

**AMERICAN BAR ASSOCIATION**  
**SECTION OF DISPUTE RESOLUTION**  
**REPRESENTATION IN MEDIATION COMPETITION**  
**2016-2017**  
**RULES AND INSTRUCTIONS**  
**UPDATED November 2016**

**COMPETITION MISSION**

The competition is designed to acquaint the law student participants with advocacy skills in alternative dispute resolution processes, specifically mediation. The focus of this competition is on attorney representation of clients in mediation. The judging criteria are designed to reward those participants who use an effective combination of advocacy skills and a problem-solving approach in the mediation. The problem solving approach is defined as one in which negotiators learn about each other's interests and BATNA (Best Alternative To A Negotiated Agreement), brainstorm options, and select and shape a solution that meets their interests and, where appropriate, objective standards. Participants are not expected to sacrifice their client's interests in order to be collaborative.

**INTRODUCTION**

As Alternative Dispute Resolution (ADR) becomes more integrated in courts and pre-trial procedure, it is very likely that attorneys will have many cases referred to these processes. Thus, it is important that the attorney adequately represent his or her client in this ADR environment. This competition is designed to acquaint the law student with advocacy in these processes, specifically mediation. The focus of this competition is on attorney representation of clients in mediation. Judging criteria are geared toward examining the effective combination and use of advocacy and collaborative problem-solving skills.

**COMPETITION RULES**

**Rule 1. Format**

Each round will consist of a 75-minute mediation session. At the close of the mediation session, there will be a 10-minute period during which each team is to analyze its performance in private, followed by a 20-minute self-analysis period (10 minutes per team) for each team to evaluate its own performance in the presence of the judges, but outside the other team's presence.

Each team may caucus with the mediator or break to meet as a client and attorney for a total of 12 minutes during the mediation session. The attorney/client team may decide how they want to use their time and may inform the mediator of how much time they would like to take for caucus. Taking a break or a caucus does not suspend time on the 75-minute mediation session; time continues to run. Teams may not conduct their "break" in front of the mediator. Because of the potential for disruption of the competition, any faculty or other observers from either of the competing schools are prohibited from leaving the room from the beginning of the session until both teams have completed their self-analysis, including during any breaks or caucus sessions.

### *Regional Competition Structure*

The Regional competition will consist of two preliminary rounds and a final round. Each team will participate in the two preliminary rounds, with the top two teams advancing to the final round.

### *Advancing to the National Competition*

The first-place team at each regional automatically advances to the National Competition. If for some the first-place team cannot participate in nationals, the team must notify the national coordinators within a week after the regional competition.

If there is an odd number of regional competitions, then the regional with the greatest number of schools participating in the regional competition will be asked to send both 1<sup>st</sup> and 2<sup>nd</sup> place teams from that region to compete at the national competition. For purposes of determining which regional has the most teams competing, a third team fielded by a host school will not be counted.

### *National Competition Structure*

The National Competition will consist of two preliminary rounds, a semi-final round and a championship round. Each team will participate in two preliminary rounds, with the top four teams advancing to the semi-final round. For the Semi-Final Round, teams will be paired according to their rankings from the preliminary rounds. Team #1 will be paired with Team #4. Team #2 will be paired with Team #3. For the semi-final and final rounds, the top seeded team in each pairing will choose which side they will represent. The winner of each of the semi-final rounds advances to the championship round.

## **Rule 2. Registration**

A school must field the number of teams they have registered as of the entry deadline at their assigned regional competition. Schools are required to send the participating students' names to the ABA Section of Dispute Resolution staff two weeks prior to the school's assigned regional. This competition requires an even number of teams in each regional competition. A late withdrawal has a negative impact on all teams as any team that withdraws must be replaced. If an unforeseen circumstance arises, the school must contact the host school and the ABA Section of Dispute Resolution staff immediately upon learning about their inability to participate. If participants do not provide the ABA with a viable reason for withdrawal, at least 24 hours before the regional begins, the participant's school will be banned from entering the competition the following year.

Law schools may enter one or two teams for the competition. If an uneven number of teams are registered for the competition as of the registration deadline, the ABA may invite the host school to enter an additional team or may request another school in the region to send an additional team.

## **Rule 3. Eligibility**

The competition is open to all full and part-time law students enrolled in ABA approved (or Canadian LSAC-member) law schools during the semester the competition is held. Students enrolled in joint degree programs (JD/MA, JD/MBA, etc.) who have not graduated from law school and are enrolled in the joint program for the semester are eligible. LLM, MJ, or other non-JD students are eligible for the competition, provided their initial law degree graduation date was no longer than twelve months before the competition registration deadline.

#### **Rule 4. Team Composition**

Each team will consist of two students, with one student acting as the lawyer and the other acting as the client for the first round. The students on each team are to determine between themselves who will act in which role for round one. Roles must be reversed for the second round. There will be no changing of partners at any time during the competition. The Judging Criteria are applied to the performance of the attorney/client team—not just the performance of the attorney. For the semi-final and the final rounds, the team members shall decide for themselves, who will act as the client and who will act as the attorney.

The ABA staff will randomly match opposing teams in advance for each regional competition round. The ABA staff will also designate in advance which team in each pairing is to assume the role of which adversary (plaintiff or defendant) in the problem for that round. Teams who represent plaintiffs in round one will represent defendants in round two. No two teams will compete against each other in both of the preliminary rounds. For purposes of administration and anonymous scoring, each team will be assigned an identifying letter prior to the competition.

#### **Rule 5. The Problems**

Each round will involve a new problem. All teams in each round will use the same problem.

The ABA staff will distribute the problems for the regional competition rounds 2-3 weeks prior to the regional competition. Each problem will consist of (1) general information for all participants and (2) confidential information for each party and their counsel.

Judges will receive all general and confidential information provided to the teams. Mediators will receive the general information only. If the mediator also serves as a judge the mediator will receive the confidential information but should not read the confidential information until after the conclusion of the mediation session.

The general information for the semi-final (at the national level only) and the final rounds will be distributed prior to the competition. The confidential information will be distributed at the competition as soon as the semi-finalists and finalists are announced, and each team has chosen or been assigned a side to represent.

The problems will be drafted in a gender-neutral format, meaning that either a male or female law student can play in the role of the party on either side of the problem.

Teams will have the opportunity to submit a request for clarification of the problems to ABA staff which will be addressed by the Competition Problem Drafting Committee. The Committee will address questions and clarifications limited to matters that would appear to have legal significance in the context of the problem as presented. A request for clarification must include a short explanation of the expected significance of the clarification. If a request does not include an explanation, the Committee may ignore the request. The Committee will provide clarifications to all teams if the clarification arises from the general information, and to the teams assigned to the appropriate side if arising within the confidential information. The timeline for the clarification process will be determined when the problems are delivered and the deadline will be strictly enforced. Clarifications issued become part of the problem. Each team is allowed to submit no more than 5 clarification questions for the general information and 5 clarification questions for the confidential information for each problem assigned in advance of the competition. The Committee reserves the right not to address questions that it deems are irrelevant, outside the scope of the problem, or counter to the purpose of this rule.

In terms of complying with Rule 16 (Staying Within the Record) teams may draw reasonable inferences from the facts provided, but teams are constrained to the facts contained within the four corners of the written problem. Students are encouraged to do some outside research to become more familiar with the subject matter as well as the legal issues. However, when presenting "facts" in the role-play, the students should be limited to facts as written in the problem. The problems are carefully drafted to create a balanced playing field. This careful balance could be tipped if the students bring in outside facts that specifically change their legal position.

### **Rule 6. Team Self-analysis**

Following the 10-minute preparation for self-analysis, each team will have 10 minutes to orally analyze its own performance in the mediation in front of the judges. This will take place outside the presence of the opposing team. Students will begin this 10-minute period by stating their answers to the following questions: (1) In reflecting upon the entire mediation, what specific problem-solving strategies did your team use well? (2) Also, in what areas did you experience difficulties and what would you do differently next time when facing a similar situation? (3) How well did the outcome advance your client's interests as presented in the written representation plan?

Judges are only allowed to ask questions about the team's self-analysis or the team's performance during this time. During the self-analysis, Judges shall not provide critique or feedback about the self-analysis or any other element of the team's performance.

The team should be prepared to respond to questions from the judges concerning the team's performance. In addition, the team may use this time as an opportunity to explain why it chose a particular approach or even a specific tactic. For scoring purposes, the judges may take into consideration anything said during this session.

The "plaintiff" team will go first in the self-analysis session. Because the teams change roles for the second round, neither should be at any net advantage from the extra preparation time they have as the "defendant" team.

### **Rule 7. Orientation**

An orientation will be provided for volunteer judges and mediators and for law student participants and their coaches and faculty advisors. The Competition Coordinator may decide to have one large orientation session or two separate orientations, one for participants and their coaches and faculty advisors and the other for judges and mediators. If there is a separate orientation for judges and mediators, the Competition Coordinator may ask one representative of each team to attend the orientation for judges and mediators. However, in some circumstances (for instance where a law student team does not have a coach or faculty advisor or where the competition coordinator has a reasonable concern that the presence of team representatives in the volunteer orientation will result in anonymity of the teams being breached) the Competition Coordinator may determine not to allow team representatives to attend the judge and mediator orientation. If team representatives are not allowed to attend the judge and mediator orientation then the Competition Coordinator must explain to the participating teams the topics to be covered in the judge and mediator orientation. If a representative from any team is allowed to attend the judge and mediator orientation then all teams must be allowed a representative at the judge and mediator orientation.

At the orientation session all student participants will be afforded the opportunity to ask questions. The Competition Coordinator will have complete discretion in answering questions related to the problem and rules. However, no new facts will be added to the problems.

While the participants may not make up facts, the facts are subject to reasonable interpretation. Whether a team's interpretation is reasonable is a matter entirely within the discretion of the judges and is not reviewable.

### **Rule 8. Permissible Assistance**

The team coach or faculty advisor may advise the team in its planning and preparation for the competition, including the semi-final and championship rounds. No one, including team coaches and faculty advisers, however, may give advice or instructions to, or attempt to communicate, in any way, with any of the participants during the period from commencement of the participants' mediation session through completion of the self-analysis and final scoring period for that mediation session. Coaches may provide advice to their team in advance of the individual rounds, including the semi-final and championship rounds, but may not provide any such assistance once the mediation round has commenced.

Competitors may attend only their own scheduled mediation sessions. No person associated with any competitor, such as a coach, family member, or friend, may attend a mediation session other than one in which that school's teams are involved, except during the Regional Finals round or the National Finals round. If a school has multiple teams participating in the Regional or National competition, persons identified with those teams (other than competitors themselves) may attend any mediation session in which that school's teams are involved.

No person associated with any competitor, including a coach, family member, friend, or any member of a team participating in the competition, may provide any form of advice or assistance to any competitor from another school in the competition. Scouting in any form is also strictly prohibited. Scouting is the observation and sharing of information with a competitor from another school about a team in the competition, during the competition, whether intentional or inadvertent. Teams from the same school (if a school has more than one team entered) are not prohibited from sharing information about other teams that they have faced. The responsibility ultimately rests on each competitor to refuse any prohibited advice or information.

The mere act of communication, receipt of information, or attendance proscribed by this rule will constitute a violation, regardless of the substance thereof, and regardless of whether initiated by a participant or by any other person. Violation of this rule will result in disqualification. Harmless error will not be a defense to a complaint based on violation of this rule, because of the appearance of impropriety occasioned even by casual exchanges unrelated to the substance of the mediation.

### **Rule 9. Technological Devices**

Competitors may use a hand-held calculator or stopwatch during a mediation session, but no other technological device may be used during a mediation session, including a laptop computer, tablet, mobile phone, smart phone, personal digital assistant, or similar electronic communication device, except for timekeeping purposes. Further, any technological device used for timekeeping must be kept in "airplane mode." A school may request a waiver of this restriction to the extent necessary to accommodate a competitor's physical or mental impairment, but the waiver must be requested in writing in advance of the competition.

### **Rule 10. Mediators and Judges**

In each mediation, an experienced mediator will serve in the role of a **facilitative** mediator. Two or three judges observe, and score the quality of representation by the student teams. Judges also give feedback

directly to the students at the end of the competition. If only two judges are available, the mediator will act as the third judge and participate in evaluation and scoring. The judges will evaluate the performance of the student-participants according to the standards and criteria provided. (See sample Judge's Score Sheet attached.) Every attempt will be made for the teams to have a different mediator and different judges in subsequent rounds, to the extent possible. After the judges have completed the scoring they will have the opportunity to critique both teams together for 15 minutes. Coaches for all teams and any other spectators may remain in the room through the entire process.

The competition director is responsible for recruiting, to the greatest extent possible, judges who are experienced and knowledgeable in problem-solving negotiation and mediation as well as some with legal backgrounds.

A judge may be disqualified before a round begins by any team if the judge has any prior relationship with a team or team member. For instance, a judge may be disqualified if he or she knows any member of a team through academic, professional or social contact. He or she may also be disqualified by a team in the current round of the competition if the judge has acted as a judge in a prior round when one of the teams has participated in both rounds and could therefore be judged twice by the same judge. However, the judge may still serve in the second round if: (1) the other mediation sessions in that round of competition have started at the time the team moves to disqualify a judge for this reason, thereby creating the possibility that another judge cannot substitute without disrupting the other mediation sessions; or (2) an insufficient number of judges exists to allow a substitution. A judge may also disqualify himself or herself if he or she feels his or her participation in the round of competition will create an appearance of impropriety.

A mediator who is not also acting as a judge in the round may not be disqualified for any reason. The mediator does not make any decisions on behalf of the parties and, as long as he or she is not also acting as a judge, has no influence on the outcome of the session. Accordingly, no reasonable basis exists for disqualifying the mediator under these circumstances.

Participants should expect mediators and judges to have read and observe the Instructions for Mediators and Judges. The competition coordinator should make all efforts possible to ensure the Judges and Mediators have read and are familiar with the Instructions for Mediators and Judges.

### **Rule 11. Observers**

Observers may not communicate with team members at any time during the mediation session, including the self-analysis and critique periods. If a team member is seen communicating with an observer during the session they will be disqualified pursuant to rule 8. Harmless communications, such as "we were just organizing lunch," will not be a defense to a complaint based on violation of this rule. **It is the participating student's obligation to convey these rules to any observer associated with the individual or school.** All non-competitors, including faculty advisors and coaches, who wish to observe the competition must sign in prior to the start of the role play. ALL observer cell/smart phone usage is strictly prohibited. Violators of this rule will be asked to leave the room immediately. If a coach or faculty advisor is in violation of this rule, it will result in disqualification of their team. Observers are **required** to remain in the competition room until the end of the Judges' critique period. The only other time an observer may exit the room is at the completion of the mediation session (75 minute mark) when the competitors leave the room to prepare for their self-evaluation. However, coaches and faculty advisors must remain in the room until the end of the Judges' critique period. If an observer leaves the room, s/he is prohibited from re-entering the room or having any contact with the competitors until the round is completed.

## **Rule 12. Timekeeping**

Responsibility rests with the student participants for timekeeping and adherence to the allotted time periods for mediation sessions, caucus, breaks, and self-analysis. Only if resources and volunteers are available will timekeepers and/or timekeeping devices be provided. However, no individual identified with a participant may act as a timekeeper in a mediation involving that participant. If there is no timekeeper, one of the judges should be designated to keep track of time (12 minutes of caucus/break per side and 75 minutes total) but should not provide the participants with updates or countdowns. At the end of time (12 minutes of caucus/break per side and 75 minutes total), the judges should announce that time is up and end the segment. Decisions by the judges with respect to elapsed times are final and non-reviewable.

## **Rule 13. Scoring**

In each mediation, each of the judges rates the performance of each team on certain relevant criteria, with a maximum of 70 points awarded per team, per round, by each judge. The criteria on which the teams will be judged are set out in the accompanying sample of the Judge's Score Sheet. A failure to reach agreement will not result in a lower score, unless that failure comes in the face of an offer that is clearly and manifestly in the interest of the declining party and thus appears to result from bad faith. The decision of the judges regarding bad faith is final and non-reviewable.

Competition directors have been provided with sample ranking and tally sheets.

Judges must independently score each team and are not allowed to confer with the other judges. Before the judges hear the self-analysis they should give each team a preliminary score. After the self-analysis judges may revise and finalize the scores.

Each judge must total his or her own scores for each team. The judge must then circle the word "Win" at the bottom of the score sheet for the team he or she gives the most points to and should circle the word "Lose" at the bottom of the score sheet for the team that received fewer points. If the judge has given both teams the same number of points, the judge must adjust the scores for the teams to give one team more points than the other. Judges must give the competition director the score sheets before the critique.

## **Rule 14. Winning a Round**

The team winning the most number of individual ballots per round will be the winner of that round. Consequently, ballots (score sheets designating a "Win") will trump overall team point totals for the purpose of determining the round winner. (A team wins with either all three judges casting ballots in their favor or on a 2-1 decision. For example, in the situation in which the total team points versus the number of winning ballots per round would result in two different overall round winners, the team with the most winning ballots will win the round.) The goal of this rule is to even the round if one judge scores substantially higher or lower than the others.

## **Rule 15. Ranking of Teams**

Teams will be ranked and seeded for the post-preliminary rounds in the following order:

1. Win/Loss Record;
2. Total Number of Ballots;
3. Total Number of Overall Points;

4. Total Number of Points Earned in the Self-Analysis Category.

**Rule 16. Staying Within the Record**

While teams may draw reasonable inferences from the facts provided, they are cautioned to stay within this reasonable sphere. Failure to stay within the record may result in up to a 5-point penalty.

**Rule 17. Controlling Law**

Although the mediation exercises may refer to actual places, for purposes of this competition, assume there is no controlling law, and the jurisdiction applies general principles of Anglo-American common law. (Any exceptions will be explicitly stated in the common facts and orientation sessions.)

**Rule 18. Boards, Exhibits, and Props**

The competition host may make flip charts, whiteboards, and blackboards available for use during the competition rounds. If the competition host makes flip charts, whiteboards, and blackboards available, they must be available in each competition room. **The flip charts, white boards, or blackboards are available for mediator use only, and competitors may NOT use them. Competitors may ask for the mediator's help in presenting information.** Competitors interested in sharing pre-planned proposals or agendas may, as an alternative to asking the mediator to write on the board, utilize the exhibit for these purposes.

Although teams are not expected to use exhibits in the mediation sessions, a team may prepare in advance one exhibit, limited to one 8 1/2 by 11 single sided page with print in 12 point font for each round. Teams are allowed to write on this exhibit during the course of the mediation session. Anything disseminated with the fact patterns does not count as a prop unless the competitors alter it before the mediation session. Teams are prohibited from using video, computers, or other technology or displays. Pictures may be used only if they comply with Rule 5 and Rule 16 and do not in any way contradict or impermissibly expand upon the facts as written in the competition problem.

In addition to sharing an exhibit with the other side, the students should also provide a copy of the exhibit to the mediator and the judges. This can be done immediately prior to the 75 minute mediation session, or during it. If the students so choose, they may attach the exhibit to their representation plan. The students should not hand any exhibit or other document to the mediators or judges after the 75 minute mediation session.

Teams are prohibited from bringing props and wearing costumes to the mediation session. A violation of Rule 18 will result in a 5 point penalty.

**Rule 19. Caucuses and Breaks**

Each team can caucus with the mediator or break outside of the mediation room for a total of 12 minutes. To do so, a team must affirmatively request to break or caucus (the mediator will grant such a request). When one team is caucusing with the mediator, the non-caucusing team shall step outside of the competition room. When one team calls a break, both teams shall step outside of the mediation room and time will run against the team that called the break. When one team is caucusing, the other team is not using their caucus/break time. If one team first calls for the break, and the other team responds by asking for a caucus, the caucus will be granted and the time counts against the team caucusing. For example, if Team A calls for the break and Team B responds that they would like to caucus with the mediator, the

time counts against Team B's 12 minutes. Once both teams have left the room for the break, it is not possible for either team to caucus with the mediator until the break is over.

### **Rule 20. Anonymity**

Participants should not identify the school they represent until after the end of the final round of the competition. Participants must therefore refrain from wearing or carrying anything with the school name, logo or other identifying symbol, including school brief cases or note pads. Teams may only refer to themselves by name or by the team letter they have been given by the competition director. Team members will be identified by their team letter on their name tag and table tent.

This rule applies to all events associated with the competition, including receptions and meals. Participants shall make extra effort to remain anonymous during any social events scheduled during the competition.

### **Rule 21. Representation Plans**

Each team shall prepare a Representation Plan setting out the team's negotiation strategy based on the parties' respective interests presented in the problem. The Representation plan shall be limited to one double-sided 8 1/2 by 11 or two single-sided 8 1/2 by 11 sheets of paper in Times, 12 point font, 1 inch margins. In the Regional Final Round, the National Semi-Final Round, and the National Final Round the Representation Plan may be handwritten using the same number of pages. The plan shall be given to the competition judges for their review at least 10 minutes prior to the beginning of the mediation round. Teams must have 5 copies of the plan available at the start of each round.

The plan should consist of an outline with a brief description under each of the following headings: (1) "Responsibility Sharing" – explain *how* you plan to share responsibilities between the attorney and the client in the mediation session; (2) "Allocation Strategy" – explain *why* your team chose the particular allocation strategy; (3) "Interests" describe the interests that your side plans to advance in the mediation session, and the likely interests of other side; (4) Your Team's BATNA analysis as well as the likely BATNA analysis of the other side; (5) Potential Collaborative solutions meeting everyone's interests (6) Key Questions/Information you will seek or anticipate; (7) "Negotiating Strategy" – your negotiation strategy in light of the preceding factors, also potentially including bargaining chips; (8) preparation for introductory remarks after the mediator's introduction; and (9) Potential Agenda items of things you would like to discuss.

In keeping with the anonymity instruction, do not put your school name or any other identifying mark or symbol on the representation plan. Instead, use the role assigned and/or your team letter designation to identify your plan. Teams should hand the representation plans to the judges immediately prior to the beginning of the mediation session. Before the mediation begins, judges are instructed to read each side's representation plan to help the judges *interpret* what they are observing.

### **Rule 22. Decision-Making**

For the regional competitions, the regional host school shall decide all issues relating to the regional competition. For the national competition, the national competition Co-chairs shall decide all issues relating to the national competition.

### **Rule 23. Team Cancellation or Late Arrival**

A team withdrawing from the competition must give notice to the national competition organizers as soon as possible. There is always the possibility that because of illness or other emergency a team will cancel its participation prior to, or on the day of, the competition. The ABA Section of Dispute Resolution shall endeavor to identify an additional team to replace the cancelling team from the host school or from another participating school. Only schools representing the side of the team that canceled will be eligible as replacements. If more than one school volunteers to furnish a replacement team, the host school will be given the right of first refusal if the host school represents the same side as the team that cancelled. Otherwise, the replacement team will be chosen by lot from among those that volunteered.

Teams are expected and encouraged to arrive timely for the competition. If a team arrives more than 15 minutes after the end of the check-in (orientation) period for any round, the judges will be instructed to impose a penalty of two points from that team's total score for the session.

#### **Rule 24. Responsibility for Hosting Regional Competitions**

The ABA wants to ensure that the responsibility for hosting the regional competition is shared amongst schools within a region. It is expected that each participating school will host the regional competition within a reasonable time period. For the convenience of the schools, the ABA will schedule regional hosts up to five years in advance.

#### ***Instructions for Mediators***

It is essential that the mediators participating in the competition adopt a consistent and uniform approach to the mediation session. With this in mind, please conduct your mediation session within the following guidelines:

1. How you approach your role as mediator in this competition determines the quality of the learning experience that each student will have during the mediation exercise. Please keep uppermost in your mind that this competition is an extra-curricular activity for law students where the primary focus should be on the student teams. Your primary goal as a mediator is to encourage the greatest amount of team performance during the exercise.
2. All mediators must read the Competition Rules.
3. Mediators and Judges should not talk with competitors after the completion of the round about the substance or performance of any team.
4. In order to learn about the approach that each of the teams will be taking in the mediation sessions, you should study the criteria that the teams were given and that the judges will be using for evaluating the teams' performances. (The criteria can be found in the Judge's Score Sheet.) You should read the criteria before appearing at the competition.
5. Your mediator's opening statement should address, at minimum, the following:
  - Role of mediator as a facilitator of the process
  - Voluntary nature of mediation
  - Process (mediator's introduction, opportunity for each side to share what brought them there, setting an agenda, joint session, option for a side to request a caucus with the mediator)
  - Ground rules for the parties and their representatives (e.g. do not interrupt)
  - Confidentiality of matters discussed in joint session and in caucus

Your mediator's opening statement should be **less than five minutes**.

6. Following your mediator's opening have each side share their views regarding the issues that brought them to the mediation. You may ask the client or the attorney if they would like to add anything if only one participated, but you should respect their strategy.
7. After each side's opportunity to share, at the parties' preference, briefly facilitate the creation of an agenda. You may utilize the board or flipchart, but you do not need to. Do not allow the participants to utilize the board to simply write up their agenda. The parties may together choose to forego the creation of an agenda. One or both sides may utilize their exhibit to prepare an agenda, and at their direction you may use the exhibit to facilitate a joint agenda.
8. Following the agenda facilitate discussion. You should adopt a facilitative style, rather than an evaluative or directive one. Do not tell anyone what to do or provide any opinions regarding the substance of the mediation. No matter what your regular professional practice is, you should permit each team to present their case and to implement their negotiation plan even if you believe it is counter-productive and artificial.
9. All your interventions should be calculated to promote the students' participation in creative problem solving and development of settlement options to the greatest extent possible. Please do not suggest options for settlement or interject your opinion. Remember that the mediation session is short and only lasts for 75 minutes. This also does not mean that you should remain completely silent. The goal is for you to be a presence but allow them to highlight the students' advocacy skills. The mediator is the only one who may write on the flipchart, whiteboard, or blackboard if one is provided.
10. Examples of possible mediation interventions:
  - Reflect something that one side says and ask an open ended question
  - Identify an interest and reflect it back to one side.
  - Ask one side a question that the other side is attempting to ask (but not communicating clearly)
  - Utilize the agenda to see if they would like to talk about something else on the list
  - Summarize an agreement reached and offer to write it on the board (or elsewhere)
11. Caucusing is optional for the students. It is not your role to call for a caucus. It is important to provide the student advocates with the opportunity to strategically decide the need for a caucus and to effectively request such interventions by the mediator. For ease of transition into caucus, mediators may say "Now that the other party is out of the room, what would you like to discuss?" or "Now that the other party is out of the room, how can we best use this time?" Or "How is this process going for you so far?" **The client/advocate may specify how much of their 12 minutes of caucus/break time will be used for the caucus. Each caucus may last no longer than 12 minutes.**

Allow the advocate/client to take the lead in the caucus, but be sure to participate. You may help them clarify their goals, determine next steps, formulate an offer, or simply do some much needed venting. When concluding a caucus, the mediator should clarify with the competitors what information is to be kept confidential. If one team takes a caucus with you, the other team may take a caucus immediately following, or may choose to wait until a later time. Even if you use a no-caucus model of mediation in your practice or you think that the time chosen by the student team is not appropriate, please allow the students to take a caucus when requested.

THANK YOU FOR YOUR HELP!

### *Instructions for Judges*

1. As judges in this competition, you perform two extremely important functions. First, you evaluate and score the quality of representation by the student teams. Second, you give measured, balanced and constructive feedback in a manner calculated to empower the law students and increase their learning from this experience.
2. All judges must read the Competition Rules prior to the competition date.
3. All judges must read each team's representation plan before the mediation process begins.
4. Anonymity: To avoid any appearance of bias, the participants have been instructed not to identify the schools they represent. Please do not ask the students to identify their law schools. Mediators and Judges should not talk with competitors after the completion of the round about the substance or performance of any team.
5. Study Criteria: Before appearing at the competition, carefully study each of the criteria for judging the performance of the teams. (The criteria can be found in the Judges' Score Sheet). You must use these criteria to evaluate the students even if the criteria do not conform to your concept of best practices.
6. Timekeeper: Although the student participants are primarily responsible for time-keeping, please choose one judge to also act as timekeeper before the session begins. The entire mediation, from start to finish, is seventy-five (75) minutes. Each team has 12 minutes to use for caucusing and/or taking a break. Once the 12 minute limit has been reached, indicate "time" and stop that segment. Please do the same at the 75 minute mark.
7. Scoring: When scoring, please remember that the teams are expected to follow a problem-solving approach to representation. Also, the mediators in the competition are to conduct the mediation in a facilitative, rather than an evaluative or directive, style of practice. Do not penalize any teams for failing to reach resolution. Full settlement is not the point of this competition due to the tight timeframe. Finally, do not penalize teams for having the client participate in the mediation session. Client participation may be an effective strategy depending on the nature of the role-play. Judges must independently score each team. **Do not confer with the other judges or discuss any of the performances.** Before you hear the self-analysis you should give each team a preliminary score. After the self-analysis you may revise and finalize the scores.

You will complete a Judges' Score Sheet. This form asks you to evaluate several aspects of the team's representation in the mediation. You may experience tension between scoring fairly while not engaging in grade inflation. It is essential to the integrity of the competition to avoid disparate scoring approaches among the judges. Therefore, please make every effort to avoid inflating the scores by scoring as outlined here:

The mid-point score of '4' should be the starting point for evaluating each team's performance for each criterion. A '4' is described as "adequate." Did the team perform adequately or better than or worse than adequately?

If the team's performance is just above adequate or "somewhat good," the score is '5'. If the performance is "good," the score is '6'. And if the performance is so exceptional that you would be willing to hire the team members immediately as your lawyers, the score is "very good" or '7'. If the team's performance is just below adequate or "somewhat poor," the score is '3'. If the performance is poor, the score is '2'. And, if the performance is "very poor," the score is '1'.

After completing the scoring, circle the team with the most points as the winner. If you have assigned the same number of points to both teams, redo your scoring to avoid a tie.

**Your Score Sheets will be collected from you after you have met with each team for their self-analysis but before you provide the teams with feedback.**

8. Self-analysis: **No critique from the judges is allowed during the self-analysis period.** You may only ask teams questions about their self-analysis and/or their view of their performance generally.
9. Feedback: **You may meet with both teams together to provide feedback, but the teams can choose to get feedback individually.** In either case, the entire feedback period should last no longer than 30 minutes. Coaches for all teams must remain in the room through the entire process.

During the scheduled feedback time, please give measured, balanced feedback to the law students in a manner calculated to empower them and increase their learning from this experience. You are role models to these students, and they will take seriously what you have to say. You should see yourself as a teacher who carefully chooses words in critiquing the work and keep in mind that these law students have invested significant extra-curricular time to participate in this experience.

They are in a vulnerable state when receiving feedback from you under conditions of competition. Therefore, your approach to giving feedback will determine the quality of each student's entire experience. Please note that your feedback should be tied to the competition scoring criteria as opposed to your "real world" experience. However, after you have completed your competition feedback, you may discuss with the participants your views on how the competition differs from your actual mediation experience (if time permits).

You should be both rigorous and careful in your comments. It is very important that you tell the law students precisely the good aspects of their performance. Even if you are mostly dissatisfied, you should be able to state what was done well. It also is important to state objectively and precisely the areas that could be improved upon. Avoid the use of harsh, charged, and judging language. This may be difficult for you to do when you have strong negative reactions to the performance you observed. Therefore, please take every precaution to filter/edit your remarks before you utter them. Do not comment on the personal appearances of the team members. We want each student to feel that their experience was worth the effort of their participation. Thank you for the extra effort you give to make this feedback discussion a positive, constructive experience for all the law students.

Please do not discuss your scores or your rankings of the teams with the student competitors after the competition is over.

THANK YOU FOR YOUR HELP!

## *Introduction on Judges' Score Sheet*

### **Preface**

These criteria should be interpreted to favor problem-solving strategies in the competition. Although practitioners use a diversity of representation approaches, this competition is organized on the premise that the mediators and teams will use a problem-solving approach. The criteria cumulatively enlist judges to assess whether each team consistently and competently followed a problem-solving approach throughout the mediation session. The criteria should be applied to the performance of the attorney/client team—not just the performance of the attorney. By judging the teams based on the same approach to representation, judges will be able to evaluate different teams on a comparable basis.

When these criteria refer to a problem-solving approach, the criteria refer to an approach in which negotiators learn about each other's interests and BATNAs (Best Alternative To A Negotiated Agreement), brainstorm options, and select and shape a solution that meets their interests. When there are apparently conflicting interests (distributive conflicts), teams should first try problem-solving methods before resorting to positional strategies. In contrast, the classically positional negotiator generally starts with firm, extreme and opposite positions and then makes calibrated concessions until both sides are close enough to split the difference.

**Before the mediation begins, judges should read each side's representation plan.** The plan should consist of an outline with a brief description under each of the following headings: (1) "Responsibility Sharing" – explain *how* you plan to share responsibilities between the attorney and the client in the mediation session; (2) "Allocation Strategy" – explain *why* your team chose the particular allocation strategy; (3) "Interests" describe the interests that your side plans to advance in the mediation session, and the likely interests of other side; (4) Your Team's BATNA analysis as well as the likely BATNA analysis of the other side; (5) Potential Collaborative solutions meeting everyone's interests; (6) Key Questions/Information you will seek or anticipate; (7) "Negotiating Strategy" – your negotiation strategy in light of the preceding factors, also potentially including bargaining chips; (8) preparation for introductory remarks after the mediator's introduction; and (9) Potential Agenda items of things you would like to discuss.

**The representation plan is not scored, it is simply to provide you with an understanding of each team's strategy.**

### **CRITERIA**

Please score each criterion on a scale of 1-7, with 1 as the lowest and 7 as the highest.

1= very poor

2= poor

3= somewhat poor

4= adequate (**STARTING POINT**)

5= somewhat good

6= good

7= very good (i.e. you would hire this person today)

**REMEMBER:** No scoring ties, no feedback to the participants during their analysis, and no discussion of the round between judges until the round is over (judge independently). Return the scoresheet prior to your comments, and if you wish you may keep the "notes" sheet to help you provide feedback. **THANK YOU FOR YOUR HELP!**

## American Bar Association Section of Dispute Resolution Representation in Mediation Competition Score Sheet

JUDGE'S NAME: \_\_\_\_\_ ROUND: \_\_\_\_\_ MEDIATOR: \_\_\_\_\_

SCALE: (Use whole numbers, no decimals or fractions!)

1 Very Poor	2 Poor	3 Somewhat Poor	4 Adequate	5 Somewhat Good	6 Good	7 Very Good
TEAM #/NAMES:				TEAM #/NAMES:		

SCORE (1-7)	CATEGORY/CRITERIA	SCORE (1-7)
	<p><b>Presentation of Case in Opening and Throughout</b></p> <ul style="list-style-type: none"> <li>•Presented facts and law in a way that could be heard productively by other side.</li> <li>•Offered proposals in a way that reflected careful planning and skillful implementation.</li> <li>•Accurately assessed and discussed litigation benefits and risks, as well as other consequences of failing to reach settlement (in joint session and/or caucus).</li> </ul>	
	<p><b>Teamwork Between Attorney and Client</b></p> <ul style="list-style-type: none"> <li>•Effectively divided responsibilities in light of client's knowledge, strengths, and vulnerabilities. (Clients are expected to speak during the mediation)</li> <li>•Communicated effectively with each other and worked together as a team.</li> <li>•Attorney ensured that client was able to make informed choices about settlement possibilities.</li> </ul>	
	<p><b>Problem-Solving Relationship Building</b></p> <ul style="list-style-type: none"> <li>•Established a problem-solving relationship with other side, if possible.</li> <li>•Recognized other side's interests; tried to satisfy them if helpful to client's interests.</li> <li>•Took initiatives to convert other team into problem-solvers.</li> </ul>	
	<p><b>Information Gathering and Communications with Other Side</b></p> <ul style="list-style-type: none"> <li>•Used active listening skills to promote communications.</li> <li>•Used appropriate questioning techniques to gather information.</li> <li>•Tested assumptions and collected necessary information at appropriate times.</li> <li>•Responded appropriately to developments that occurred during mediation, especially new information and unforeseen moves by other side.</li> </ul>	
	<p><b>Generating and Selecting Creative Options</b></p> <ul style="list-style-type: none"> <li>•Generated range of legal and non-legal options to meet client's interests, as well as interests of other side.</li> <li>•Evaluated/selected options based on interests and, if appropriate, objective criteria.</li> <li>•Actively encouraged the development of creative ideas.</li> <li>•Effectively managed distributive features of dispute.</li> </ul>	
	<p><b>Interaction with the Mediator</b></p> <ul style="list-style-type: none"> <li>•Responded appropriately to the mediator.</li> <li>•Engaged the skills of the mediator to assist in breaking impasse and/or move towards resolution.</li> </ul>	
	<b>TOTAL TEAM SCORE - PAGE 1</b>	

	<p><b>Caucus</b></p> <ul style="list-style-type: none"> <li>•Chose intelligently whether and when to use a caucus; if caucus used, used caucus effectively.</li> <li>•Effective use of caucus may include, but are not limited to: updating/discussing negotiation strategy in light of the joint session; preparing client to make or receive offers; collaborating with the client and mediator on information gaps and how to address them; exploring alternatives to a negotiated resolution.</li> </ul>	
	<p><b>Advocating Client's Interests</b></p> <ul style="list-style-type: none"> <li>•Understood and advanced client's legal and non-legal interests throughout the mediation process.</li> <li>•Did not sacrifice client's interests in order to be collaborative.</li> <li>•Did not sacrifice client's interests in order to seek competitive advantage.</li> </ul>	
	<p><b>Self-Analysis of the Team's Skills</b> (Mediator is not Present During Self Analysis) Students should begin the 10-minute period of team self-analysis by answering the following questions: (1) In reflecting upon the entire mediation, what did your team do well? (2) Also, in what areas did you experience difficulties and what would you do differently next time when facing a similar situation? Based on this team's answer, how adequately did it learn from its experiences in this mediation exercise?</p>	
	<p><b>Self-Analysis of Outcome</b> (Mediator is Not Present During Self Analysis) Students should continue the 10-minute period of team self-analysis by answering the following question: How well did the outcome advance your client's interests as presented in the written representation plan? Based on the answer, how adequately did it understand how well or poorly it advanced the interests of the client?</p>	
	<b>TOTAL TEAM SCORE THIS PAGE</b>	
	<b>TOTAL TEAM SCORE PAGE 1</b>	
	<b>RULE 20 – ANONYMITY PENALTY:</b> Deduct up to 5 points if the team violated the rule regarding anonymity.	
	<b>GENERAL PENALTY:</b> Deduct up to 5 points if the team violated any Rule other than 20	
	<b>LATE ARRIVAL PENALTY:</b> Deduct 2 points for a team's late arrival if instructed to do so by the competition coordinator.	
	<b>TOTAL TEAM SCORE</b>	
Win Lose circle 1	<b>STOP. You MUST designate one team as a Win and one team as a Lose, in accordance with Rule 13. If you do not designate a winner and a loser neither team will be able to advance in the competition.</b>	Win Lose circle 1
<b>Judge's <u>Signature</u> and <u>Cell phone #</u> (will be redacted for students):</b>		

**American Bar Association Section of Dispute Resolution  
Representation in Mediation Competition Comments**

JUDGE'S NAME: \_\_\_\_\_ ROUND: \_\_\_\_\_ MEDIATOR: \_\_\_\_\_

TEAM #/NAMES:	TEAM #/NAMES:
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**American Bar Association Section of Dispute Resolution  
Representation in Mediation Competition Comments**

JUDGE'S NAME: \_\_\_\_\_ ROUND: \_\_\_\_\_ MEDIATOR: \_\_\_\_\_

TEAM #/NAMES:	TEAM #/NAMES:

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