

**New Sixth Edition of Elkouri & Elkouri: How Arbitration Works
Responds to Changes in Times**

"The problems you have today are not the problems you had 30 years ago when I started out," Alan Miles Ruben, editor-in-chief of the *Sixth Edition of Elkouri & Elkouri: How Arbitration Works*, told BNA, and his work reflects the developments in the field of labor arbitration. The new edition, which will be issued mid-December, includes significant changes in areas such as interpreting contract language, evidence, and remedies, and new chapters on public-sector issues.

Ruben noted that the book is the "premier universally cited work" in the labor arbitration field. The publication, he observed, is cited more by arbitrators than all other works put together, and it is cited by courts as well.

Ruben, who has been a law professor as well as an arbitrator, pointed out that the book is the result of the input of over 200 members of the labor bar, including management, unions, and arbitrators, and that the book cites about 12,000 arbitration awards.

One area in which the book is beginning "to report what many arbitrators have been doing in recent years," Ruben said, is the "plain meaning" rule. The older view has been that arbitrators refer just to language of the collective-bargaining agreement, and if it is not ambiguous, they do not refer to extrinsic evidence, like bargaining history or past practice. However, the new edition offers criticisms of that rule.

The new edition points out that the *Restatement (Second) of Contracts* states that "meaning can almost never be plain except in a context . . ." Ruben observed that a contract is not what a third party—the arbitrator—thinks it is, but what the parties meant, and determining that might require going beyond the language of the contract.

Evidence is another area in which the new edition of *How Arbitration Works* reflects changes in the field. Ruben observed that arbitrators often have said about hearsay evidence that they would "let it in for what it is worth."

Labor arbitration, Ruben stated, is much like an administrative proceeding, in which hearsay is allowed. The appropriate approach to the admission of hearsay, Ruben said, is to allow it in if the opposing party is given a fair opportunity to meet the hearsay evidence through its own presentation of evidence. He noted that in his arbitrations, he sometimes has allowed a second day of hearing to give the opposing party the opportunity to combat hearsay assertions.

Allowing hearsay in for what it's worth should be relegated to the "scrap heap," Ruben said. He stated that the assertion that hearsay is in for "what it's worth" leaves the opposing party with little guidance as to what to do, whether to offer its own evidence to refute the statement at the hearing or the brief or just ignore it. Hearsay is even allowed in courts, Ruben said, and there are 22 exceptions to the hearsay rule.

The new edition, Ruben continued, emphasizes federal and state law, which increasingly is being grafted into contracts. Arbitrators, Ruben observed, used to say "we are there to interpret contracts, not the law," but that no longer is the case.

The *Sixth Edition* has specific chapters about the public sector. Ruben noted that the "growth area in the last few years in unionism is the public sector," and there are many issues unique or nearly unique to the public sector. These include constitutional protections against unreasonable search and seizure, Fifth Amendment issues, and also labor law issues, such as the scope of bargaining and interest arbitration.

The *Sixth Edition of How Arbitration Works* also takes a fresh look at remedy issues. Ruben noted that remedies like attorneys' fees, interest, and even punitive damages are beginning to appear in labor arbitration.

The book also considers issues involving mediation. He noted that in his own arbitral practice, in which he has heard over 1,500 cases in his career, he will act as a mediator if the parties wish, and that other arbitrators will too. But, he said, there are questions as to how forthcoming arbitrators should be in letting parties know that they are willing to help them reach a settlement. There is also the question of conflict of interest, Ruben continued, and how an arbitrator deals in the arbitration, if the mediation fails, with information gained in confidence in the role of a mediator.

Finally, Ruben pointed to the book's coverage of emerging ethical issues, like disclosing conflicts of interest and the arbitrator's ability to advertise as long as it is truthful.

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