Message from the Chairs

By Mark A. Welge, Esq., and Kathleen L. Daerr-Bannon, Esq.

As incoming chairs of your ADR Committee, we wish to express our deep appreciation to PBA President Reg Belden for the opportunity to serve. We are delighted that Tom Salzer will continue as vice-chair and will be joined by Bob Creo, vice-chair, for this year. We are also appreciative of the efforts and hard work of retiring chairs Jack Nilon, Andy Goode and M. David Halpern. We trust that they will continue their prodigious efforts on behalf of this committee and on behalf of ADR as we carry on their initiatives, including pending legislation in Harrisburg for establishment of procedural rules for the conduct of international commercial arbitration in Pennsylvania, legislation known as UNCITRAL; proposals for the establishment of a statewide agency to be known as the Commission on Dispute Resolution and Conflict Management which have been progressing through the efforts of ADR Committee stalwart Herb Nurick and the Government Lawyers Committee; Tom Salzer’s work on developing statewide standards for mediator certification and the chairs’ call for uniform statewide regulations for court-annexed ADR.

We continue to see the expansion generally of ADR in both state and federal agencies and in the areas of employee rights and consumer transactions. The U.S. Supreme Court has now decided Green Tree Financial Corp. Alabama and Green Tree Financial Corporation v. Larketta Randolph and Circuit City v. Adams, sanctioning the broad use of ADR, especially arbitration, in consumer and employment disputes. The debate continues over revisions and final language for the draft Uniform Mediation Act, developments we will continue to monitor and expect to ultimately be considering at the state level. Increasingly, Pennsylvania courts at the trial level, the Philadelphia Commerce Court and the Commonwealth Court are utilizing court-annexed ADR through the pro bono efforts of members of the bar. Several local bar associations have begun exciting efforts to offer compensated ADR services to parties with disputes arising in the county, without regard to whether a matter is in litigation. This effort began in Berks County some time ago as reported to us by another ADR Committee stalwart, Fred Hatt. Herb Nurick was involved in establishing a similar program in Dauphin County and most recently Montgomery County, under the leadership of its past president Mark Schultz, instituted such a program as well. We have obtained the rules and procedures for each of these county programs and would be delighted to provide them to anyone interested in investigating such a program in their county.
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As co-chair of the Philadelphia Bar Association ADR Committee, Kathe Daerr-Bannon, and co-chairs Chuck Forer and Ed Pereles, are currently reviewing such a program for consideration by the Philadelphia ADR Committee should that committee decide to submit a proposal to the Philadelphia Board of Governors.

This is an interesting and exciting time for ADR in Pennsylvania! Returning home from the third Annual Conference of the ABA Section on Dispute Resolution last month in Arlington, Virginia, Kathe was particularly encouraged by the “critical mass” of ADR which exists in Pennsylvania. We were very well represented at the conference. Outgoing PBA President Marvin Lieber, who, along with Attorney General Mike Fisher have sponsored the efforts of Professor David Trevaskis and Project PEACE promoting mediation in the schools, was on the faculty. In addition, significant contributions were also made by Professor Bob Ackerman, Bob Creo, Bonnie Finkel, Judith Meyer, Ben Picker, Professor Nancy Welsh and Ellen Wolf (PECO/Exelon), all of whom are nationally recognized in the field. And as Kathe looks forward to attending the Annual Conference of the International Academy of Mediators (IAM) in Toronto this month, we are reminded that Bob Creo is a founder and the first president, and Mark Welge an inducted member, of this organization dedicated to the highest standards of professionalism in ADR.

Surely today the “critical mass” for ADR exists in Pennsylvania as a result of the efforts of many members of the bar and of the community. The charge for our committee and for each and every one of us is to turn this into a true culture of ADR for Pennsylvania. With the leadership and encouragement of PBAPresident Reg Belden, we plan to seek higher visibility and increased activity on behalf of our cause by all of our members and supporters. We look forward to working with you and seeing you in Harrisburg on June 8 at 1:30 p.m. for our committee meeting. Let us know your thoughts and what you are doing! ☐

Mark Welge, a founder of Marta & Welge in Philadelphia, recently formed Welge Dispute Solutions, LLC, a new firm devoted to mediation and arbitration. Mark is a former chairman of the Philadelphia Bar ADR Committee.

Kathleen L. Daerr-Bannon is a mediator and arbitrator with more than 12 years of ADR experience. She was significantly involved in such visible proceedings as Dalkon Shield, silicone breast implants and Piper Aviation. Ms. Daerr-Bannon is also currently a co-chair of the Philadelphia Bar ADR Committee.
Is There a Real Difference in Whether Common Law or Statutory Law Govern Arbitration?

by Thomas Salzer, Esq.

Pennsylvania is one of 37 states with judicial codes recognizing arbitration as a means of dispute resolution that may be governed both by statutory instruments such as the Uniform Arbitration Act (UAA) and by common law. For the purposes of this article, common law is defined not only per Black’s Legal Dictionary but also in a broader fashion to include the antithesis of the UAA, the statutory language addressing arbitration as a secondary or ancillary aspect of those statutes not primarily designed for arbitration. Examples are: Comprehensive Environmental Response Compensation & Liability Act (CERCLA) 42 USCA sec.9622; Public Lands-Land Use Planning 43 USCA sec.1716; Conservation, South Pacific Tuna Fishing 16 USCA sec.973n, and PA Act No. 195-Public Employee Labor Relations, all of which are statutes primarily dealing with topics other than arbitration but which set out an arbitration means/methodology for conflict resolution.

With this predicate, the question is: Should anyone be concerned whether arbitration issues are governed by the common law or by a statute primarily oriented to arbitration such as the Uniform Arbitration Act? Note that the terms substantive and procedural may be misleading or confusing; so in an attempt to finesse away any confusion, the term arbitration issues will be used to cover both substantive- and procedural-oriented questions or controversies.

A review of Pennsylvania legislation provides some cites and specifics to this framework of generalities. With regard to statutory language primarily oriented to arbitration, Pennsylvania had a statute called the Act of 1927, P.L. 381, No. 248, which gave way to the Act of Oct. 5, 1980, P.L. No. 693, 42 P.S. sec. 7314 Civil Actions & Proceedings, Arbitrations. It should be noted that the Act of 1980 differs from the UAA in one major area, collective labor bargaining, and in numerous minor ways as set out in a 1982 University of Pittsburgh Law Review article by Herbert Sherman, pages 365-69.

Besides distinctions between what states’ arbitration statutes allow and those allowed by the UAA, the Superior Court recently chose to comment on the common law of arbitration and the Pennsylvania statutory arbitration law and concluded “we need not decide whether common law or statutory arbitration applies, however, in order to decide whether appellants’ issues are properly before us because 42 P.S. Sec. 7342(a), relating to common law arbitration, provides that several sections of the UAA, including Sec. 7303, relating to the validity of an agreement to arbitrate; Sec. 7304 relating to court proceedings to compel or stay arbitration; and Sec. 7320 relating to appeals from court orders ... are applicable to common law arbitration.” Midomo Company, Inc. v. Presbyterian Housing Development Company, 739 A.2d 180, 183 (1999).

It is just as easy to assume that the Superior Court in Midomo was making a generalization as it is to assume that the statement was narrowly tailored to the specific facts of the Midomo dispute. If the Superior Court is making a sweeping generalization that the difference is minimal because Subchapter B of the Act of 1980 (common law arbitration) incorporates significant parts of the statutory law, it might be interesting to ask the Midomo Court why the following three areas exist as they do:

1) The standards for overturning an arbitration award differ depending on whether common law or statutory law is being referred to. An area of possible conflict arises out of Section 7314 of the Pennsylvania Act under which a court may vacate an award if the arbitrator failed to comply with various procedural requirements under Section 7307, whereas it remains less clear that
the award would be vacated under common law. supra Supreme Court decisions in Trilogy cases.

2) Arbitration for collective bargaining agreements when called for in writing as to be governed by Subchapter A (statutory arbitration of PA statute) must be “consistent with any statute regulating labor and management relations.” Section 7302, PA Act of 1980. The following examples illustrate how the PA Arbitration Act of 1980 is inconsistent with the labor statutes and court decisions.

The common, federal case law in collective bargaining agreement arbitrations is defined by the Steelworkers Trilogy (three decisions of the Supreme Court of the United States handed down on the same day in 1960):

1. **United Steelworkers v. American Manufacturing Co.,** 363 U.S. 564 (1960);
2. **United Steelworkers v. Warrior and Gulf Navigation Co.,** 363 U.S. 574 (1960);

In these cases, federal guidelines are established for courts when they are faced with questions of enforceability of agreements to arbitrate labor disputes and questions of judicial review of labor arbitration awards in the private sector. The first two cases of the Trilogy (American Manufacturing and Warrior & Gulf) deal with the enforceability of an agreement to arbitrate. In American Manufacturing, the Court said, “The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim, which on its face is governed by the contract. Whether the moving party is right or wrong, is a question of contract interpretation for the arbitrator.

“The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.” American Manufacturing, 363 U.S. at 567-68.

“The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.” Enterprise Wheel, 363 U.S. at 596-599.

Some of the provisions of Pennsylvania’s new arbitration statute are arguably inconsistent with these Trilogy standards. For example, Section 7303 of the Pennsylvania statute provides that an arbitration agreement is enforceable “save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.” If a Pennsylvania court were to apply commercial contract rules to the question of enforceability of an agreement to arbitrate a labor dispute, the approach would be inconsistent with the first two cases of the Trilogy. The Supreme Court has made it clear that a collective bargaining agreement is not an ordinary contract to be governed by ordinary principles of contract law. In *Warrior & Gulf*, the Court said, “The collective bargaining agreement ... is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.” *Warrior & Gulf*, 363 U.S. 578. If a Pennsylvania court were to refuse to order enforcement of an agreement to arbitrate a labor dispute because the dispute was not procedurally arbitrable (for example, due to a lack of timely filing of the grievance), the result would be inconsistent with standards which flow from the Trilogy. The Supreme Court of the United...
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States has held that procedural arbitrability is a question for the arbitrator to decide. John Wiley & Sons Co. v. Livingston, 376 U.S. 543 (1964). Therefore, once again it is important to be aware whether the arbitration is governed by the common law of arbitration or the statutory law, PA's Act of 1980, the Pennsylvania version of the UAA.

3) The PA Arbitration Act of 1980 makes a distinction in parties to an arbitration who are government units and Commonwealth government. For the purposes of this article, it is only necessary to point out that this difference in definition determines whether the common law of arbitration governs or the statutory guidelines of the PA Arbitration Act of 1980 govern. As a summary statement with two examples that follow, “The procedures set forth in the new arbitration act are too inconsistent with the normal labor arbitration procedures protected by Act No. 195 (43 P.S. sec.1101.101 et seq.) for the new arbitration act to apply to labor arbitration with a political subdivision.” U. Pitt. L. Rev. at 386.

In a specific example of the difference between the common law and the statutory law of arbitration, it has been held that Section 1201(a)(5) of Act No. 195 (an act primarily dealing with public employee relations, here included in the common law because it does not deal primarily with arbitration), makes it an unfair labor practice for a public employer to refuse to bargain collectively with the union “including, but not limited to, the discussing of grievances with the exclusive representative” of the employees. Furthermore, Act No. 195 is violated by a public employer who fails to submit a grievance to binding arbitration. Association of Pa. State Colleges and Univ. Faculties v. Pennsylvania Labor Relation Board, 30 Pa.Commonwealth Ct. 403, 373 A.2d 1175 (1977).

If the Pennsylvania version of the UAA were applicable to arbitration procedures under collective bargaining agreements with political subdivisions, there would be meaningful conflict with procedures under Act 195. See U. Pitt. L. Rev. at 387.

In another example of differences or conflicts between common law and statutory governance of arbitration, Act 111, 43 P.S. sec.217.1(1981-82), provides that policemen and firemen employed by political subdivisions (or by the commonwealth) have the right to bargain with their employers collectively, through unions, over terms and conditions of their employment, and that they “have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.” 42 P.S. sec. 217.1 & 217.8. These detailed rules, in certain instances, are clearly inconsistent with the guidance provided by the PA Act of 1980. See, U. Pitt. L. Rev. at 389-390.

As these three areas illustrate, there are specific, if not exclusive, areas where it does make a real difference whether statutory law or common law is referred to for guidance. ❑

Tom Salzer is an attorney with a civil engineering background. He has held positions as an associate with a construction litigation firm in Philadelphia, the Federal Energy Regulatory Commission and a construction claims firm. Currently, he is associated with Foster Wheeler Constructors, Inc.

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United States Supreme Court Upholds the Enforceability of Arbitration Agreements in Employment Contracts

by Andrew Bernstein, Esq. and Cindy Caplan, Esq., both of Pillsbury Winthrop, LLP, New York, NY.

In a 5-4 decision, the United States Supreme Court ruled that the Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-16 (FAA), which requires the enforcement of valid arbitration agreements, applies to all employment contracts except those involving certain types of transportation workers, Circuit City Stores, Inc. v. Adams, U.S., No. 19-1379 (March 21, 2001) (Circuit City). The case significantly strengthens the enforceability of arbitration agreements by narrowing an exemption in the FAA and recognizing the benefits of arbitration in the employment context.

Employee Signs an Employment Application Containing and Arbitration Provision

The case arose out of a claim of employment discrimination by respondent, Saint Clair Adams, an employee of petitioner Circuit City Stores, Inc., a national retailer of consumer electronics. Adams signed an employment application that included a provision requiring him to settle all disputes arising out of his employment by arbitration before being hired by Circuit City as a sales counselor in one of its California stores.

Two years later, Adams filed an employment discrimination lawsuit against Circuit City in state court, asserting claims under California’s Fair Employment and Housing Act, Cal. Govt. Code Ann. §§ 12900 et seq. (West 1992 and Supp. 1997). Circuit City then filed suit in the United States District Court for the Northern District of California seeking to compel arbitration of respondent’s claims, pursuant to the FAA. The District Court entered the requested order, holding that respondent was obligated by the arbitration agreement to submit his claims against the employer to binding arbitration. Adams appealed the decision to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit Opposes the Interpretation of the FAA Provided by 11 Federal Appeals Courts

Prior to the Circuit City case, 11 federal appellate courts had narrowly interpreted Section 1 of the FAA, which exempts the “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” According to these courts, the scope of Section 1 was limited to certain types of transportation workers and therefore only such transportation workers could avoid arbitration on the basis of the FAA exemption. The Ninth Circuit ruled contrary to the other federal appellate courts by favoring a broader definition of the FAA exemption which would allow all workers in interstate commerce to circumvent arbitration and pursue employment claims in court. The Ninth Circuit’s decision caused uncertainty in the scope of enforceability of arbitration agreements and thereby left the matter ripe for adjudication by the United States Supreme Court.

The Supreme Court Reverses the Ninth Circuit’s Ruling

The Supreme Court reversed the Ninth Circuit decision and expanded the enforceability of pre-dispute arbitration agreements. Justice Anthony Kennedy, who wrote the majority opinion for the Court, relied on the wording of the FAA and a long line of precedent to support the Court’s decision to uphold the enforceability of arbitration agreements in the employment context. According to Justice Kennedy, (Continued on Page 7
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allowing litigation to overcome arbitration would introduce “considerable complexity and uncertainty ... into the enforceability of arbitration agreements in employment contracts [and] would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the nation’s employers.”

The dissenting justices expressed concern that the Court has “pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.”

United States Supreme Court Will Hear Follow-Up to Arbitration Case

As a follow-up to this ruling, the United States Supreme Court has agreed to decide whether the Equal Employment Opportunity Commission (EEOC) can still sue for monetary and other damages on behalf of an employee who is covered by an arbitration agreement. Equal Employment Opportunity Commission v. Waffle House, 99-1823. A federal court in South Carolina ruled that the EEOC was not limited by an employee’s arbitration agreement, but a federal appeals court reversed that decision in 1999. The United States Court of Appeals for the Fourth Circuit held that while the arbitration agreement did not prevent the EEOC from being involved in employment disputes, it did limit the damages that the EEOC could seek. The Supreme Court waited until after it issued its ruling in the Circuit City case to agree to address this related matter.

Employers Can Avoid Costly Litigation

The Circuit City ruling sends a strong signal in support of arbitration. Following this decision, courts will be compelled to respect pre-dispute arbitration agreements contained in employment applications and contracts provided that they are drafted appropriately. Employers can avoid costly litigation by amending their employment policies, manuals and agreements to include arbitration clauses.

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Gaming the Mediator: Tricks Parties Play at Mediation

By Mark Welge, Esq.

Tricking or “gaming” the mediator is a form of unethical behavior by a party or its advocate in order to achieve an unfair advantage at mediation. We have all encountered “gaming” and know that it has adverse effects on the dispute resolution process. Frequently, “gaming” is difficult to recognize until after it has occurred. By that time, the damage is done. This article describes some of the games parties or their counsel play at mediation and provides some suggestions for discovering and preventing them. The subheadings are provocatively titled only to get your attention.

I Like to Watch!

A party attends the mediation, not to negotiate, but to observe. The party has no settlement authority. The “game” is to monitor the negotiations and obtain information that may be useful in ongoing or prospective litigation. Frequently, “gaming” is difficult to recognize until after it has occurred. By that time, the damage is done. This article describes some of the games parties or their counsel play at mediation and provides some suggestions for discovering and preventing them. The subheadings are provocatively titled only to get your attention.

Let’s Take it Slow.

The party uses mediation as a tactical ploy to either delay trial, slow down the litigation process or postpone filing of suit. The “game” is played when a party agrees to mediate, but only if ongoing litigation is stayed or the other side agrees not to sue until the mediation concludes. However, the party is stalling because it has no intention of negotiating in good faith.

Stays of pending litigation or trial delays should be kept as brief as possible, only allowing the parties to negotiate until resolution or impasse. The mediation agreement ought to provide for resumption of proceedings shortly after conclusion of mediation. Parties who request longer stays may be doing so for illegitimate reasons.

I May Have to Go Out With You, But I Don’t Have to Like You.

In court-ordered mediation, some parties participate only because they have to, not because they want to. Forced participation may translate into parties attending the mediation with hidden agendas, resentment for the process and an interest in subverting the mediation. These feelings and intentions may be concealed intentionally from the mediator and other parties. However, signs that a party does not want to be at mediation usually express them-

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selves in the form of lack of candor, guarded communications or confrontational behavior.

The mediator needs to inquire, at the outset, why the parties are conducting the mediation. Artful questioning can uncover those who are at mediation with a good-faith desire to negotiate, and those who are there because a judge has ordered them to do it.

The “Lovers” Quarrel

A party intent on undermining the mediation process will manufacture a pretext for ending it. The “game” is played like this: offense is taken from some innocuous statement by the other side and the “offended” party becomes argumentative and confrontational, eventually storming out of the mediation in anger. Alternatively, an argument with the mediator is instigated, together with accusations that the mediator is biased or is not properly facilitating the negotiation. Whatever the precipitating event, it is created for the purpose of derailing a mediation that the party had no good-faith interest in joining in the first place.

Preventing this trick may be impossible, but it should be recognized for what it is. A well-crafted mediation agreement may provide sanctions for such conduct; however, proving that the conduct was pretextual, and enforcing sanctions, is extremely difficult.

I’ll Show You Mine If You Show Me Yours.

This is a bad faith negotiation technique to get the other party’s settlement position on the table. One party appears to negotiate in good faith, makes offers and counteroffers until the other side reaches a range in which settlement is likely. Then the first party breaks off the negotiation, sometimes using the “busy line” or “lovers quarrel” games. The mediator is “used” to carry the offers and report responses.

This trick is hard to recognize when it is unfolding. Requiring that party representatives be present at mediation, however, is one way to make this “game” more difficult to play.

Speak for Yourself, John.

The party persuades the mediator to use the “trial balloon” technique. Apparently unwilling to make an offer of its own, the party asks the mediator to float the proposal as his or her own. The party gets the reaction it seeks from the other side, then disavows the floated proposal, conceals its true position and obtains a negotiation advantage. The mediator becomes the medium for this unethical ploy.

Careful questioning by the mediator can determine why a party is unwilling to identify the offer as its own. If the reason lacks logic or sincerity, the mediator should refuse to float the offer.

I Know Something You Don’t Know.

The party uses the mediator to probe the other side for confidential information. For example, the party tells the mediator it might change its position if the other side has an expert, document or fact witness relating to a particular issue. The witness or document has not yet been revealed. The mediator is asked to find out and report back to the first party. The requested information is obtained, but there is no change in position.

The mediator can derail this “game.” When the party tells the mediator that it will change its position, the mediator should ask the party to articulate the change before he or she probes the other side. In any event, if the other side has confidential information, it should demand that the information remain confidential and not be revealed by the mediator if there is any doubt that a party is negotiating in good faith.

Conclusion

Mediation is a collaborative dispute resolution process. It is prone to abuse if one or more parties decide to subvert it through overt or covert “games.” The mediator and parties must remain vigilant and knowledgeable about these unethical tricks in order to recognize and stop them.
In order to get more of a sense of the entire committee, please respond to the following items and return in the enclosed envelope. Note that this is NOT a binding vote and no authorization or confirmation is to be implied by responding to these items; this is an attempt to reach eventual consensus of the Committee.

A. Is there a need for a codified mediator credentialing process at all with the goal of increasing the professionalism of mediation?

YES [20] NO [3]

If you responded above (to “A”) with “yes,” then please respond to the following questions,

Do you want the credentialing process to be solely a permissive award not required to act as a mediator analogous to being a “Board Certified” physician?


B. Should a mediator credentialing statute address mediators in court-annexed mediation?

YES [18] NO [4]

C. Should a mediator credentialing statute address mediators in government agency-sponsored mediation?


D. Should a mediation credentialing statute address mediators in private mediation?

YES [20] NO [3]

E. Should a mediator credentialing statute require a mediator in a private mediation to be an active member of the Pennsylvania bar?

YES [3] NO [19]

F. Should having a JD degree (nothing more or less) be the pre-requisite to initially being a certified mediator for private mediation?


If you replied “yes” to “F,” the immediate question above, then please skip questions “G,” “H” & “I” and go to “J.” If you replied “no” to “F,” then please reply to the following questions:

G. What initial ADR training topics and hours should be required if a certified mediator must have a JD degree? no concise listing of topics, 1 entry of 17 hrs., 1 entry of 30 hrs., and 10 entries of 40 hrs.

(Continued on Page 11)
H. Should there be a definite attempt through express statutory stated course requirements to accommodate non-attorneys in the mediator accreditation statute?  
YES[16]  NO [3]

I. If you accepted the idea that a certified mediator does not have to have a JD degree, then what are the range of initial ADR topics and hours required? no concise listing of topics, but 1 entry of 80 hrs., and 6 entries of 40 hrs.

J. Should a mediator credentialing statute require mediation-oriented continuing education for private mediation?  

K. Should any course requirements to be a certified mediator for private mediation be (1) expressly stated in the statute or (2) refer in the statute to requirements that will be defined later by the MCC (Mediator Credentialing Committee)?  
Circle the preferred – either (1) [4] or (2) [16]

L. Should there be a “grandfathering” provision?  
YES[20]  NO [3]

If you replied “yes” to “L,”

M. What is the criteria to meet to be grandfathered? be an arbitrator for 2-6 years; average = 4 years

Regardless of your response to “L,” please answer the following,

N. Should the codified mediator credentialing process address in any way whether mediation is (1) the practice of law or (2) not the practice of law or (3) is a function of facts unique to each mediation?  

While it was not expressly asked which of these 3 choices the respondent thought was the correct answer, 1 indicated #1; 2 indicated #2; and 4 indicated # 3.  □
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