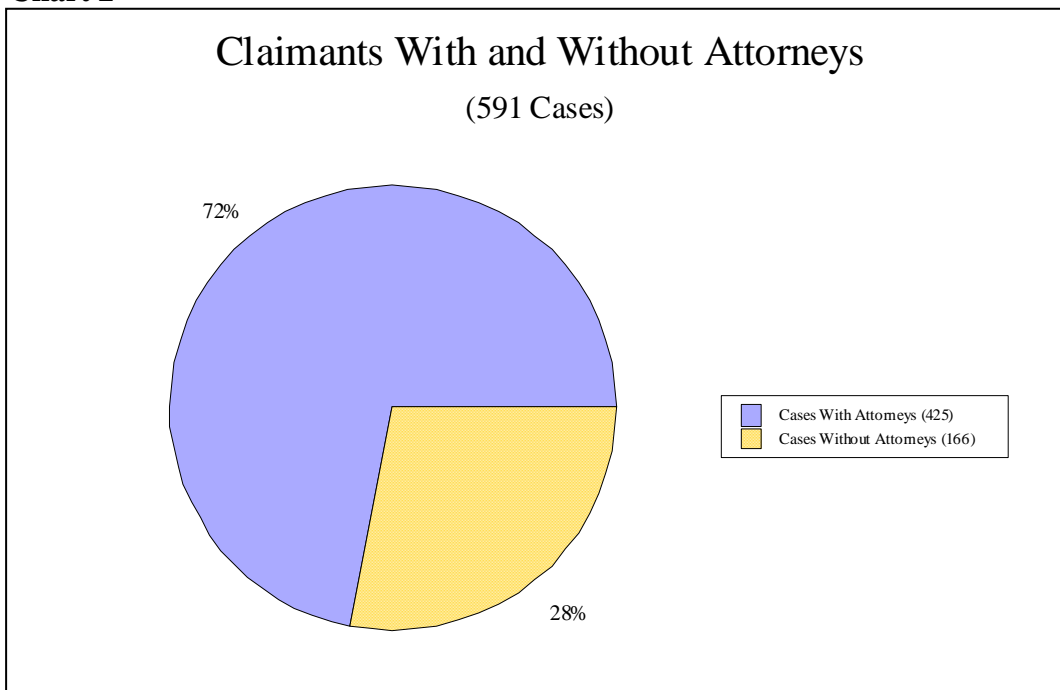
The *Rules* require Kaiser to submit a demand for arbitration to the OIA within ten days of receiving it.²⁴ The average length of time that Kaiser took to submit demands to the OIA is four (4) days. The mode is one (1). This means that usually Kaiser sent the OIA a demand on the day after Kaiser received it. The range is 0 – 96 days.

There were 15 cases in which Kaiser took more than 10 days to submit the demand to the OIA. If only these “late” cases are considered, the average is 19 days, and the mode is 11. The range is 11 to 96 days.

C. Claimants With and Without Attorneys

Claimants were represented by counsel in 72% of the new cases (425 of 591). In 28% of cases, the claimants represented themselves (or acted in *pro per*).

Chart 2



²⁴Exhibit B, Rule 11.

V. SELECTION OF THE NEUTRAL ARBITRATORS

One of the most important steps of the arbitration process occurs at the beginning: the selection of the neutral arbitrator. Subsection A first describes the selection process in general. The next four sub-sections discuss different aspects of the selection process in detail: 1) whether the parties selected the neutral arbitrator by joint selection or by striking and ranking the names on their List of Possible Arbitrators (LPA) (subsection B); 2) the cases in which the parties decided to postpone the selection of the neutral (subsection C); 3) the cases in which the parties disqualified a neutral arbitrator (subsection D); and 4) the amount of time it took the parties to select the neutral arbitrator (subsection E). Finally, the report examines cases in which parties have selected party arbitrators (subsection F).

A. How Neutral Arbitrators are Selected

The process for selecting the neutral arbitrator begins when the OIA starts to administer a case²⁵ and a claimant has either paid the \$150 arbitration filing fee or received a waiver of that fee. The OIA sends both parties in the case a LPA. The LPA contains 12 randomly computer generated names of neutral arbitrators from the appropriate geographical panel.

Along with the LPA, the OIA sends the parties information about the people named on the LPA. The parties receive a copy of each neutral arbitrator's application and fee schedule, and subsequent updates to the application, if any.²⁶

If a neutral arbitrator has served in any earlier, closed OIA case, the parties may also receive copies of any evaluations previous parties have submitted about the neutral, and any redacted awards or decisions the neutral arbitrator has written.

The parties have 20 days to respond to the LPA.²⁷ Parties can respond in one of two ways. First, both sides can jointly decide on the person they wish to be the neutral arbitrator. This person does not have to be named on the LPA, be in the OIA pool, or meet the OIA

²⁵For the OIA to administer a case, it must be mandatory or the claimant must have opted-in. The OIA can take no action in a non-mandatory case before a claimant has opted in except to return it to Kaiser to administer. See footnote 23.

²⁶Neutral arbitrators are required to update their applications every two years. If an arbitrator has not served on the panel for at least two years, he/she may not have any update.

²⁷A member of the OIA staff contacts the parties before their responses to the LPA are due to remind them of the deadline.

qualifications.²⁸ Provided the person agrees to follow the OIA *Rules*, the parties can jointly select anyone they want to serve as neutral arbitrator.

On the other hand, if the parties do not jointly select a neutral arbitrator, each side returns the LPA, striking up to four names and ranking the rest, with “1” as the top choice. When the OIA receives the LPAs, the OIA eliminates any names that have been stricken by either side and then totals the scores of the names that remain. The person with the best score²⁹ is asked to serve. This is called the “strike and rank” procedure.

A number of OIA administered cases close before a neutral arbitrator is selected. Forty-eight (48) cases either settled (20) or were withdrawn (28) without a neutral arbitrator in place.³⁰ Before a neutral has been selected, claimant can request a postponement of the LPA deadline under Rule 21 of up to 90 days. In addition, after the neutral arbitrator is selected, but before he or she begins to serve, California law allows either party to disqualify the neutral arbitrator.

B. Joint Selections vs. Strike and Rank Selections

Of the 509 neutral arbitrators selected, 150 were jointly selected by the parties (29%) and 358 (70%) were selected by the strike and rank procedure. One neutral arbitrator was selected by court order.³¹ Of the neutral arbitrators jointly selected by the parties, 117 (78%), were members of the OIA pool, though not necessarily on the LPA sent to the parties. In 33 cases (22%), the parties selected a neutral arbitrator who was not a member of the pool. See Chart 3. Four (4) neutral arbitrators who are not part of the OIA pool account for 25 of the joint selections.

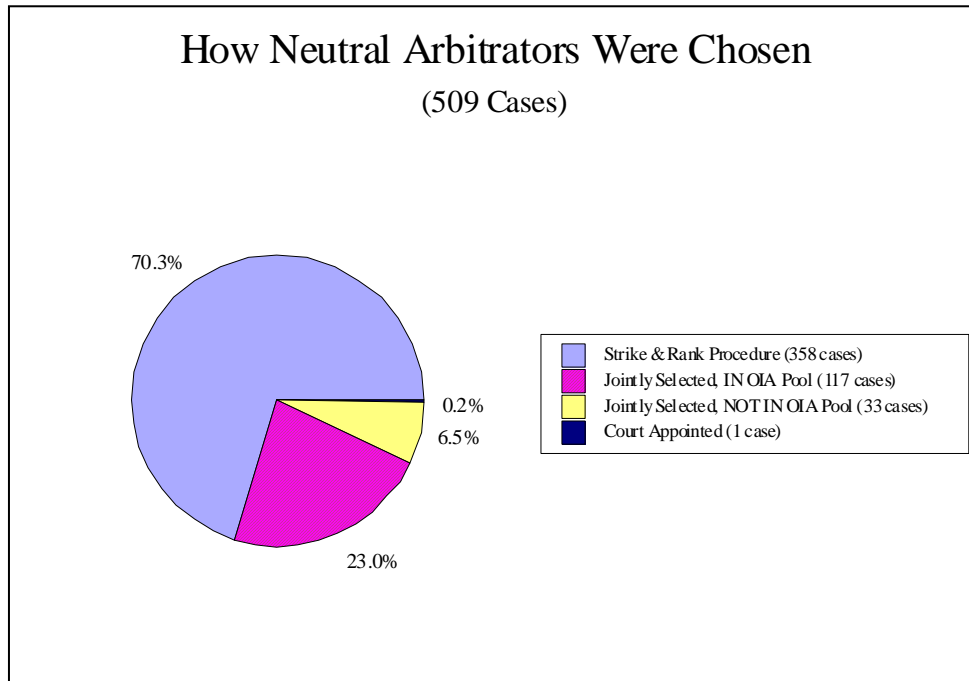
²⁸Neutral arbitrators who do not meet our qualifications – for example, they might have served as a party arbitrator in the past three years for either side in a Kaiser arbitration – may serve as jointly selected neutral arbitrators. There is, however, one exception: If, pursuant to California’s Ethics 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.

²⁹For example, a person who was ranked “1” by both sides – for a combined score of “2” – would have the best score.

³⁰These cases included both cases with attorneys and cases where the claimant was in *pro per*. The disposition varied however. For *pro per* cases, 5 settled and 16 were withdrawn. For represented cases, 15 settled and 12 were withdrawn.

³¹In rare cases when the parties cannot select a neutral arbitrator, generally because of disqualifications of neutral arbitrators, either party can petition the state court to do so. See footnote 35.

Chart 3



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

Under Rule 21, a claimant has a unilateral right to a 90 day postponement of the deadline to respond to the LPA. If a claimant has not requested one, the respondent may request such a postponement, but only if the claimant agrees in writing. The parties can request only one postponement in a case – they cannot, for example, get a 40 day postponement at one point and a 50 day postponement later. Many parties request a postponement of less than 90 days. In addition to Rule 21, Rule 28 allows the OIA, in cases where the neutral arbitrator has not been selected, to extend deadlines. The OIA has used this authority occasionally to extend the deadline to respond to the LPA. Generally, parties must use a 90 day postponement under Rule 21 before the OIA will extend the deadline under Rule 28. A Rule 28 extension is generally short – two weeks if the parties say the case is settled or withdrawn³² – though it may be longer if, for example, it is based on the claimant’s medical condition, or a party has gone to court for some reason.

Under Rule 21, claimants do not have to give a reason to obtain a 90 day postponement. For a Rule 28 extension, however, they must provide a reason. The reasons for a Rule 28 extension are often the same as claimants identify as the reasons they use Rule 21. In some cases, the parties are seeking to settle the case or to jointly select a neutral arbitrator. Some want a little

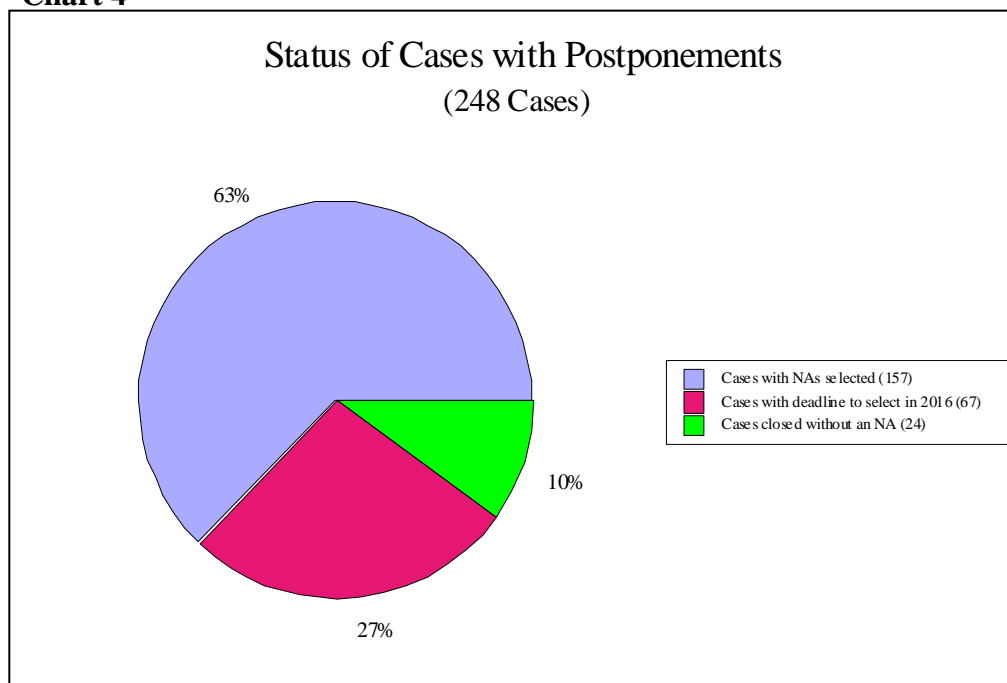
³²The extension allows the claimant to send in a written notice of settlement or withdrawal without a neutral arbitrator being selected, which reduces expenses generally.

more time to evaluate the case before incurring the expense of a neutral arbitrator. There are also some parties who request more time for health reasons.

There were 248 cases where the parties obtained either a Rule 21 postponement, a Rule 28 extension of the time to return their responses to the LPA, or both. The claimants made all of the requests for Rule 21 postponements. Requests for a Rule 28 extension were made in 18 cases. In some, the Rule 21 request was made in prior years. There was one case where a Rule 28 extension was given without a prior Rule 21 postponement.

Chart 4 shows what happened in those 248 cases. Sixty-three percent (63%), 157 cases, now have a neutral arbitrator in place. Twenty-four (24) closed before a neutral arbitrator was selected. For the remaining 67 cases, the deadline to select a neutral arbitrator is after December 31, 2016.

Chart 4



D. Status of Cases with Disqualifications

California law gives the parties in an arbitration the opportunity to disqualify neutral arbitrators at the start of a case.³³ Neutral arbitrators are required to make various disclosures within ten days of the date they are selected.³⁴ After they make these disclosures, the parties have 15 days to serve a disqualification of the neutral arbitrator. Additionally, if the neutral arbitrator fails to serve the disclosures, the parties have 15 days after the deadline to serve disclosures to disqualify the neutral arbitrator. Absent court action, there is no limit as to the number of times a party can 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.

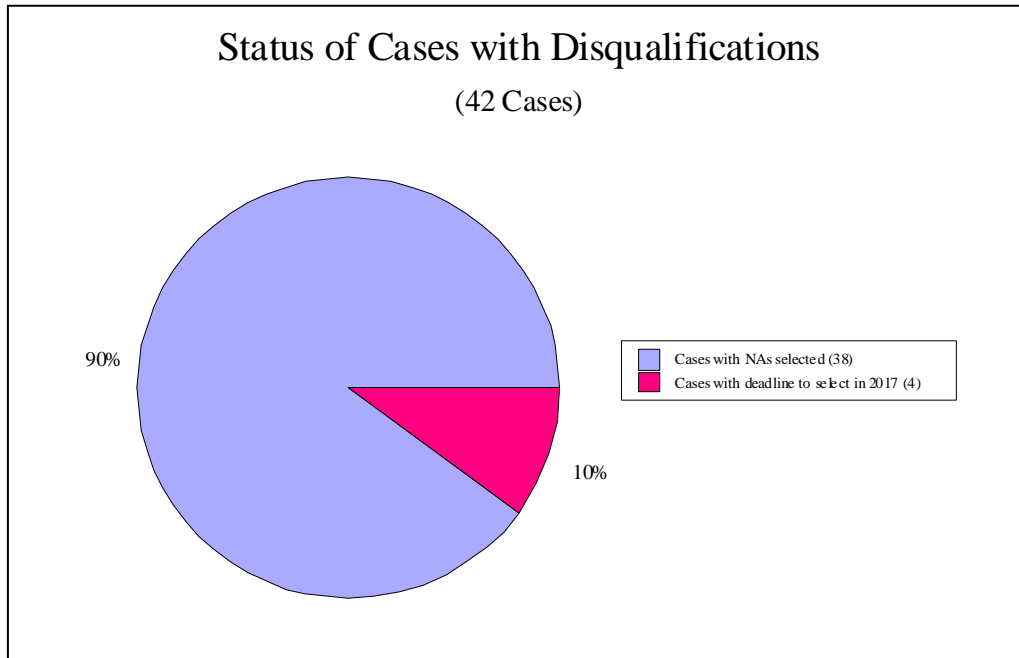
Neutral arbitrators were disqualified in 42 cases. Claimants disqualified 39 neutral arbitrators and Kaiser disqualified 21. Thirty-six (36) cases had a single disqualification. Two (2) cases had two (2) disqualifications, one (1) case had three (3), one (1) case had four (4), and two (2) cases had six (6) or more disqualifications.³⁵ Chart 5 shows what happened in those 42 cases. In 38 of the cases with a disqualification, a neutral arbitrator had been selected. In four (4) of the cases with a disqualification, the time for the neutral arbitrator selection had not expired by the end of the year.

³³California Code of Civil Procedure § 1281.91; see also Exhibit B, Rule 20.

³⁴California Code of Civil Procedure § 1281.9, especially California Code of Civil Procedure § 1281.9(b). In the OIA system, the ten days are counted from the date of the letter confirming service which the OIA sends to the neutral arbitrator, with copies to the parties, after the neutral arbitrator agrees to serve.

³⁵In cases with multiple disqualifications, one of the parties may petition the California Superior Court to select a neutral arbitrator. If the court grants the petition, a party is only permitted to disqualify one neutral arbitrator without cause; subsequent disqualifications must be based on cause. California Code of Civil Procedure §1281.91(2).

Chart 5

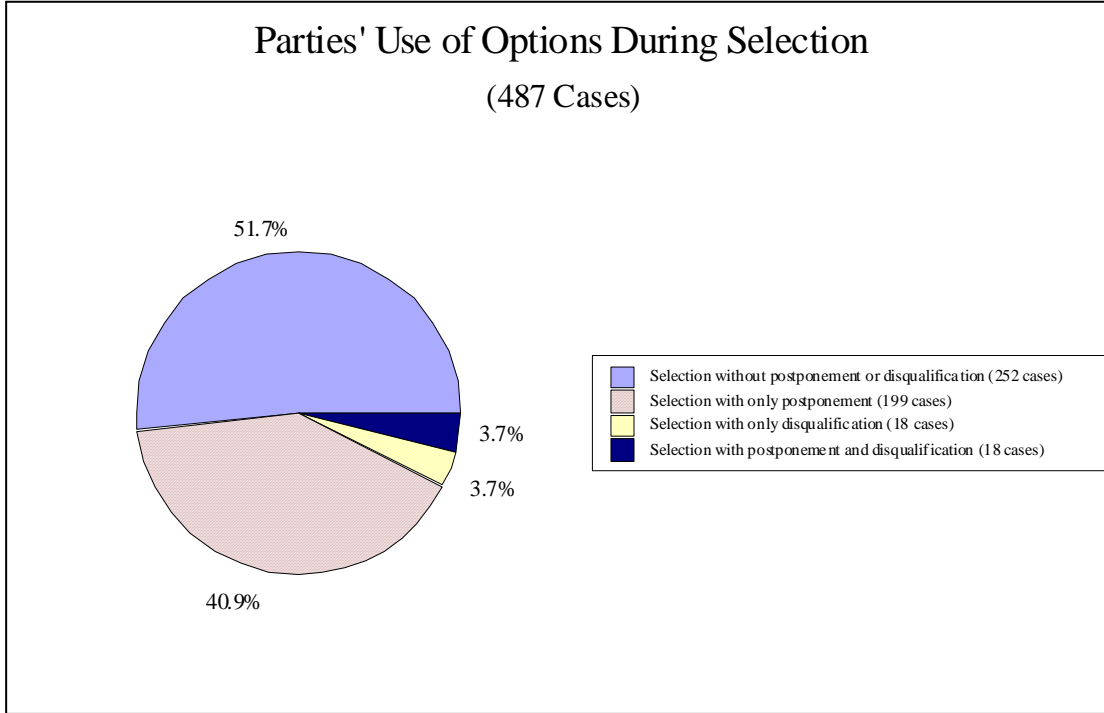


E. Length of Time to Select a Neutral Arbitrator

This section considers 487 cases in which a neutral arbitrator was selected³⁶ and divides the selections into four categories when discussing the length of time to select a neutral arbitrator. The first is those cases in which there was no delay in selecting the neutral arbitrator. The second category is those cases in which the deadline for responding to the LPA was extended, generally because the claimant requested a 90 day postponement before selecting a neutral arbitrator. The third category is those cases in which a neutral arbitrator was disqualified by a party and another neutral arbitrator was selected. The fourth category is those cases in which there was both a postponement of the LPA deadline and a disqualification of a neutral arbitrator. The last three categories include cases where the request for postponement and/or the disqualification was made in prior years, but the neutral arbitrator was selected this year. Finally, we give the overall average for the 487 cases. Chart 6 displays the four categories.

³⁶Twenty-two (22) cases in which a neutral arbitrator was selected are not included in this section. In these cases, a neutral arbitrator had previously been appointed, had begun acting as the neutral arbitrator, but had subsequently been removed as the neutral arbitrator. These include cases where a neutral arbitrator died, became seriously ill, was made a judge, or made disclosures in the middle of a case – because of some event occurring after the initial disclosure – and was disqualified. Because we count time from the first day that the case was administered, those cases are not included in these computations of length of time to select a neutral arbitrator.

Chart 6



1. Cases with No Delays

There were 252 cases where a neutral arbitrator was selected in which there was no delay. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is no delay is 33 days. The average number of days to select a neutral arbitrator in those cases is 24 days, the mode is 23 days, and the range is 2 – 39 days.³⁷ This category represents almost 52% of all neutral arbitrators selected.

2. Cases with Postponements

There were 199 cases where a neutral arbitrator was selected and the only delay was a 90 day postponement and/or an OIA extension of the deadline under Rule 28. Under the *Rules*, the maximum number of days to select a neutral arbitrator when there is a 90 day postponement is 123 days. The average number of days to select a neutral arbitrator in those cases is 110 days, the

³⁷In the case that took 39 days to select a neutral arbitrator, the parties had jointly selected a neutral arbitrator who declined the case. The OIA gave the parties the option to exercise a 90 day postponement to jointly select another neutral arbitrator but instead a neutral was selected from the LPA.

mode is 113 days, and the range is 25 – 235 days.³⁸ This category represents almost 41% of all cases which selected a neutral arbitrator.

3. Cases with Disqualifications

There were 18 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 is 96, if there is only one disqualification.³⁹ The average number of days to select a neutral arbitrator in the 18 cases is 64 days, there is no mode, and the range is 29 – 116 days.⁴⁰ Disqualification only cases represent almost 4% of all cases which selected a neutral arbitrator.

4. Cases with Postponements and Disqualifications

There were 18 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 is 158 days, the mode is 143, and the range is 132 – 240 days.⁴¹ These cases represent almost 4% 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 is 66 days. For purposes of comparison, the California Supreme Court stated in *Engalla vs. Permanente Medical Group*⁴² that the old Kaiser system averaged 674 days to select a neutral arbitrator over a period of 2 years in the 1980's. See Chart 7.

³⁸In the case that took 235 days to select a neutral arbitrator with just a postponement, the claimant's attorney first obtained a 90 day postponement and the parties then stipulated to an additional 60 day postponement under Rule 28 in order to jointly select a neutral arbitrator.

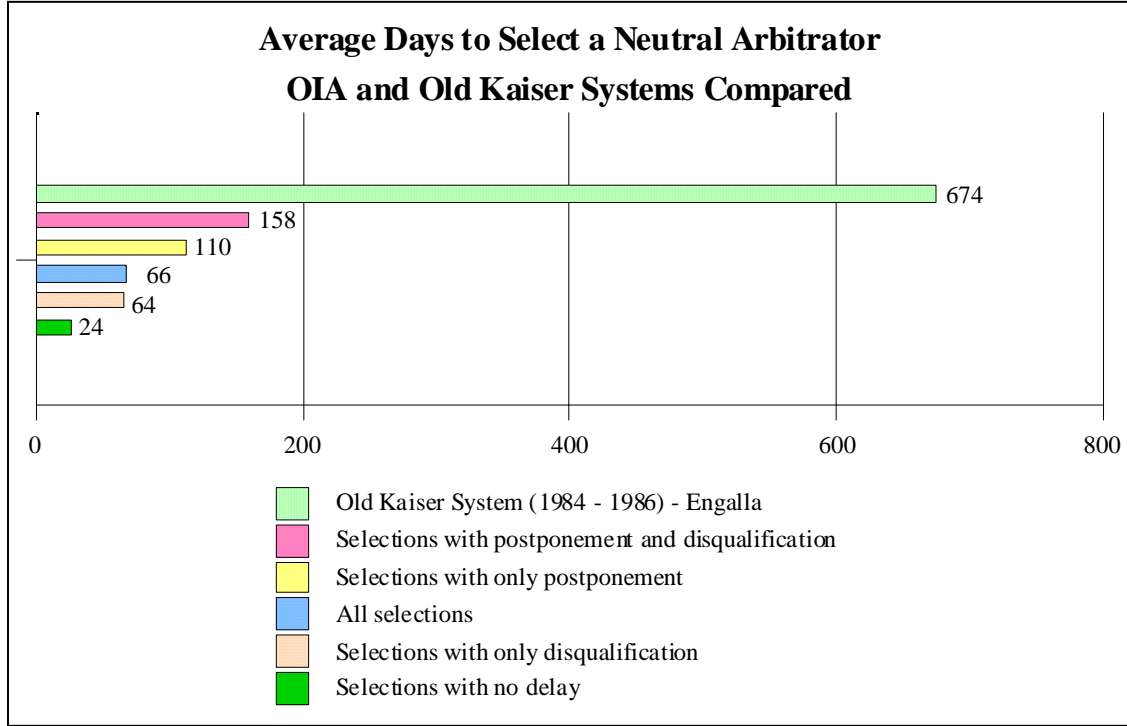
³⁹The 96 days is comprised of the 33 days to select the first neutral arbitrator; the 30 days for the statutory periods for disclosure, disqualification, and service under the California Code of Civil Procedure; and then 33 days to select the second neutral arbitrator. The amount of time increases if there is more than one disqualification.

⁴⁰In the case that took 116 days to select a neutral arbitrator, the attorneys disqualified 7 neutral arbitrators (3 by claimant's attorney and 4 by Kaiser's attorney) before jointly agreeing to a neutral arbitrator.

⁴¹In the case that took 240 days to select a neutral arbitrator, the *pro per* claimant obtained a 90 day postponement. The first selected neutral arbitrator declined the case. The *pro per* then disqualified the next 6 neutrals before jointly selecting a neutral arbitrator.

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

Chart 7



F. Cases With Party Arbitrators

In medical malpractice cases in which the claimed damages exceed \$200,000, a California statute gives parties a right to proceed with three arbitrators: one neutral arbitrator and two party arbitrators.⁴³ The parties may waive this right. The Blue Ribbon Panel (BRP) that gave rise to the OIA questioned whether the value added by party arbitrators justified their expense and the delay associated with two more participants in the arbitration process. The BRP therefore suggested that the system create incentives for cases to proceed with one neutral arbitrator.

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

Few party arbitrators are used in the OIA system. One (1) of the 52 cases that went to hearing was decided with party arbitrators. The case closed in 472 days with an award for Kaiser.

Of the cases that remained open at the end of the year, party arbitrators had been designated in six (6) cases by both parties.

⁴³California Health & Safety Code §1373.19.

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. As explained below, neutral arbitrators who fail to comply with deadlines may be suspended – i.e., the OIA removes the neutral arbitrators’ names from the OIA pool – until they take the necessary action. Thus, neutrals are not listed on any LPA when they are suspended and cannot be jointly selected by the parties.

First, through its software, the OIA tracks whether the key events set out in the *Rules* – service of the arbitrator’s disclosure statement, the arbitration management conference, the mandatory settlement meeting, and the hearing – occur on time. If arbitrators fail to notify 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 some cases, the OIA contacts neutral arbitrators a second time, asking for confirmation. The second notice warns arbitrators that, if they do not provide confirmation that the event took place, the OIA will suspend them until confirmation is received.

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

A. Neutral Arbitrator’s Disclosure Statement

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

B. Arbitration Management Conference

The *Rules* require the neutral arbitrator to hold an Arbitration Management Conference (AMC) within 60 days of his or her selection.⁴⁴ Neutrals are also required to return an AMC form to the OIA within five days of the conference. The schedule set forth on the form establishes the deadlines for the rest of the case. It also allows the OIA to see that the case has been scheduled to

⁴⁴Exhibit B, Rule 25.

finish within the time allowed by the *Rules*, usually 18 months. Receipt of the form is therefore important. No neutral was suspended for failing to return an 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 fill out and return, stating that the meeting took place and its result. The OIA received notice from the parties in 313 cases that they held a MSM. Fifty (50) of them reported that the case had settled at the MSM. Five (5) of these cases involved a *pro per* claimant. In 19 cases, neither party returned the MSM form to the OIA by the end of the year.⁴⁵

D. Hearing and Award

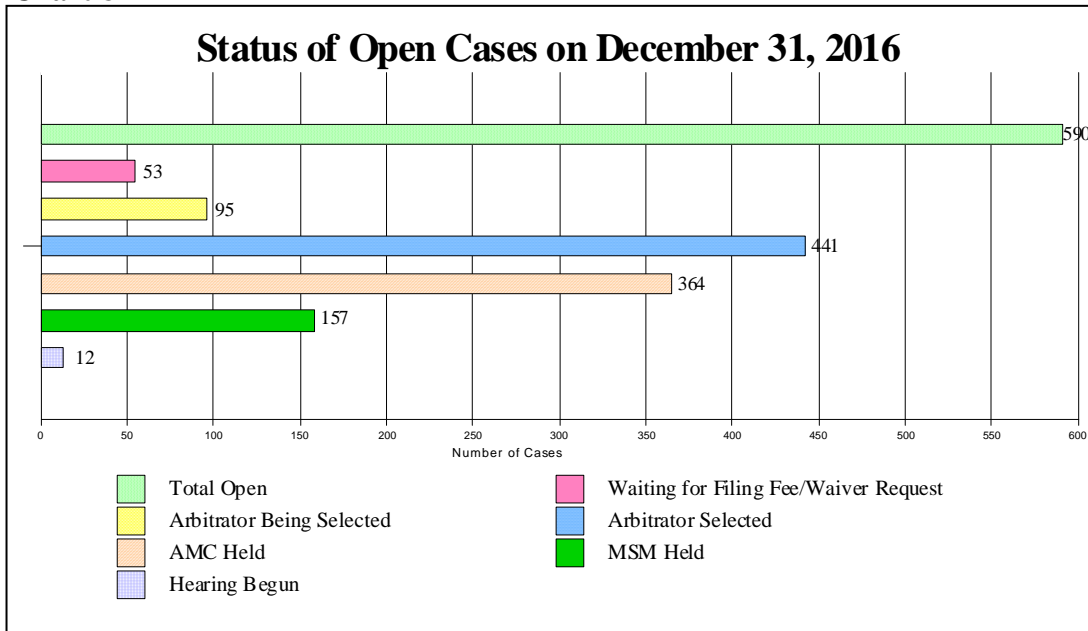
The neutral arbitrator is responsible for ensuring that the hearing occurs and an award is served within the time limits set out in the *Rules*. One (1) neutral was suspended for failing to timely serve the decision, and one was suspended for failing to extend the deadline to serve the award. Both neutrals complied and were returned to the pool.

E. Status of Open Cases Administered by the OIA on December 31, 2016

There were 590 open cases in the OIA system. In 53 of these cases, the LPA had not been sent because the filing fee had not yet been paid or waived. In 95 cases, the parties were in the process of selecting a neutral arbitrator. In 441 cases, a neutral arbitrator had been selected. Of these, the AMC had been held in 364. In 157 cases, the parties had held the MSM. In twelve (12) cases, 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.

⁴⁵While the OIA sends letters to the parties, 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

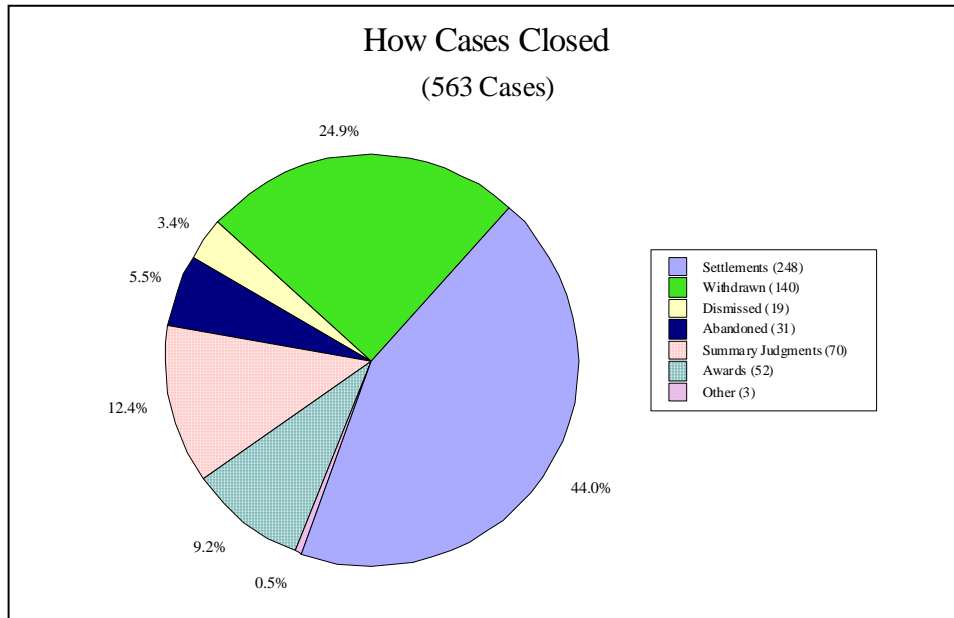


VII. THE CASES THAT CLOSED

Cases close either because of (1) action by the parties (cases that are settled, withdrawn, or abandoned for non-payment of the filing fee) or (2) action of the neutral arbitrator (cases are dismissed, summary judgment is granted, or cases are decided after a hearing). This discussion looks at each of these methods, how many closed, and how long it took. The discussion of cases that closed after a hearing also includes the results: who won and who lost. Chart 9 displays how the 563 cases closed.⁴⁶

⁴⁶There were 3 cases that closed because the case was consolidated with another or by judgment on the pleadings. As they represent less than one percent of the total of all closed cases, they are not further discussed in this section.

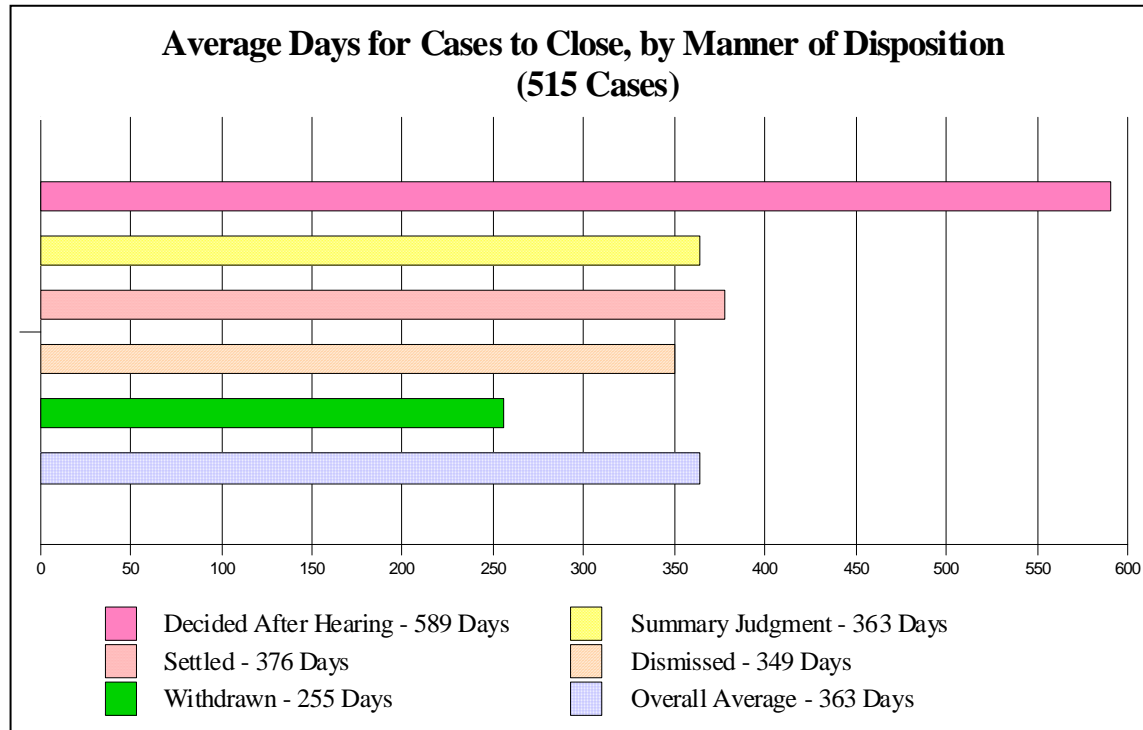
Chart 9



As shown on Chart 10, cases closed on average in 363 days, in 12 months.⁴⁷ The mode is 346 days. The range is 1 – 2,016 days. No case closed after its deadline, i.e., none was “late.”

⁴⁷Chart 10 refers to 515 closed cases, not 563, because the OIA does not begin measuring the time until the fee is either paid or waived. It excludes 31 abandoned cases, 16 cases that were withdrawn or settled before the fee was paid, and 1 case that was consolidated.

Chart 10

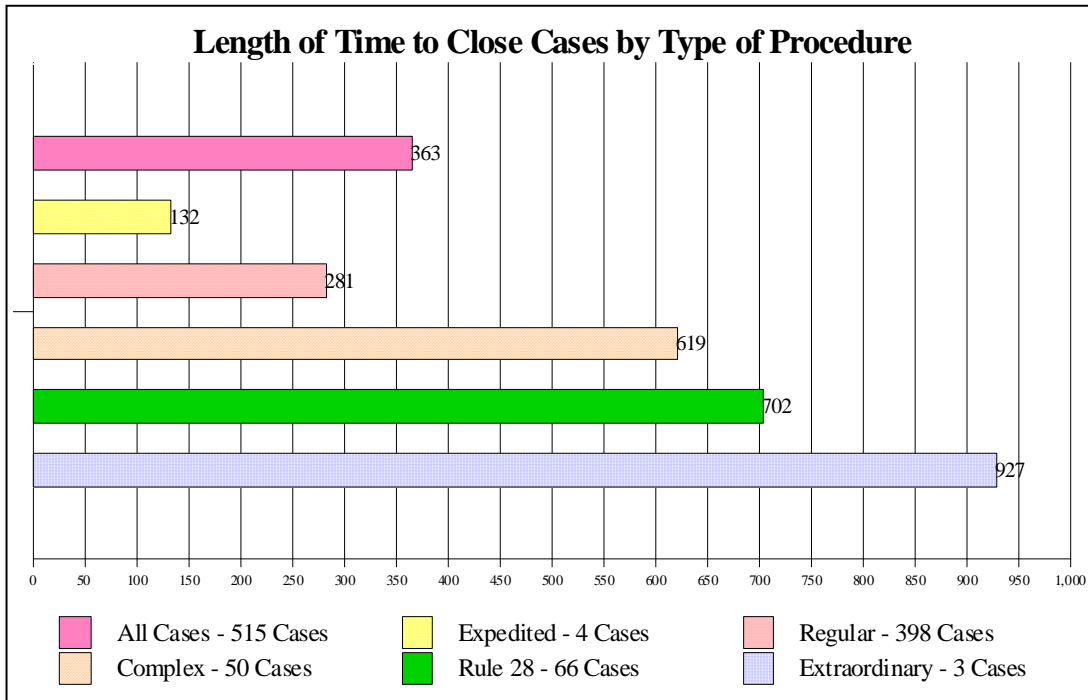


The second half of this section discusses cases that employed special *Rules* to either have the cases decided faster or slower than most. This begins on page 29. Under the *Rules*, cases must ordinarily be completed within 18 months. Eighty-five percent (85%) of the cases are closed within this period, and 56% close in a year or less. If a claimant needs a case decided in less time, the case can be expedited. If the case needs more than 18 months, the parties can classify the case as complex or extraordinary, or the neutral arbitrator can order the deadline to be extended for good cause under Rule 28.⁴⁸

Chart 11 shows the average time to close by type of procedure.

⁴⁸A 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. Six (6) cases that closed were both complex and the subject of a Rule 28 extension.

Chart 11



A. How Cases Closed

1. Settlements – 44% of Closures

Settlements occurred in 248 of the 563 cases. This represents 44% of the cases closed during the year. The average time to settle is 376 days, just over 12 months. The mode is 244, and the range is 1 – 2,016 days.⁴⁹ In 16 settled cases (6%), the claimant was in *pro per*. Fifty (50) cases closed at the mandatory settlement meeting.

⁴⁹In the case that took 2,016 days to settle, the claimant’s attorney obtained a 90 day postponement. The parties jointly selected the neutral arbitrator. The hearing was continued 5 times before the case settled.

2. Withdrawn Cases – 25% of Closures

The OIA received notice that 140 claimants had withdrawn their claims. In 60 (43%) of these cases, the claimant was in *pro per*. Withdrawals take place for many reasons. We categorize a case as withdrawn when a claimant writes us a letter withdrawing the claim, or when we receive a dismissal without prejudice from the parties. When we receive a “dismissal with prejudice,” we call the parties to ask whether the case was “withdrawn,” meaning voluntarily dismissed, or “settled” and enter the closure accordingly. Twenty-five percent (25%) of closed cases were withdrawn.

The average time for a party to withdraw a claim is 255 days. The mode is 100 days and the range is 7– 761 days.⁵⁰

3. Abandoned Cases – 6% of Closures

Claimants failed to either pay the filing fee or obtain a waiver in 31 cases.⁵¹ These cases were deemed abandoned for non-payment. In 25 of the 31 cases, the claimants were in *pro per*. Before claimants are excluded from this system for not paying the filing fee, they receive three notices from the OIA and are offered the opportunity to apply for fee waivers.

4. Dismissed Cases – 3% of Closures

Neutral arbitrators dismissed 19 cases. Neutral arbitrators dismiss cases if the claimant fails to respond to hearing notices or otherwise to conform to the *Rules* or applicable statutes. Fourteen (14) of these closed cases involved *pro pers*.

5. Summary Judgment – 12% of Closures

Summary judgment was granted to the respondent in 70 cases. In 52 of these cases (74%), the claimant was in *pro per*. Failing to have an expert witness (18 cases), failing to file an opposition (22 cases), exceeding the statute of limitations (7 cases), and no triable issue of fact (21 cases) were the most common reasons given by the neutrals in their written decisions granting summary judgment.

⁵⁰In the case that was withdrawn after 761 days, the *pro per* claimant obtained a 90 day postponement. The parties disqualified 6 neutrals (4 by the *pro per* claimant and 2 by Kaiser’s attorney). The Kaiser attorney then obtained a Rule 28 postponement in order to petition the court to appoint a neutral. Pursuant to the court order, the parties jointly selected a neutral arbitrator based on the OIA names they subsequently provided the court. The matter was designated complex, and 1 year later the *pro per* withdrew the case on the second day of a 6 day scheduled arbitration hearing.

⁵¹The arbitration filing fee is \$150 regardless of the number of claimants or claims. This is significantly lower than court filing fees except for small claims court. If a Kaiser member’s claim is within the small claims court’s jurisdiction, the claim is not subject to arbitration. Both the OIA and Kaiser inform these claimants of their right to go to small claims court.

The average number of days to closure of a case by summary judgment is 363 days. The mode is 182. The range is 121 – 829 days.⁵²

6. Cases Decided After Hearing – 9% of Closures

a. Who Won

Nine percent (9%) of the cases closed (52 of 563) proceeded through a full arbitration hearing to an award. Judgment was for Kaiser in 33 of these cases, or 63%. In three (3) cases, the claimant was in *pro per*. The claimant prevailed in 19 of them, or 37%. None was a *pro per* claimant.

b. How Much Claimants Won

Nineteen (19) cases resulted in awards to claimants. The range of relief is \$100 - \$8,812,879. The average amount of an award is \$859,489. There is no mode. A list of the awards made is attached as Exhibit E.

c. How Long It Took

The 52 cases that proceeded to a hearing, on average, closed in 589 days. The mode is 483 days. The range is 204 – 1,287 days.⁵³ Cases that go to a hearing are the most likely to employ the special procedures discussed in Section VII.B to give the parties extra time. If only regular cases are considered, the average to close is 449 days.

B. Cases Using Special Procedures

1. Expedited Procedures

The *Rules* include provisions for cases which need to be expedited, that is, resolved in less time than 18 months. Grounds for expediting a case include a claimant's illness or condition

⁵²In the case that closed in 829 days after a motion for summary judgment, the *pro per* claimant obtained a 90 day postponement. The neutral arbitrator stayed the matter due to the medical condition of the claimant but recused himself one year later after discovering a conflict. The OIA stayed the neutral arbitrator selection due to the claimant's medical needs. The claimant disqualified the next neutral. After an additional year, a motion for summary judgment was heard and granted.

⁵³In the case that took 1,287 days to close after a hearing, the claimant's attorney obtained a 90 day postponement. After 7 months, the neutral arbitrator recused himself because he knew a witness. The new neutral arbitrator continued the arbitration hearing 4 times. The hearing eventually went forward and resulted in a \$346,369 award for claimant.

raising substantial medical doubt of survival, a claimant's need for a drug or medical procedure, or other good cause.⁵⁴

Claimants in ten (10) cases requested that their cases be resolved in less than 18 months. Seven (7) of the requests were made to the OIA. Five (5) requests were granted and two (2) denied. Kaiser objected to two (2) of the requests; one (1) was granted and the other was denied. In three (3) other cases, requests were made to neutral arbitrators. Two (2) requests were granted and one (1) request was pending at the end of the year.

The OIA had two (2) open expedited cases pending at the beginning of the year. Four (4) expedited cases closed. Two (2) settled, one (1) was withdrawn, and the other was closed by summary judgment. The average for these cases to close is 132 days, and the range is from 92 to 209 days. Five (5) expedited cases remained open at the end of the year.

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

2. Complex Procedures

The *Rules* also include provisions for cases that need more time. In complex cases, the parties believe that they need 24 – 30 months.⁵⁵ The designation does not have to occur at the beginning of a case. It may be made as the case proceeds and the parties develop a better sense of what evidence they need. Fifty-four (54) cases were designated as complex. Fifty (50) complex cases closed. The average length of time for complex matters to close is 619 days, about 20 months. The mode is 570. The range is from 244 to 1,596 days (about 53 months).⁵⁶

⁵⁴Exhibit B, Rules 33 – 36.

⁵⁵Exhibit B, Rule 24(b).

⁵⁶The complex case that took 1,596 days to close was designated complex because claimant's attorney filed a motion in state court to be relieved as counsel of record which was set to be heard 5 months later, after receiving a 90 day postponement and a Rule 28 delay until the court decided that motion. The claimant's attorney remained on the case and disqualified the first arbitrator. Almost 4 years later, claimant's attorney withdrew. The case settled 6 months after the substitution of claimant's new counsel.

3. Extraordinary Procedures

Extraordinary cases need more than 30 months for resolution.⁵⁷ Eight (8) cases were designated extraordinary and three (3) cases closed. One (1) closed after a hearing for claimant in 1,073 days, and two (2) cases settled in 1,065 days, and 644 days respectively.⁵⁸

4. Rule 28 Extensions of Time to Close Cases

Rule 28 allows neutral arbitrators to extend the deadline for a case to close past the eighteen month deadline if there are “extraordinary circumstances” that warrant it. Neutral arbitrators made Rule 28 determinations of “extraordinary circumstances” in 79 cases. Sixty-six (66) cases with a Rule 28 designation closed. The average time to close cases with a Rule 28 extension is 702 days. The mode is 533 days. The range is 313 – 2,016 days.⁵⁹

According to the neutral arbitrator orders granting the extensions, the claimant’s side requested four (4) and the parties stipulated seven (7) times. An extension was ordered once over the respondents’ objections. Twelve (12) orders noted that there was no objection. Sixty-one (61) orders recited there was good cause or extraordinary circumstances. Where neutral arbitrators gave specific reasons, the most common reasons were problems with medical experts.

VIII. THE COST OF ARBITRATIONS IN THE OIA SYSTEM

A. What Fees Exist in OIA Arbitrations

Whether in court or in private arbitration, people face certain fees. In an OIA arbitration, in addition to attorney’s fees and fees for expert witnesses, a claimant must pay a \$150 arbitration filing fee and half of the neutral arbitrator’s fees. State law provides that neutral arbitrator’s fees be divided equally between the claimant and the respondent.⁶⁰ In addition, state law provides that if the claim is for more than \$200,000, the matter will be heard by an arbitration panel, which consists of three arbitrators – a single neutral arbitrator and two party arbitrators, one selected by each side. Parties may waive their right to party arbitrators.

⁵⁷Exhibit B, Rule 24(c).

⁵⁸The extraordinary case that took 1,073 days to close was originally designated complex because the claimant’s attorney had a medical family emergency. The hearing was continued 3 times before the parties designated the matter extraordinary. The hearing went forward 4 months later and resulted in an \$8,812,879 award for the claimant.

⁵⁹The case with a Rule 28 extension that took 2,016 days to close is discussed in footnote 49 concerning the longest case to settle.

⁶⁰California Code of Civil Procedure § 1284.2.

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. These provisions are discussed below. When claimants ask for waiver information, they receive information about the types of waiver and the waiver forms. The claimants can thus choose which waiver(s) they want to submit.

B. Mechanisms Claimants Have to Avoid These Fees

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

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

This waiver is available to individuals whose gross monthly income is less than three times the national poverty guidelines. The OIA informs claimants of the existence of this waiver in the first letter we send to them. They have 75 days to submit the form, from the date the OIA receives their demands for arbitration.⁶¹ According to statute and Rule 12, this completed form is confidential and only the claimant and claimant's attorney know if a request for the waiver was made or granted. If claimants' income meets the guidelines, the \$150 arbitration fee is waived.

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

This type of fee waiver, which is required by state law, depends upon the claimants' ability to afford the cost of the arbitration filing fee and the neutral arbitrators' fees. Claimants must disclose certain information about their income and expenses. The fee waiver application is based on the form used by the state court for waiver of the filing fee to allow a plaintiff to proceed *in forma pauperis*. According to the *Rules*, the form is served on both the OIA and Kaiser. Kaiser has the opportunity to object before the OIA decides whether to grant this waiver.⁶² If this waiver is granted, a claimant does not have to pay either the neutral arbitrator's fees or the \$150 arbitration filing fee. A claimant who obtains this waiver is allowed to have a party arbitrator, but must pay for the party arbitrator.

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

The *Rules* also contain provisions to shift to Kaiser the claimants' portion of the neutral arbitrators' fees and expenses.⁶³ For claims under \$200,000, the claimant must agree in writing not to object later that the arbitration was unfair because Kaiser paid the fees and expenses of the

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

⁶²See Exhibit B, Rule 13.

⁶³See Exhibit B, Rules 14 and 15.

neutral arbitrator. For claims over \$200,000, the claimant must also agree not to use a party arbitrator.⁶⁴ No financial information is required. The waiver forms are served on Kaiser, the neutral arbitrator, and the OIA.

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

1. The \$150 Arbitration Filing Fee

The OIA received 64 forms to waive the \$150 filing fee. The OIA granted 59 and denied 5.⁶⁵ Twenty-two (22) of these claimants received both a waiver of the filing fee and the waiver of the neutral arbitrators' fees and expenses. By obtaining the waiver of the filing fee, the neutral arbitrator selection process can begin immediately, without waiting for the second waiver to be granted.

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

The OIA received 50 completed fee waiver applications. The OIA granted 43 waivers of the arbitration filing fee and neutral arbitrators' fees, and denied 3.⁶⁶

⁶⁴If the claimant waives his/her right to a party arbitrator but Kaiser wants to proceed with party arbitrators, Kaiser will still pay all of the neutral arbitrator's fees and expenses.

⁶⁵Three (3) had the other fee waiver granted. One (1) submitted a second, completed form and it was granted while the other withdrew the case shortly after submitting the fee waiver.

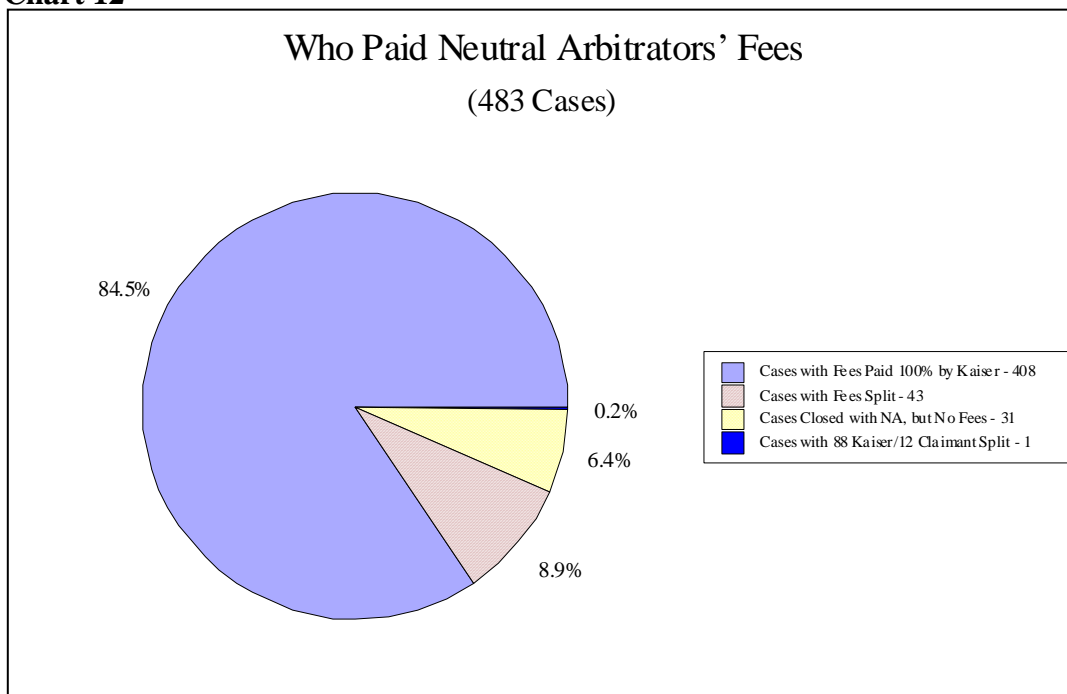
⁶⁶One claimant qualified by submitting the other waivers described in both the prior and next sections. The other claimant submitted two incomplete request forms. Kaiser objected to both, and both requests were denied. The claimant paid the filing fee and submitted the waivers described in the next section for waiver of the neutral arbitrator's fee.

3. The Neutral Arbitrators' Fees and Expenses

State law requires arbitration providers such as the OIA to disclose neutral arbitrators' fees and fee allocations for closed cases.⁶⁷ We received fee information from neutral arbitrators for 483 cases that closed.

In these 483 cases, fees were allocated 100% to Kaiser in 408 (84%) cases. In 31 (6%) cases, no fees were charged. Fees were split 50/50 in 43 (9%) cases. One case had a 88 (Kaiser)/12 (claimant) split. See Chart 12. In 452 cases where the neutral arbitrators charged fees, Kaiser paid all of the neutral arbitrators' fees in 90% of the cases.

Chart 12



D. The Fees Charged by Neutral Arbitrators

Members of the OIA pool set their own fees. They are allowed to raise their fees once a year, but the increases do not affect cases on which they have begun to serve. The fees range from \$150/hour to \$880/hour. The average hourly fee is \$471. Some neutral arbitrators also offer a daily fee. This ranges from \$900/day to \$8,000/day. The average daily fee is \$3,893.

⁶⁷California Code of Civil Procedure §1281.96.

Looking at the 452 cases in which neutral arbitrators charged fees, the average neutral arbitrator fee is \$7,469. The range is \$180 - \$132,167. This excludes the 31 cases in which there are no fees. The average for all cases, including those with no fees, is \$6,990.

The arbitrators' fees described in the prior paragraph include many cases where the neutral arbitrator performed relatively little work. If only the cases where the neutral arbitrator wrote an award are considered, the average neutral arbitrator fee is \$29,944. The range is \$5,760 – \$132,167.

IX. ANALYSIS OF LIEN CASES

This section applies only to the lien cases. In lien cases, unlike the other demands for arbitration, Kaiser makes the demand against a member to recoup the costs of medical care it provided where Kaiser asserts the member has recovered something from a third party, such as in a car accident. Kaiser submitted 20 demands for arbitration based on liens. Geographically, 12 of them came from Northern California, 6 from Southern California, and 2 from San Diego.

A. Demands for Arbitration Submitted by Kaiser to the OIA

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

Under the *Rules*, Kaiser must submit a demand for arbitration to the OIA within 10 days of serving the demand on the member. The average length of time that Kaiser took to submit demands to the OIA is 41 days. The mode is 8. The range is 0 – 117 days. Sixteen (16) of the 20 cases were late. The average for “late” cases is 50 days, there is no mode, and the range is 12 - 117. It takes Kaiser much longer to submit these demands than the demands it receives from members.

2. Members With and Without Attorneys

Members were represented by counsel in 45% of the new lien cases the (9 out of 20). In 55% of cases, the members represented themselves.

B. Selection of the Neutral Arbitrators

Neutral arbitrators were selected in 20 cases. For an explanation of the selection process, please see Section V.

1. Joint Selections vs. Strike and Rank Selections

No neutral arbitrator was selected by the parties jointly. All neutral arbitrators were selected by strike and rank.

2. Cases with Postponements of Time to Select Neutral Arbitrators

There were five (5) cases where the member obtained a Rule 21 postponement of the time to respond to the LPA.

3. Length of Time to Select a Neutral Arbitrator

This section sets out the length of time to select a neutral arbitrator based upon how the neutral arbitrators were selected. The first category reports cases with no delay in selecting the neutral arbitrator. The second reports cases with postponements. The third section reports cases with disqualifications. Finally, we give the overall average number of days to select a neutral arbitrator for the cases.

a. Cases with No Delays

There were 14 cases where a neutral arbitrator was selected that had 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 is 26, and the range is 22 – 33. This category represents 70% of all selections.

b. Cases with Postponements

In five (5) cases where a neutral arbitrator was selected with a Rule 21 postponement, it took an average of 115 days. The mode is 116 days. The range is 111 – 117 days.

c. Cases with Disqualifications

In the one (1) case where a neutral arbitrator was selected and the only delay was that a neutral arbitrator was disqualified, it took 50 days.

d. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases is 49 days.

5. Cases With Party Arbitrators

No lien case has ever had party arbitrators.

C. Maintaining the Case Timetable

1. Suspensions

No neutral arbitrator was suspended in a lien case.

2. Mandatory Settlement Meeting

The OIA received four (4) notices from the parties that they held an MSM. None reported settlements.

3. Status of Open Lien Cases Administered by the OIA on December 31, 2016

There were 12 open lien cases at the end of the year. One (1) is still in the process of selecting a neutral arbitrator. Eleven (11) have selected a neutral arbitrator. An Arbitration Management Conference has been held in eight (8).

D. The Cases That Closed

Twenty-one (21) lien cases closed. Cases close either because of (1) action by the parties (cases that are settled, withdrawn, or abandoned), or (2) action of the neutral arbitrator (cases are decided after a hearing). This discussion looks at each of these methods, how many closed, and how long it took.

Cases closed on average in 179 days (about 6 months). The range is 7– 509 days. No case closed late.

1. How Cases Closed

a. Settlements – 57% of Closures

Twelve (12) of the 21 cases settled. The member was in *pro per* in five (5) cases. The cases closed in an average of 195 days. The range is 24 – 509 days.

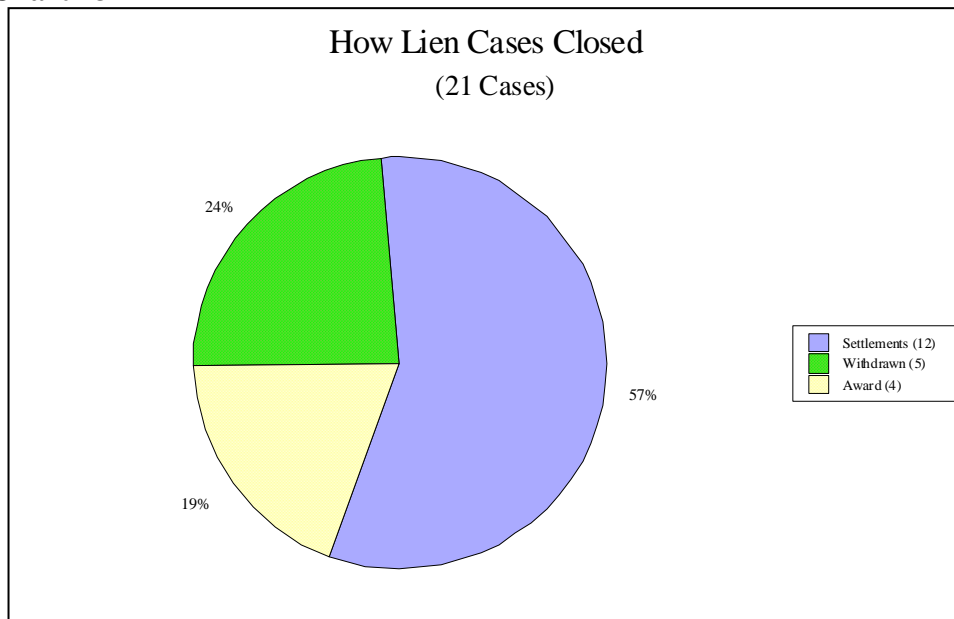
b. Withdrawn Cases – 24% of Closures

The OIA received notice that Kaiser withdrew five (5) claims. The member was in *pro per* in three (3) of them. Kaiser withdrew the cases on average in 97 days.

c. Cases that Closed after Hearing – 19% of Closures

Four (4) cases proceeded through a full arbitration to an award. All the awards were in favor of Kaiser. The awards average \$39,730 with a range of \$10,000 to \$100,000.⁶⁸ The member was in *pro per* in three (3) of the cases. The cases closed in an average of 211 days with a range of 125 – 278 days.

Chart 13



2. Cases Using Special Procedures

For a discussion of expedited, complex, and extraordinary procedures or Rule 28 extensions, see Section VII.B. No lien case has ever been designated expedited or extraordinary. No case was designated complex and no neutral arbitrator used Rule 28 to extend the time for a case to close.

E. The Cost of Lien Arbitrations in the OIA System

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

We have fee information in 15 cases. In five (5) cases, there was no fee. In the cases with fees, they were allocated 100% to Kaiser in nine (9) cases and split 50/50 in one (1).

⁶⁸A list of the awards made in 2016 is attached as Exhibit E.

2. The Fees Charged by Neutral Arbitrators

In the 10 cases in which neutral arbitrators charged fees, the average is \$2,556. The range is \$400 – \$6,323.

X. EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM

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

A. The Parties Evaluate the Neutral Arbitrators

Some people told the OIA that it sent out neutral arbitrator evaluations in too many cases in which the neutral arbitrator had little contact other than the AMC. The argument was that information in such cases was not useful to appraise the neutral arbitrator. Therefore, in 2013, the OIA began sending neutral arbitrator evaluations to counsel for the parties or *pro per* claimants only in cases in which the neutral arbitrator made a decision that ended the case.

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

The OIA sent 286 evaluations and received 104 responses in return, or 36%.⁶⁹ Thirty-six (36) identified themselves as claimants (7) or claimants' counsel (29), and 66 identified themselves as respondents' counsel. Two (2) did not specify a side.⁷⁰

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

⁶⁹The response rate has climbed from 28% in 2005. The OIA had hoped that the response rate would increase if the evaluations were sent out more selectively.

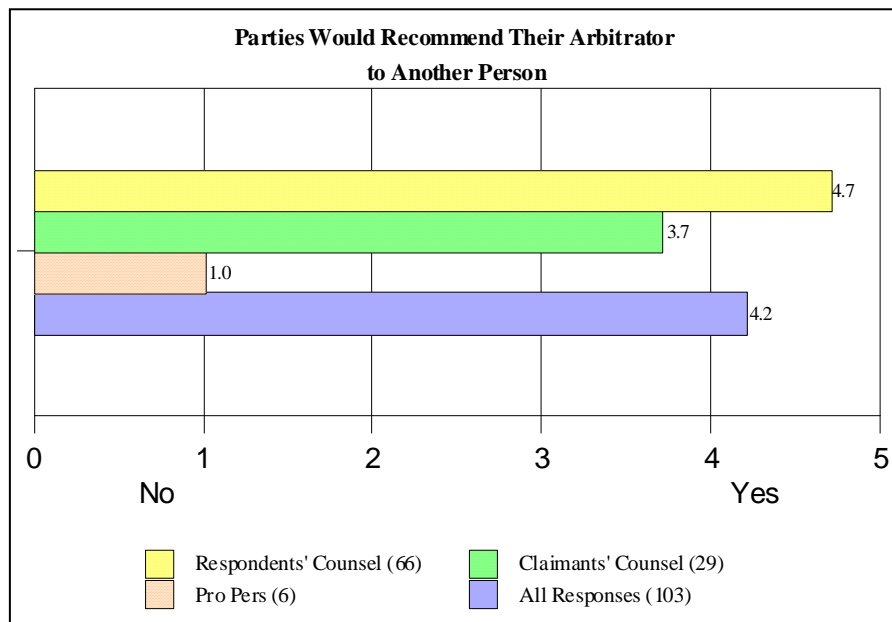
⁷⁰These responses are included only in the overall averages.

Table 5 - Parties' Evaluations of Neutral Arbitrators

Question	Claimants' Counsel	Pro per	Respondents' Counsel	Not Specified	Total
Impartial and treated parties fairly	4.1	1.0	4.8	2.5	4.3
Treated parties with respect	4.6	1.9	4.9	3.0	4.6
Explained procedures and decisions clearly	4.3	1.6	4.9	2.0	4.4
Understood applicable law	4.2	1.6	5.0	2.5	4.5
Understood facts of the case	4.3	1.3	4.9	2.5	4.4
Fees reasonable for work performed	4.5	1.0	4.7	1.0	4.4
Would recommend this neutral	3.7	1.0	4.7	2.0	4.2

As shown in the chart below, the average on all responses when asked whether they would recommend this neutral to another person with a similar case is 4.2.

Chart 14



B. The Neutral Arbitrators Evaluate the OIA System

Under Rule 48, when cases close, the neutral arbitrators complete questionnaires about their experiences with the *Rules* and with the overall system. The information is solicited to evaluate and improve the system. As with the evaluations sent to the parties to evaluate the neutral arbitrators, in 2013 the OIA began sending these forms to neutral arbitrators only in cases where the neutral arbitrator closed the case. The reasoning is similar: if the neutral arbitrator has not done much other than hold an AMC, the neutral arbitrator may not have much experience upon which to judge the system. The OIA sent questionnaires in 143 closed cases and received 136 responses. The results continue to show a high degree of approval of, and satisfaction with, the *Rules* and the OIA.

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

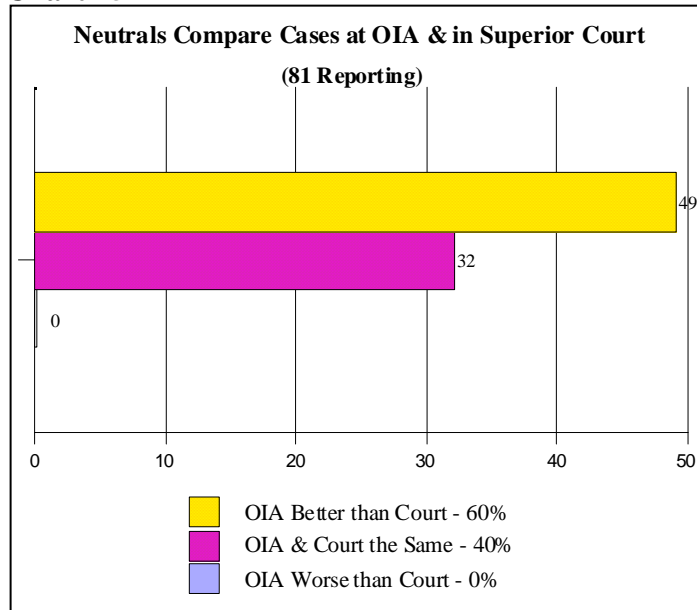
The questionnaires also includes two questions that ask arbitrators to check off features of the system which worked well or poorly in the specific case. The vast majority of those who responded were positive.

Table 6 - Neutral Arbitrators' Opinions Regarding OIA System

Feature of OIA System	Works Well	Needs Improvement
Manner of neutral arbitrator's appointment	96	1
Early management conference	89	2
Availability of expedited proceedings	31	1
Award within 15 business days of hearing closure	51	11
Claimants' ability to have Kaiser pay neutral arbitrator	88	3
System's rules overall	92	3
Hearing within 18 months	50	1
Availability of complex/extraordinary proceedings	21	2

Finally, the questionnaires ask the neutrals whether they would rank the OIA experience as better or worse than or about the same as a similar case tried in court. Eighty-one (81) neutral arbitrators made the comparison. Forty-nine (49), or 60%, said the OIA experience was better. Thirty-two (32), or 40%, said it was about the same. None said the OIA experience was worse.

Chart 15



Most neutral arbitrators generally praised the system, OIA, or *Rules*. Many, however, mentioned difficulties with *pro pers*, and their inability to follow procedures. Several neutrals asked for more time for awards, and a few commented that the notices required by the Ethics Standards are cumbersome. Some offered suggestions for rule changes, one specifically became a suggestion by the OIA to the AOB which will be discussed next year.

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 and the ease of obtaining medical records. The form is similar to, but shorter than, the form sent to the neutral arbitrators.

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

The OIA sent 996 evaluations and received 234 responses (23%).⁷¹ Eighty-nine (89) identified themselves as either claimants (21) or claimants’ counsel (68), and 129 identified themselves as respondents’ counsel. Sixteen (16) did not specify a side.

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

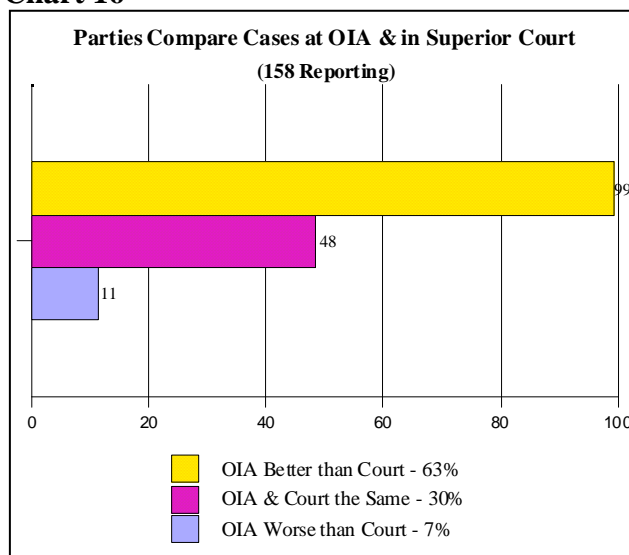
Table 7 - Parties’ Evaluations of the OIA System

Question	Claimants’ Counsel	Pro per	Respondents’ Counsel	Not Specified	Total
Procedures worked well	4.2	2.6	4.9	4.8	4.5
Obtaining medical records went well	3.8	2.4	4.9	4.8	4.3
OIA responsive to questions/concerns	4.5	3.7	4.9	4.9	4.7

The form also asked the parties if they have had a similar experience in Superior Court and, if so, to compare the two. Of the 158 people who made the comparison, 99 said it was better. Forty-eight (48) said it was the same. Eleven (11) said it was worse.

⁷¹Three (3) people returned blank forms.

Chart 16



In general, the most common subject was the neutral arbitrator pool, with opinions that it should be more diverse, objections to the lack of a jury, or that it was inherently biased. The next most common comment concerned obtaining medical records. Those who responded called getting records from Kaiser expensive, time consuming, and/or confusing. There were several requests to eliminate the optional 90 day postponement to select the neutral arbitrator and a few requests to eliminate the ability to shift the cost of the neutral arbitrators fees to Kaiser. *Pro per* claimants once again expressed their frustration in navigating a legal system without a lawyer. Finally, some offered specific suggestions for rule changes, one became the subject of a suggestion by the OIA to the AOB which will be discussed next year.

XI. THE ROLE OF THE ARBITRATION OVERSIGHT BOARD

A. Membership

The Arbitration Oversight Board (AOB) is chaired by Cornelius Hopper, M.D., Vice President for Health Affairs, *Emeritus*, of the University of California System. The Vice Chair is Richard Spinello, Executive Director of Financial Risk and Insurance, CHOC Children’s Hospital, Orange, retired.

The membership of the AOB is a distinguished one. There are eleven board members, besides the two officers.

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

The members in alphabetical order, are:

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

Patrick Dowling, M.D., M.P.H., 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.

Cornelius Hopper, M.D., Vice President for Health Affairs, *Emeritus*, of the University of California System, Oakland.

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

Rosemary Manchester, MBA, a member of Kaiser for many years, Sebastopol.

Bruce R. Merl, M.D., Director of Medical-Legal Affairs, The Permanente Medical Group, Oakland.

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

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

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

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

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

Steven R. Zatzkin, retired Senior Vice President and General Counsel, Kaiser Foundation Health Plan, Inc. and Kaiser Foundation Hospitals, Oakland.

B. Activities

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

It discussed at length how a senate bill could affect consumer arbitrations and what changes would have been needed by the OIA had the bill become law. It requested comments provided by parties and neutral arbitrators in the suggestion sections of the evaluations for possible OIA *Rules* changes. It explored *Rules* changes in general and decided to create a sub-committee to address possible amendments in the coming year. It also requested information about *pro per* cases abandoned for non-payment of the filing fee and reviewed letters, sent to *pro pers*, requesting that fee. The AOB was satisfied with the OIA's procedure of sending three reminder letters with information about how to apply for fee waivers, including information for claimants representing themselves, and the OIA's responsiveness to phone calls from *pro pers*.⁷²

The AOB also reviews the draft annual report and comments upon it. Exhibit I is the AOB Comments on the Annual Report for 2016.

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

This report describes a mature arbitration system which is continuously improving. The OIA publishes this report on its website and sends copies to those who request it. The annual reports provide more information about the OIA's arbitrations than any other arbitration provider. The wealth of this information was recognized by the National Academy of Science's Committee on Science, Technology, and Law when a member of the CSTL drafted and published an article largely based on annual reports.⁷³ The OIA website also 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.⁷⁴ The OIA posts this information for the parties and the public.

Using the data that the OIA has published in prior reports, this section considers the operation of the OIA over time. As in the preceding sections, lien cases are only considered in the first three Sections (A, B, and C) and the last (K).

⁷²See Section VII.A.3.

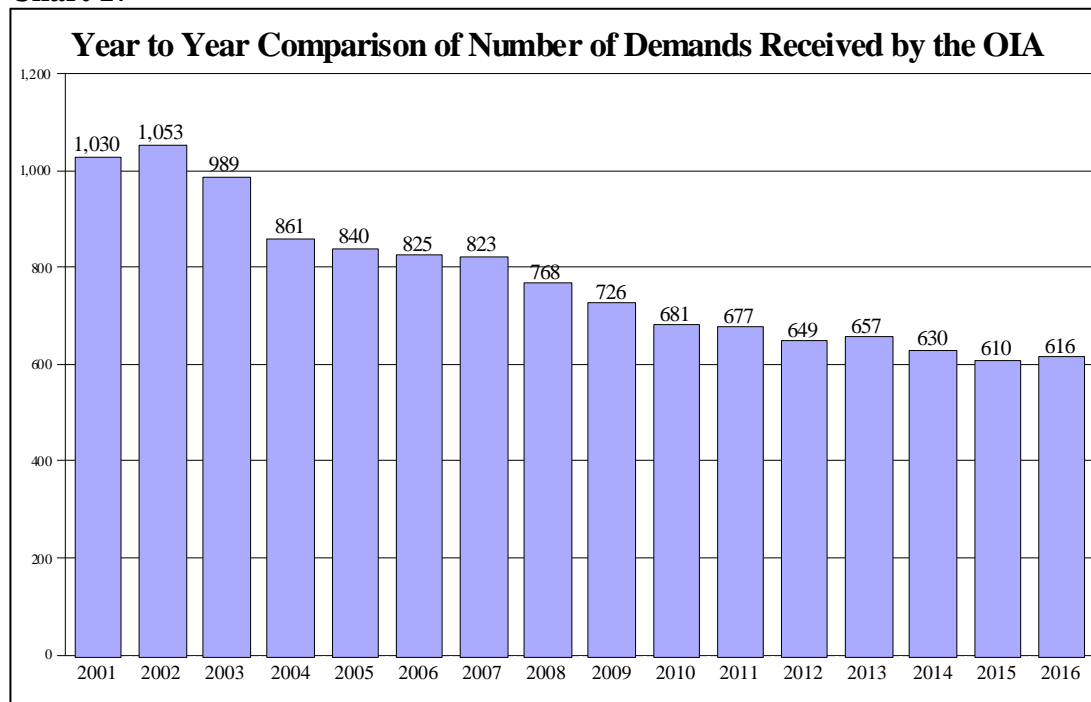
⁷³Can Mandatory Arbitration of Medical Malpractice Claims be Fair? The Kaiser Permanente System," published in the November, 2015 *Dispute Resolution Journal*, Vol. 70, No. 3.

⁷⁴No names of individual claimants or respondents are included, only corporate entities.

A. The Number of Demands for Arbitration

The number of demands for arbitrations has declined since 2002, with a slight increase in 2013. The number reached a high of 1,053 in 2002. As Chart 17 shows, the sharpest decline occurred between 2003 and 2004 (a decrease of 128), with significant further decreases from 2007 to 2010. In 2016, the OIA received 616 demands, 6 more than last year. The number of demands increased by 25 in Northern California, but decreased by 21 in San Diego. The number of lien cases decreased by 5 to 20. Since 2010, the number of demands received has varied by no more than 28.

Chart 17



B. The Number of Neutral Arbitrators Has Decreased

Even though the number of demands for arbitration has declined 40% since 2002, the number of neutral arbitrators has remained relatively stable, normally declining in odd numbered years when neutral arbitrators are required to submit updates and increasing the next year. This year, however, 28 neutrals left the pool, leaving 249 neutral arbitrators - 2 fewer than 2011 when the pool contained 251 neutrals. The pool has ranged from 349 at the end of 2000 to a new low at 249 in 2016. On average, 38% have been retired judges. This year, 39% are retired judges. The composition of the pool of neutral arbitrators includes those who have plaintiff's side experience and those who have defendant's side experience. Ninety-two percent (92%) report medical malpractice experience.

C. The Number Who Served

The percentage of neutral arbitrators who have served in any given year has dropped with the number of demands, since there are fewer opportunities to serve. It reached a high of 70% in 2003, when the OIA received 989 demands for arbitration and had 287 neutral arbitrators in its pool.⁷⁵ Fifty-nine percent (59%) of neutral arbitrators served this year. For the most part, the percentage of neutral arbitrators who have served in any given year has been between 53 and 63%.

D. The Number Who Wrote Awards

The number of neutral arbitrators who have written awards also remained high, ranging from 44 (in 2014) to 93 (in 2004).⁷⁶ During the OIA's existence, 417 different neutral arbitrators have written 1,681 awards. Equally important, through 2015, the vast majority of those neutral arbitrators, 68 to 82%, only wrote a single award in any year. For all neutral arbitrators who wrote awards in 2016, a higher percentage (87%) wrote a single award. Distributing the work helps reduce the possibility of neutral arbitrators being dependent upon Kaiser for work.

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

Since 1999, 90 different neutral arbitrators have made 122 awards of \$500,000 or more in favor of claimants. Most of the neutral arbitrators who made the awards were members of the OIA pool, but ten (10) were not. The awards have ranged from \$500,000 to \$11,640,000.

As Chart 18 illustrates, most neutral arbitrators who have made awards of \$500,000 or more served again. Specifically, 68 neutral arbitrators served 1,604 times after making their awards for \$500,000 or more. In almost half of these cases (749), the parties jointly selected the neutral arbitrator.⁷⁷

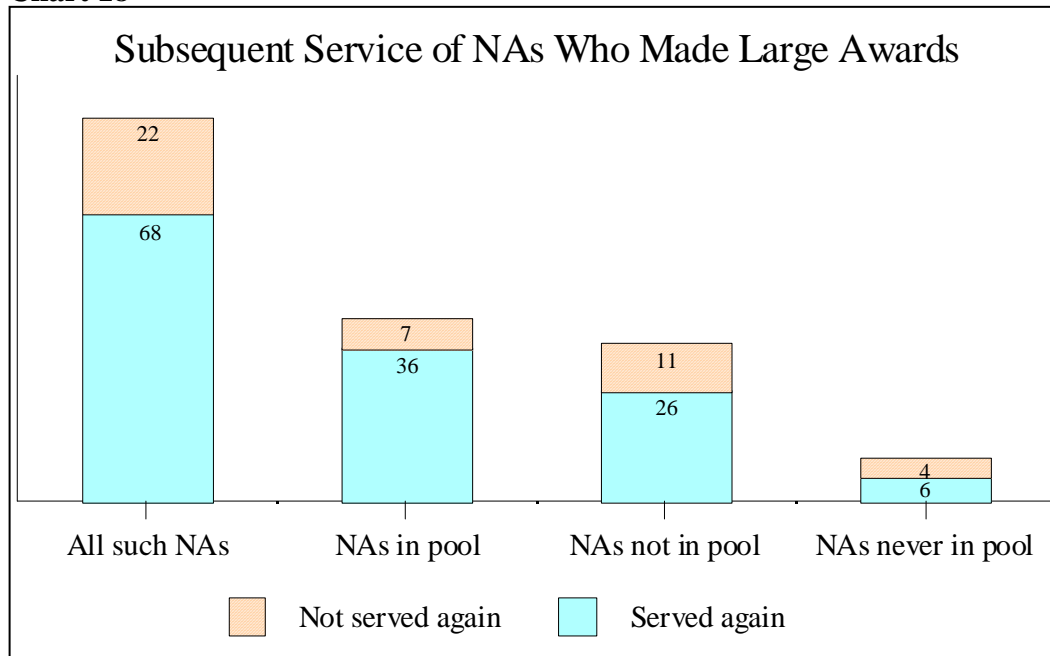
Of the 22 neutral arbitrators who were not selected after making their awards for \$500,000 or more, some were never in the OIA pool and some left the pool. Seven (7) of the neutral arbitrators who made such awards and were still in the pool have not served again.

⁷⁵By contrast, compared to 2003, this year there were 373 fewer demands for arbitration and 38 fewer neutral arbitrators in the pool.

⁷⁶This year, 47 different neutrals wrote awards.

⁷⁷In 2016, 27 neutral arbitrators who made such awards were selected in 89 cases. In 36 of the cases, they were jointly selected.

Chart 18



F. Claims Primarily Allege Medical Malpractice

The large majority of demands for arbitration are, and have always been, claims that allege medical malpractice. This has ranged from 86 to 97%.⁷⁸ Benefit claims are generally less than two percent (2%).

G. Claimants Without Attorneys

The average percentage of cases with claimants who are not represented by an attorney is 24%, reaching 29% the first year and dropping to 17% in 2004. This year, 28% of claimants do not have an attorney, slightly higher than last year. Dealing with the concerns raised by *pro per* claimants has been a continuing issue for the OIA, the AOB, and neutral arbitrators. Both the AOB and the OIA have revised forms and the “*pro per* handout” to make them easier for *pro pers* to understand. See Exhibit B, Rule 54. The OIA is also readily available by phone and email to answer questions from *pro per* claimants about the filing fee, neutral arbitrator selection, the *Rules*, and related items.

⁷⁸The range may actually be smaller because during the early years, the OIA categorized a larger percentage of demands as “unknown” when they gave no specifics. Now, Kaiser provides information as to the type of claim being made.

H. The Parties Select Neutral Arbitrators by Strike and Rank in Majority of Cases

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 either party can timely disqualify neutral arbitrators after the selection. The OIA gives both parties identical information about the neutral arbitrators. This includes evaluations of the neutral arbitrators by the parties in earlier cases and redacted awards.

The percentage of neutral arbitrators chosen by strike and rank versus those jointly selected has ranged from 65% (2000 and 2015) to 74% (2003 and 2013). Similarly, the percentage of neutral arbitrators jointly selected who are members of the OIA pool has ranged from 55% (2011) to 84% (2014).⁷⁹

I. Less than Half of the Claimants Use Procedures Contained in OIA *Rules* and State Law to Delay Selecting the Neutral Arbitrator, While Time to Select Remains Timely

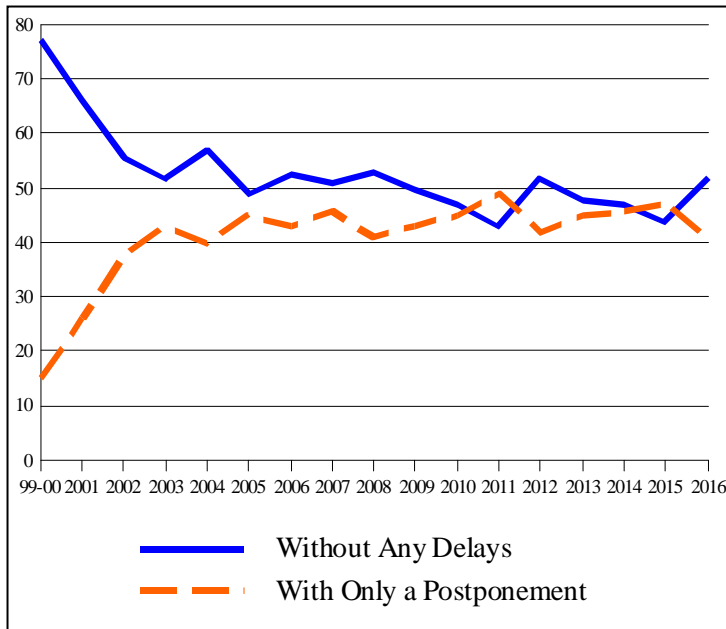
The use of the tools (postponement and disqualification) allowing more time to select a neutral arbitrator has increased.⁸⁰ In 2000, only 21% of cases employed one or both. Since 2001, 34 to 57% of the cases did. Claimants made almost all of the postponements (99%, 5,744 out of 5,774) and the vast majority of disqualifications (79%, 927 out of 1,170). Chart 19 displays the use of the 90 day postponement versus no delays over time.

⁷⁹There have only been 15 cases in which the parties had to go to court to have a neutral arbitrator selected.

⁸⁰We call the parties to remind them of the deadline to return the List of Possible Arbitrators. During this call, we remind claimants or their attorneys that they may seek a postponement if they are not able to return their responses by the deadline.

Chart 19

**Year to Year Comparison of Percentage of
Neutral Arbitrators Selected Without Delay vs.
Neutral Arbitrators Selected With Only a Postponement**



The length of time to select a neutral arbitrator, however, has remained consistent since 2003: 24 to 26 days for cases with no postponements and 108 to 114 days for cases where the claimants seek a postponement. Table 8 compares the differing forms of selecting a neutral arbitrator since 2008.

**Table 8 - Year to Year Comparison of No Delay vs. Delays:
Percentage and Average Number of Days to Select Neutral Arbitrators**

	2008	2009	2010	2011	2012	2013	2014	2015	2016
No delay	26 days 53%	26 days 50%	25 days 47.7%	25 days 43%	24 days 52%	24 days 48%	25 days 47%	25 days 44%	24 days 51.7%
Only Postponement	114 days 41%	113 days 43%	110 days 44.9%	111 days 49%	108 days 42%	108 days 45%	108 days 46%	109 days 47%	110 days 40.9%
Only Disqual.	58 days 3%	71 days 3%	80 days 3.5%	72 days 2%	63 days 2%	59 days 2%	66 days 3%	62 days 4%	64 days 3.7%
Postponement & Disqual.	157 days 3%	165 days 4%	174 days 3.9%	160 days 6%	175 days 4%	162 days 5%	178 days 4%	173 days 5%	158 days 3.7%
Total Selections	67 days	70 days	71 days	75 days	66 days	69 days	71 days	73 days	66 days

The average number of days to select a neutral arbitrator for all cases dropped by seven (7) days. While half of the claimants use procedures to delay selecting a neutral arbitrator, the time to select a neutral arbitrator is many times faster than the pre-OIA system.

J. The Parties Consistently Close Most Cases Themselves

The most common way cases close has always been settlement (40 to 49%). This is followed by cases withdrawn by the claimant (20 to 28%); cases decided after a hearing (9 to 18%); and summary judgment (7 to 13%). The remaining cases were abandoned by the claimant or claimant’s attorney or dismissed by the neutral arbitrator. Table 9 displays the statistics since 2008.

Table 9 - Year to Year Comparison of How Cases Closed

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Settlements	44%	46.5%	44%	44%	44%	44%	46%	44%	44%
Withdrawn	27%	25.6%	25%	26%	26%	27%	27%	26%	25%
Abandoned	5%	4.3%	4%	3%	3%	5%	4%	6%	6%
Dismissed	3%	2.4%	3%	4%	3%	3%	3%	3%	3%
Summary Judgment	8%	7%	11%	11%	11%	9%	13%	10%	12%
Awards	13%	13%	12%	11%	13%	11%	9%	10%	9%

K. The Results After a Hearing

In those cases in which the claimant won after a hearing, the awards have ranged from a single dollar to \$11,640,000. The average is \$460,613. 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 just over \$1,000,000. The largest average, \$1,282,547, was in 2015, which had an award of \$11,640,000.

Since 2010, the average percentage of cases in which members prevailed after a hearing is 34%.⁸¹ In 2016, 37% of members prevailed in non-lien cases.

L. Cases Close in Twelve Months

The average for all cases was 319 days in 2003 and reached 363 this year, 6 days more than the high in 2009, and 21 more days than last year. See Table 10.

⁸¹Up until 2009, lien cases were included in this percentage. They are now excluded and reported separately in Section IX.

Table 10-Year to Year Comparison of Average Number of Days to Close, by Disposition

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Settlements	340 days	375 days	341 days	326 days	330 days	318 days	334 days	344 days	376 days
Withdrawn	227 days	234 days	242 days	268 days	240 days	241 days	226 days	227 days	255 days
Summary Judgment	324 days	366 days	351 days	346 days	343 days	336 days	344 days	371 days	363 days
Awards	455 days	503 days	483 days	555 days	558 days	538 days	510 days	584 days	589 days
All Cases	325 days	357 days	336 days	339 days	340 days	325 days	323 days	342 days	363 days

The OIA closely follows each case that is still open after 15 months to make sure that the case remains in compliance with the *Rules*. Because of this type of diligence by the neutral arbitrators and the OIA, only 40 cases over time – less than half of one percent – of all closed OIA cases have closed beyond the deadline set by the *Rules*. None closed late in 2016.

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

California law provides that, absent any other arrangement by the parties, the fees of the neutral arbitrator will be split evenly between the parties. The OIA *Rules*, however, provide several ways to shift those fees to Kaiser and most claimants use them. In 86% of the cases with neutral arbitrator fees that began after January 1, 2003 and ended in 2016, the fees were paid by Kaiser. This is most easily and most commonly done by the claimants signing a form and agreeing not to use party arbitrators. Claimants may also request a waiver based on financial hardship, which also exempts them from paying the \$150 filing fee or giving up the right to party arbitrators. In addition, a waiver created in 2003 by the California Legislature allows claimants who meet certain tests to avoid the \$150 filing fee.⁸² While some claimants file for both waivers, others request only that the \$150 fee be waived, relying on the waiver forms to shift the neutral arbitrators’ fees to Kaiser.

N. Neutral Arbitrators and the OIA System Receive Positive Evaluations

Since 2000, the OIA has been sending the parties evaluations of the neutral arbitrators and the OIA. The evaluations ask, among other things, whether the neutral arbitrator treated the parties with respect and whether the parties would recommend the arbitrator to others. The responses to the evaluations have generally been quite positive, especially from the attorneys. This year, the average for all questions by claimants’ attorneys is 4.4 (on a 1 – 5

⁸²Unlike 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).

scale). This is slightly higher than last year, which was 4.2. For Kaiser attorneys, the average remained the same for both years, 4.8. Fewer *pro per* claimants return the evaluations, and the numbers are lower than responses from attorneys.

The OIA began asking neutral arbitrators to evaluate the OIA system in 2000. The questions ask them to identify whether particular features are useful or not, whether the OIA is helpful or responsive, and to compare the OIA system with the court system. The arbitrators' evaluations have always been positive. This year 100% of the neutral arbitrators and 93% of the parties who answered the question rated the OIA system as good as or better than the state court system.