

# Under Consideration

## NYSBA's *Arbitration Training*: A Valuable New Tool for Arbitrators and Counsel

By John Burritt McArthur

On July 17-19, 2023, the New York State Bar Association held its 11th annual arbitration training program, co-sponsored by Cardozo Law School and covering every major step in arbitration process and the major questions arbitrators frequently need to decide: selecting arbitrators, setting prehearing schedules, deciding pre-hearing disputes, dealing with co-panelists, running the merits hearing, and working through the post-hearing, particularly deliberating and writing the award. Fortunately for arbitrators, lawyers whose practice includes arbitration, and other arbitration participants, NYSBA recently made its 2023 program much more widely available by publishing an edited transcript under the title *Commercial Arbitration Training for Arbitrators and Litigators: A Comprehensive Training by Leading Practitioners* (“*Arbitration Training*”).<sup>1</sup>

The volume's 533 pages contain invaluable advice on how to become an arbitrator and how to build an arbitration practice. A 200-page appendix contains short memos and sample forms on key topics.

*Arbitration Training* is ideal material for training new arbitrators and lawyers new to arbitration. It will also be very valuable for experienced arbitrators and lawyers wanting to refresh their knowledge and update themselves on rapidly changing and therefore cutting-edge areas like cybersecurity, AI, and ediscovery.<sup>2</sup>

Three presenters led the 2023 program, provided most of the comments, and served as “lead faculty”: Charles Moxley, Edna Sussman, and Lea Haber Kuck. All are stalwarts of the domestic and international arbitration worlds. In fact, all the 51 faculty have extensive experience in one or another aspect of arbitration. As a representative example of their depth of experience, retired Judge Shira Scheindlin, whose *Zublake* opinions framed the judicial discussion over electronic discovery standards, spoke on ediscovery. Leaders on cybersecurity addressed that critical topic. That the speakers were drawn primarily from the New York arbitration world, still the arbitration center in the United States, guaranteed a faculty with broad and diverse experience. Predictably, the

transcript of their talks generated an excellent training guide for arbitrators and lawyers.

### I. Comprehensive Advice for Arbitration ‘Newbies’

The first half of *Arbitration Training* devotes 251 pages to chapters one through eight and covers each step in arbitration sequentially. The slightly longer second half contains thirteen chapters on areas deserving separate attention: international arbitration, building an arbitrator career, cybersecurity, ediscovery; “arbitration law,” writing awards, diversity, and ethics.

A short review cannot replicate the full depth and richness of *Arbitration Training*. It can, however, give a sense of what is on offer. For instance, it addresses many issues that arbitrators usually should raise if the parties don't. New arbitrators are unlikely to realize they should raise these issues if the parties do not. One example of these issues is the need for a negotiated confidentiality agreement to fully protect parties.<sup>3</sup> The book further provides guidance on effective electronic-document production;<sup>4</sup> the complexity and impact of choosing an applicable procedural law;<sup>5</sup> and the cluster of problems that can surround third-party subpoenas.<sup>6</sup> Each of these issues pose potential trouble spots. But why would new arbitrators and lawyers new to arbitration know that?

*Arbitration Training* has useful guidance on many practical questions.<sup>7</sup> It explains the nitty gritty of arranging (and numbering) exhibits and why lawyers should avoid ordinary evidentiary objections (except on privilege).<sup>8</sup> It repeatedly describes how arbitrators can persuade counsel (and why) to shed their “Litigative DNA” and participate fully in a cooperative effort to produce a quicker, cheaper, and final – but still fair – outcome.<sup>9</sup> It suggests tools to narrow discovery (for instance, “phased in or tiered discovery,” sampling, limiting search custodians and time periods).<sup>10</sup> It contains excellent advice on how to manage the hearing by nipping excessively personal and sarcastic examination in the bud.<sup>11</sup>

Page after page gives other nuts-and-bolts advice. One treats the challenges of handling *ex parte* review of allegedly

privileged documents;<sup>12</sup> another treats the arbitrators' power to impose sanctions.<sup>13</sup> The manual urges including a buffer in the merits hearing's duration to avoid the often severe disruption from running out of time.<sup>14</sup> It stresses the importance of the arbitrators coordinating time estimates in panel cases<sup>15</sup> and provides rules of thumb for estimating billable time generally.<sup>16</sup> It addresses how and when to handle attorneys' fees.<sup>17</sup> It gives a good picture of standards on award finality and the *functus officio* doctrine.<sup>18</sup> Points like these should be as welcome reminders to experienced arbitrators and counsel, not just for those new to arbitration.

The second half of *Arbitration Training* moves past the basic structure of an "average" arbitration. Perhaps most importantly for new arbitrators, three chapters discuss getting started and building an arbitration career. The first contains a dialogue of five presenters' views on what parties look for in arbitrators.<sup>19</sup> One of the presenters is one of the three program leaders, a second is a partner and global head of a large firm's international arbitration practice, a third a partner at another large international law firm, a fourth a current arbitrator who previously was general counsel of Mastercard and then president of arbitration provider CPR, and the last an arbitrator who has headed AIG's Employment Dispute Resolution program. Their discussion of the qualities they believe make some arbitrators in demand and others will interest all arbitrators, old and new.

A second "career" chapter contains advice from two AAA vice presidents.<sup>20</sup> It includes tips on effective websites, focusing arbitrator marketing on true expertise,<sup>21</sup> and the importance of working well with case administrators. Moreover, it offers realistic advice. For instance, even while encouraging fledgling arbitrators by reminding them that building a career is "a marathon, not a sprint," it also notes that less than 10% of AAA arbitrators are full-time arbitrators.<sup>22</sup> Another presenter, an AAA vice president, recommends that arbitrators avoid presenting themselves as a "jack of all trades."<sup>23</sup> A third career-development chapter hosts officers of major arbitration organizations describing their organizations.<sup>24</sup>

Those interested in the still-growing area of international arbitration will find three very useful chapters on the material differences between domestic and international arbitration.<sup>25</sup> Three other chapters discuss areas where arbitrators must stay current to comply with their obligations to protect confidentiality, disclose potential conflicts, and administer arbitrations competently. There are chapters on the rapidly changing areas of electronic discovery, ethics and cybersecurity, and cybersecurity and artificial intelligence.<sup>26</sup> Three others address award writing, arbitration law, and ethics.<sup>27</sup>

Taken together, the edited transcript contains a well-rounded, detailed, and realistic training program covering

the major steps of being an arbitrator or, as counsel, participating in arbitration.

## II. The Modern View of Arbitration

The twenty-one chapters of *Arbitration Training* are not just a sequence of unrelated discussions. Instead, they form a unified whole that clearly articulates the modern view of commercial arbitration that has developed in the last part of the twentieth century.

Early in the last century, arbitration often functioned as an informal process very unlike courtroom litigation and was based on equitable, unexplained decisions largely driven by the arbitrator's sense of fairness and justice.<sup>28</sup> As late as 1953, the Supreme Court treated this informal process as *the* model of arbitration in a decision that year that refused to let arbitrators decide federal statutory claims.<sup>29</sup>

The modern arbitration advocated in *Arbitration Training* is very different. It is party-driven, muscular, and transparent. It invites party participation in designing the arbitration, treats as binding any agreements they reach about the arbitration, and protects party rights by staying faithful to the contract and the law. Arbitrators should approach the law the way courts would, because this is what parties today almost certainly expect.<sup>30</sup> The spirit of the approach is captured in one presenter's urging that arbitrators approach their work with humility.<sup>31</sup> Solicitude to the parties is reflected in the lead presenters' agreement that if the parties want traditional discovery even after they consider arbitrator arguments for less broad investigation, they are entitled to the process they choose.<sup>32</sup> It shows in frequent reminders for arbitrators to consult the parties when deciding major issues,<sup>33</sup> and in the recommendation that arbitrators not conduct their own independent, outcome-affecting research.<sup>34</sup> It is the reason the presenters stress having the parties confirm on the record that they have presented all proof they intend to offer.<sup>35</sup>

Modern arbitration is "muscular arbitration." That phrase comes up early in the book and means active management to make sure arbitrations are quick, inexpensive, and final. That goal is in obvious tension with party autonomy.<sup>36</sup> The materials offer many suggestions on how arbitrators can lead parties (not coerce them) into considering narrower, prompter discovery.

Modern arbitration is transparent. It is open to party participation at every reasonable point and arbitrators should solicit that participation. The need for transparency explains the recommendation that even orders deciding discovery motions and granting dispositive motions include some reasoning;<sup>37</sup> in the general emphasis throughout on soliciting the parties' views before ruling on issues; and in urging the arbitrators to tell the parties if an unbriefed issue troubles one or

more arbitrators and giving the parties a chance to address it, rather than letting views arbitrators kept hidden influence the award.<sup>38</sup> The forceful discussion of disclosure, with a presumption of disclosing all conflicts that might give a party pause without regard to how old the conflict or whether disclosure appears technically required, is one of the book's powerful arguments for transparency.<sup>39</sup>

A core aspect of transparency is that arbitrators explain their decisions. Arbitral legitimacy, like judicial legitimacy, depends upon showing why the facts and law justify the decisions reached. *Arbitration Training* debunks the myth that reasons weaken awards by giving losing parties material to use in vacatur efforts.<sup>40</sup> Losing parties may still disagree with a reasoned award, but the award's showing that the arbitrators heard the losing party's positions and why they disagreed with them goes a long way to making that losing party feel heard and respected. Explanations build legitimacy.

One of *Arbitration Training's* singular achievements is that it teaches the larger modern vision of arbitration as requiring party participation and the rule of law, as well as fairness. The transcript documenting the presenters' discussion on how to achieve this complex balance is a major contribution to modern arbitration.

### III. Experienced Arbitrators and Lawyers Will Want This Book, Too

The transcribed program should be highly useful for experienced arbitrators and lawyers, not just new entrants to the field. Lawyers will benefit from almost all of the content

important to arbitrators because lawyers, too, need to understand the rules, practices, and constraints under which arbitrators operate. Think how much a lawyer would value a book containing an over 500-page transcript of 51 judges debating issues surrounding their handling of civil cases. *Arbitration Training* is that book, but about arbitration.

One prime example of information useful to lawyers is the repeated argument that lawyers to drop their "litigative DNA" and accept arbitration's invitation to narrow discovery.<sup>41</sup> Lawyers who fail to do so often hurt their clients. These transcripts should help even experienced lawyers better understand how deeply arbitrators are committed to cheaper, quicker, and more efficient preparation and hearings and how to achieve these goals without sacrificing fairness. It will encourage them to refine their skill at preparing focused discovery. Smart lawyers will learn to perceive arbitration as an opportunity, not a burden.

This book should be useful to all lawyers who handle arbitrations. Its insight into what troubles and concerns arbitrators is precious knowledge for lawyers. *Arbitration Training* teaches lawyers to avoid the trap of filing minimal arbitration demands or just a general denial as an answer. Smart lawyers use every demand, counterclaim, and answer as another opportunity to persuade the arbitrators on the merits.<sup>42</sup> And many arbitrators (but perhaps too few) order "particularization" (more specific pleading) as a substitute for ordering more discovery when the situation warrants.<sup>43</sup>

*Arbitration Training* will help lawyers avoid steps that mark them out as novices in arbitration. It encourages them to drop personal attacks on opposing counsel in discovery disputes (or, even worse, when examining witnesses at the merits hearing) or attaching hundreds of pages to a discovery motion when the relevant materials lie in just a handful of pages.<sup>44</sup> Lawyers will learn to not waste time trying to exclude exhibits or exclude experts by *Daubert* motions. They will not cite discovery cases and rules with state and federal standards and procedures that do not apply in arbitration. They will try hard to agree on a joint schedule to submit to the arbitrators.

How many lawyers groomed on domestic trial work really consider witness statements as an opening presentation of testimony or other practices common in arbitration?<sup>45</sup> How many lawyers who resist witness statements generally nonetheless seriously consider using expert reports as a substitute for direct examination, a shift that should ensure the arbitrators have studied the expert's work carefully before live testimony? How many use PowerPoints on specific issues or witnesses during the hearing, ask to make them exhibits, and then rely on them to shorten post-hearing briefing?<sup>46</sup> How many arbitrators have used a "Kaplan opening," in which they tell the parties what questions they have thus far and therefore where to focus upcoming testimony?<sup>47</sup> How many lawyers



write motions to compel that deal only with the merits and do not take potshots at their opponent?<sup>48</sup> Lawyers will benefit from this book in every one of these areas.

As one arbitrator put it, it is “surprisingly hard to learn how to be an effective and successful arbitrator or counsel in arbitration.”<sup>49</sup> Rules and statutes provide some structure and some constraints, but these skeletal limits are remarkably general. It is up to the arbitrators and the parties to fill in the rest.

#### IV. Arbitrator Training Deserves a Space in Most Arbitration Collections

*Arbitration Training* belongs in the select group of books and materials that truly promises a comprehensive education on arbitration. Two books, the American Arbitration Association’s *Handbook on Arbitration Practice* and the College of Commercial Arbitrators’ *Guide to Best Practices in Commercial Arbitration*, provide highly useful books with chapters on each major aspect of arbitration. Now, *Arbitration Training* does too. It is as comprehensive as those books and materials. Its being based on edited transcripts of oral presentations makes it highly readable.

Readers looking for an authoritative book to cite to courts on arbitration practices often cite the College of Commercial Arbitration’s *Guide to Best Practices*, because that book has the formal imprimatur of that prominent group. Parties also often cite the AAA’s *Handbook*, even in non-AAA cases. To become an effective arbitrator requires learning subtle lessons, beyond obvious points like the provisions of major rules. Any given phrasing may strike home with one reader, but not another. A unique advantage of *Arbitration Training* is that it includes comments on all major arbitration questions from multiple presenters: arbitrators, practitioners, and sometimes officials of provider groups. The presenters largely agree on how modern arbitration should operate, but they explain some of the points in quite different wording. Hearing the core messages through multiple voices makes these materials an important addition – a supplement, not a replacement – for the *Best Practices Guide* and the *Handbook*. *Arbitration Training* deserves a place in any arbitrator or lawyer’s collection of core arbitration material.



**John Burritt McArthur** was one of the first lawyers at Houston’s Susman Godfrey LLP, where he practiced from 1983 to 1992, and later was a name partner in San Francisco’s Hosie McArthur LLP. He has concentrated his practice on arbitration since 2009. Listed by arbitration organizations including the American Arbitration Association, CPR, Fed-Arb, and FINRA, he is a Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators, and a Member of the National Academy of Distinguished Neutrals. He has written and spoken frequently on many legal matters. His most recent book, *The Reasoned Arbitration Award in the United States: Its Promise, Problems, Preparation, and Preservation*, was published in October 2022 by Juris Publications. McArthur was on the team that revised the chapter on awards in the Fourth Edition of the College of Commercial Arbitrator’s *Guide to Best Practices in Commercial Arbitration*, and was one of the team of general editors for the Fifth Edition.

#### Endnotes

1. Charles J. Moxley, Jr., Edna Sussman and Lea Huber Kuck, eds, *Commercial Arbitration Training for Arbitrators and Litigators: A Comprehensive Training by Leading Practitioners*, NYSBA (2025) [Hereinafter “*Arbitration Training*”].
2. Some arbitrators take the position that “discovery” does not exist even in domestic arbitration. But a slimmed-down version of discovery is used in those arbitrations, and there is no reason to hide that fact.
3. *Arbitration Training* at 107-11. Some of the citations include dialogue from multiple faculty members, some from just one. Because the book does present a largely unified view of arbitration, however, this review does not identify individual speakers because doing so could distract from the largely unified message conveyed by the materials.
4. *Id.* at 166-70.
5. *Id.* at 286-91.
6. *Id.* at 138-50; Appendix 595-600.
7. Many arbitrators do not like using the term “discovery,” preferring instead “information exchange,” and in international arbitration “discovery” is not used. The only reference in the AAA’s international rules to discovery is a clause stating that it is not permitted. *Id.* at 256. The “discovery” allowed in domestic arbitration usually involves a few depositions at most and narrow, focused documents requests, with no interrogatories (certainly no contention interrogatories) or requests for admission. For the balance between arbitration guidance and party autonomy, see *id.* at 97-103.
8. *Id.* at 167, 203-04, 209-10.
9. *Id.* at 77-78.
10. *Id.* at 314-15.
11. *Id.* at 205-06:

I as chair should immediately say, “Counsel, we’re not having any questions like that. Sustained. We’re going to deal with the facts and law pertaining to this matter without any such kind of personal attacks. Next question.”

12. *Id.* at 120-24.
13. *Id.* at 124-28.
14. *Id.* at 161-62, 164-65; *see also id.* at 163; *cf id.* at 187 (discussing need for arbitrators to put aside enough time to prepare for hearing).
15. *Id.* at 164 (deposits and time estimates), 186-88.
16. *Id.* at 188.
17. *Id.* at 170, 222-23, 334-35.
18. *Id.* at 235, 331-37.
19. *Id.* ch. 14 (Preferences in Selecting Arbitrators and Arbitration Counsel).
20. *Id.* ch. 20 (The Real World – Developing Your ADR Career).
21. *Id.* at 486 (“Don’t be a master of all trades”), 493-94 (twice urging arbitrators to not court skepticism by portraying themselves as “a jack of all trades”).
22. *Id.* at 486 (“Less than 10%.”), 504 (“a marathon, not a sprint”).
23. *Id.* at 486 (“Don’t be a master of all trades”), 493-94 (nor “Jack of all trades”).
24. *Id.* ch. 21 (Learning From Providers and Recent Entrants . . . ).
25. *Id.* ch. 9 (Keynote Address: Introduction to the World of International Arbitration . . . ), 10 (Distinctive Features of International Arbitration), and 11 (International Arbitration – How It Differs From Domestic Arbitration).
26. *Id.* Chs. 12 (Electronic Discovery), 16 (Ethics And Cybersecurity For Arbitrators . . . ), And 18 (Cybersecurity and Artificial Intelligence . . . ).
27. *Id.* Ch 13 (Award Writing), 15 (Arbitration Law), And 19 (Arbitration Ethics).
28. Edward Brunet, *Replacing Folklore Arbitration With a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 40, 42-25 (1999) (describing model as “always an informal process with expert decision-makers, speed, privacy, ‘informal presentations of evidence,’ ‘little or no discovery,’ no right to judicial review, and ‘application of equitable rather than legal principles to resolve the dispute.’”).
29. *Wilko v. Swan*, 346 U.S. 427, 435-37 (1953).
30. *Id.* at 373 (“ . . . I adhere as much as I can to the law, and that’s very, very important because I think parties expect that in me as well.”)
31. *Id.* at 75-76, 131.
32. For the parties ultimately having the right to set the scope of discovery when they agree upon it, *see id.* at 89, 99 (Kuck); 97-98, 102 (Moxley).
33. *See generally id.* at 336 (“What you want to do as an arbitrator, to the extent you can, is do what the parties expect.”).
34. For discussion of independent research, *see id.* at 188-92.
35. *Id.* at 220-22.
36. One section is even titled “party autonomy vs. arbitrator initiative. *Id.* at 97; *see generally id.* at 90, 92, 97-99, 102, 393.
37. *Id.* at 193 (need to explain rulings on discovery motions; reasons let “the parties will know we heard them and considered the matter – that they got a fair shake even if they didn’t prevail on such disputes”), 193-94 (give reasons for granting dispositive motions, but generally say less when denying because case will proceed on the merits).
38. *Id.* at 190 (“ . . . I think the perspective is that you decide the case that you’re given, and if something’s really bothering you . . . is to go back to the parties and ask them to brief it . . . ”).
39. On disclosure, *see id.* at 177-78, 261, 284, 462-72.
40. *Id.* at 245-46. The award also debunks the idea that reasoned awards are always unreasonably expensive by discussing the reality that arbitrators can write brief reasoned awards when the parties want reasons but at a relatively general level. *Id.* at 327-28 (discussing “minimal or lite award”), 339-40 (discussing “reasoned award lite”).
41. For the task “Shedding our Litigative DNA,” *see id.* at 77-78.
42. *Id.* at 181.
43. *Id.* at 57-58, 133.
44. *Id.* at 205-06, \_\_\_\_.
45. *Id.* 95-98.
46. On the benefit to parties of using detailed PowerPoints during their case with references to the record and the ability to file shorter post-hearing briefs that reference these PowerPoints, assuming they are in the record, *see id.* at 229-30, 237.
47. *Id.* at 238-39.
48. *Id.* at 250 (observation on lawyers often overbriefing discovery motions).
49. *Id.* at xx.

## The *Commercial Arbitration Training for Arbitrators and Litigators* ebook

(free to all NYSBA members)

and print edition

(available at a reduced price to members)

can be accessed in NYSBA’s Online Store.

**<https://nysba.org/nysba-online-store/>**