McNeill Guidelines and FAQ

1. **Mediator Compensation**. My fee for serving as mediator is $635/hour. Typically, in cases with two sides the allocation of fees is 50/50; but there may be reasons to alter the allocation in multi-party cases or where insurers or indemnitors with coverage obligations need to be worked into an allocation matrix. This is accomplished by party agreement or negotiation.

I invoice only for time devoted to preparation, the actual mediation session(s) and substantive communications with counsel. I do not charge for administrative matters, such as preparing the agenda for the initial organizational call, my engagement letter, emails to schedule sessions, invoice preparation, and the like. I only charge for time actually dedicated to assisting you and your clients in resolving the case. I also do not charge for any out-of-pocket expenses, such as photocopying, lunch, snacks, libations.

I require advanced retainers to be paid in the same allocation as the fee allocation -- against mediator fees to be earned incurred. Typically, with two "sides" each will remit a retainer of $6,000 for a total of $12,000. The amount of the retainer may vary according to the complexity of the case (and required pre-mediation preparation) and/or if more than one mediation day is anticipated.

If the retainer/deposit exceeds the fees earned and invoiced, I will promptly refund the excess in the proportions paid. If the deposit does not cover the full amount of my fees. I will send an invoice for the amount that exceeds the aggregate retainers – again in the proportion paid -- and counsel agree to assist and facilitate client payment.

I will deposit the retainers in my firm's IOLTA trust account; and I will provide my firm's Form W9 and routing instructions for wire transfer (of course, checks are always welcomed).

Typically, I provide a single final invoice to each side at the conclusion of mediation. However, if the case or dispute does not resolve on mediation day, I am proactively persistent in follow up to continue to drive forward to a settlement. Accordingly, I may exercise discretion to send an interim invoice after mediation day; and then send a final invoice once post-mediation day efforts have concluded.

2. **Scheduling a Mediation.** I am not a high volume mediator – I focus on complex commercial disputes (often high value/high stakes); but I have interest in and availability for a wide range of commercial disputes.

I convene full day mediations one day per week, typically on a Tuesday, Wednesday or Thursday. This allows me to prepare extensively for the mediation, and if the dispute does not settle on that day I vigorously and persistently continue to explore viable resolution opportunities. I hear from clients that "some mediators stop too soon." I am not that mediator.

You will schedule mediation dates directly with me. I do not delegate scheduling to my Business Manager, Casey Seal; and I do not utilize online scheduling programs.

I prefer in-person mediations. In my experience, that dynamic creates a dedicated and efficient best opportunity to resolve the dispute. However, 10 to 15 percent of my mediations are by Zoom, and I am proficient in that mode (and my class action mediations often are conducted by Zoom).

My Birmingham, Michigan office is comprised of 8,000 square feet shared with experienced, high profile solo practitioners. We have five conference rooms with varying capacities accommodating six to sixteen people.

I am willing to conduct in person mediations in other locations (in Michigan or elsewhere) for the convenience of clients and counsel; and I never charge travel time.

3. **The Initial Conference.** Once we select a mediation date, I will hold an initial conference by Zoom, during which we will plan, tailor and schedule the mediation process to meet the needs of the business clients and counsel. This is with external counsel; internal counsel are welcome (but not obligated) to attend. Sometimes it makes sense for clients to attend the initial conference.

In advance of the Initial Conference, I will ask counsel to send me the operative pleadings (Complaint and Counter-Claims, if any), initial disclosures, briefs (without exhibits) in support of motions to dismiss or motions for summary judgment, and key Court opinions or orders. In pre-litigation disputes, I will ask the parties to provide me with inter-party correspondence (between client representatives or between counsel) asserting positions with respect to the dispute.

4. **Written Mediation Submissions**. Mediation statements will be submitted and exchanged between counsel, generally seven days before the mediation (unless together we determine otherwise). I do not have limitations on pages or exhibits. I trust your judgment and simply ask that you be reasonable with your opposing counsel and me.

Sometimes, the parties opt for "staggered briefing" (in the style of dispositive motion practice). This is particularly useful in pre-litigation mediations or before significant discovery has taken place in the case. This avoids "surprise" issues or positions for which a party or parties cannot pivot and address shortly before mediation day. For the same purposes, there can be simultaneous exchange of opening briefs, then simultaneous exchange of response/reply briefs. In these options, we start the briefing earlier to complete the briefing at least seven days before mediation day.

I realize that mediation statements are designed and prepared for constituencies other than the mediator – the other side's counsel, client mediation participants, corporate senior and oversight management and/or other key stakeholders, such as shareholders/members in closely held entities who aren't attending mediation day, insurers, and liability and damage experts. You should write to impact the risk evaluation and re-evaluation by an adverse side – but please make sure you educate me.

On the submission date, please: (a) electronically deliver your mediation statements to me, and exchange with counsel for the other parties; and (b) send a hard copy overnight to my office – please three-hole punch the hard copies as I build my notebook on your case. Yes, I am that old school, but a tabbed notebook makes it much easier and quicker for me to locate specific material as we discuss the case and the attendant risk/leverage factors.

I review all exhibits in detail, but I would like you to highlight/colorize content that you think is particularly important to your positions (for focus and emphasis).

5. Pre-Mediation Sessions with each side. It is my practice to hold pre-mediation sessions separately with each side or group (lawyers and clients who will participate on mediation day). In these sessions, I focus on listening to the clients, to understand their perspective on the case or dispute and their vision for resolution. Most cases do not go to trial, and pre-mediation sessions encourage clients to explain their case to an independent neutral with 40 years of litigation experience; and I will listen carefully with appropriate open-ended questions.

In pre-mediation sessions, I do not push risk buttons, I do not cross examine, I do not play devil's advocate. I listen. I seek to understand the client's case. This is a "safe environment" for clients to explain.

In my experience, a pre-mediation session with each side:

- Provides an open opportunity for clients to engage in direct dialogue with me; and for counsel to work in the factual, legal and practical points they consider critical to reaching a fair resolution, in a way that counsel may not have utilized in mediation statement advocacy.
- Creates an opportunity for clients/counsel and me (as mediator) to develop rapport and trust, which will be critical to successfully breaking through the key moment during mediation day when settlement impasse approaches.
- Allows all of us a "running start" on mediation day, and replaces the first set of caucus sessions during the morning of that day;
- Expedites getting to the core liability, damage and business reality issues that embody risk and drive resolution; and
- Results in earlier exchange of initial settlement positions. In traditional mediation days of yore the first set of proposals are exchanged around mid-afternoon – pre-mediation sessions typically bring that forward to the morning of mediation day.

Typically, pre-mediation sessions take place 2-3 business days before mediation day, with duration of 75 minutes, but could be shorter or longer depending upon number or complexity of the issues, the dynamic within the team or between sides.

6. **Confidentiality Rules.** The communications during and in furtherance of mediation are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants -- except as provided at law. Let's discuss what rules would govern here to further ensure that protection. Typically, I invoke FRE 408 or the state version thereof, and any other applicable local court rule or state court rule from the likely jurisdiction in which this case would be litigated if we do not resolve the dispute – in Michigan, MCR. 2.412 or Rule 16 in each of the E.D. Mich. and W.D. Mich. Local Rules.

I encourage counsel to review mediation confidentiality with their clients. I intend to touch on this subject briefly at the pre-mediation sessions. However, my practice generally is to rely on counsel to explain the confidentiality obligations to their clients in detail in advance of the pre-mediation sessions.

I utilize a second level of confidentiality. I will not disclose to another team or side any exchanges between your team (or members thereof) and me that occur during a caucus, private or "shuttle diplomacy" session at any point in our mediation process. This includes all communications: during your selection of me as mediator; ex-parte phone calls, Zooms, and emails; pre-mediation sessions; during mediation day and in any post mediation day follow up; There is one exception – if your team authorizes me share with another other side or team a specifically identified disclosure you made to me. I have safeguards to protect against any miscommunication on this exception, which we will discuss.

I look forward to working with each of you and your clients. You have my full commitment to work very hard to understand and discuss with everyone the governing law, the facts, the existing business relationship(s), practicalities and key settlement factors so that your clients can make a well-informed assessment of risk and the decision whether to enter into resolution in lieu of continuing (or initiating) litigation.

With warm regards,