

Regulatory Impact Analysis
Duties of Parties, Representatives, and Attorneys (11 NCAC 23G .0104)

Agency:	North Carolina Industrial Commission
Contact:	Gina Cammarano – (919) 807-2524
Rule proposed for amendment:	11 NCAC 23G .0104 (see Attachment)
State Impact:	None or <i>de minimus</i>
Local Impact:	None or <i>de minimus</i>
Private Impact:	None or <i>de minimus</i>
Substantial Economic Impact:	No
Statutory Authority:	G.S. §§ 97-80; 143-296; 143-300; Rule 4 of <i>Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions</i> .

A. Background and Purpose of Proposed Rule Amendment:

This proposed rule amendment is necessitated by an expected change to the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions* with regard to how the attendance method is determined in Superior Court mediations.

The North Carolina Workers’ Compensation Act mandates, in G.S. §97-80(c), that the Industrial Commission’s mediation rules shall be “substantially similar” to the rules “approved by the Supreme Court for use in the Superior Court division. . .”. In other words, the Industrial Commission mediation rules need to be consistent with the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions* to the greatest extent possible, including as to the mediation attendance requirements and how the mediation attendance “method” (in-person, remote, or hybrid¹) is determined.

Paragraph (b) of Industrial Commission Rule 11 NCAC 23G .0104, in its current form, is premised on the assumption that the method of attendance for use in the Superior Court division will be either presumptively in-person or presumptively remote. Paragraph (b) goes on to allow the parties, the mediator, and any other person required to attend the mediation to agree on a method of attendance that differs from the presumptive method. Further, paragraph (b) allows the filing of a motion asking the Industrial Commission to order a method of attendance that differs from the presumptive method.

Currently, the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions* provide that remote attendance is the presumptive, or default, attendance method in Superior Court mediations. The Supreme Court amended the Superior Court mediation rules by Order dated June 3, 2020 to make remote attendance the default method. At the time the June 3, 2020 Supreme Court was entered, paragraph (b) of the

¹ “Hybrid” attendance means that some mediation participants are participating at an in-person location while others are participating remotely.

Industrial Commission mediation rules required that mediation attendees “physically” attend the mediation. In response to the June 3, 2020 Supreme Court Order, the Industrial Commission adopted an emergency amendment to paragraph (b) of Rule 11 NCAC 23G .0104, which went into effect on June 16, 2020 and provided that attendance shall mean in-person attendance whenever in-person attendance is required in Superior Court mediations and remote attendance whenever remote attendance is required in Superior Court mediations. The emergency rule amendment was followed by a temporary rule amendment that was approved by the Rules Review Commission on August 20, 2020 and went into effect on August 28, 2020 and then a permanent rule amendment that was approved by the Rules Review Commission on February 18, 2021 and went into effect on March 1, 2021.

It is now anticipated that the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions* will be amended again to create a framework for determining mediation attendance that allows the parties and mediator to agree on one of three methods of attendance (in-person, remote, or hybrid) in each case. If no agreement can be reached, then the rule will provide for a default method of attendance (in-person or remote) in that case. The default method will be determined by the type of attendance declared by the mediator in the Dispute Resolution Commission Mediator Information Directory. (The default will be remote for mediators declaring “remote only” and the default will be in-person for mediators declaring either “in-person only” or “any attendance.” If the mediator has not declared a type of attendance, then the default method will be in-person.) The Superior Court mediation rule also will allow a party or mediator to file a motion for an Order requiring a method of attendance other than the default method when the parties remain in disagreement about the method of attendance. This is a way, for example, for a party to obtain an Order requiring a hybrid mediation, even if the default method is in-person. Finally, the Superior Court mediation rule will allow a mediator to file a motion to withdraw from the case if the mediation is ordered to be conducted by a method contrary to the type of attendance declared by the mediator in the Dispute Resolution Commission Mediator Information Directory.

To ensure that the Industrial Commission adheres to its statutory mandate to adopt mediation rules that are “substantially similar” to the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions*, and to avoid confusion on the part of the regulated public regarding how to interpret paragraph (b) of Rule 11 NCAC 23G .0104, the Industrial Commission is proposing an amendment to paragraph (b). This proposed amendment eliminates the “either/or” assumption regarding the presumptive method of attendance and, instead, very generally states that the attendance method for Industrial Commission mediations shall be the same as the attendance method set forth in the mediation rules approved by the North Carolina Supreme Court that are in effect at the time of the mediation for use in the Superior Court division.

As discussed below, the economic impact, if any, of this proposed rule amendment to the State, to local government and/or to the private sector, is expected to be *de minimus*.

B. Proposed Rule Amendment is Expected to Have Little or No Economic Impact on State, Local Government, or Private Sector as Compared to the *Status Quo*

All Parties and Mediators Already Have In-Person, Remote, and Hybrid Attendance Experience and Capabilities and All of These Types of Attendance already are Permitted in the Rule

As things currently stand, all parties and mediators in Industrial Commission mediations are required by paragraph (b) of Rule 11 NCAC 23G .0104 to potentially participate in mediation in-person or remotely, depending on the default method of attendance set forth in the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions*. Therefore, these parties and mediators already are prepared to appear at mediation in person, and they also already are technologically equipped to appear at mediation remotely.

Because these parties and mediators already possess and pay for the technology that enables them to participate in mediations remotely (namely, telephones or laptops and/or smart devices equipped with microphones and cameras for the parties and mediators, and Zoom memberships for the mediators), there are no expected new costs associated with this proposed Industrial Commission rule change.

Again, the Industrial Commission proposed rule change merely clears up any potential confusion about how the method of attendance (in-person versus remote versus hybrid) is determined in Industrial Commission mediations by making it clear that method of attendance in Industrial Commission mediations is determined in the same way the method of attendance is determined in Superior Court mediations.

All Parties and Mediators already have Experience Reaching Agreement on the Method of Attendance, and this already is Allowed in the Rule

Paragraph (b) of Rule 11 NCAC 23G .0104 already allows the parties, mediator, and any other person required to attend the mediation to agree on a method of attendance that differs from the presumptive method, and it is not uncommon for agreements to be reached where some mediation attendees appear remotely and some appear in-person, thereby resulting in “hybrid” attendance. (This happens, for example, when an injured worker wants to be with her attorney at the attorney’s office for the mediation, but the mediation is conducted via Zoom).

Further, paragraph (c) of Industrial Commission Rule 11 NCAC 23G .0104 allows a party or insurance carrier representative who is required to attend a mediation in person to attend that mediation remotely (including by telephone or videoconferencing) by consent of the parties and mediator, thereby resulting in “hybrid” mediation attendance.

Therefore, the *status quo* in Industrial Commission mediations is one in which it is not uncommon for the parties and mediator to agree on the attendance method, and it is not uncommon for the agreed-upon attendance method to be the method that works best for all parties and the mediator and meets their individual needs. Therefore, in practice, Industrial Commission mediations already are being conducted in various ways (regarding method of

attendance) by agreement of the parties. Some mediations are being conducted with all participants in person. Some are being conducted completely remotely. And some are being conducted with some participants in the same physical location and others joining in remotely.

Therefore, even though the anticipated change to the Superior Court mediation rule will no longer provide for a presumptive or default method of attendance to be used in all cases but, instead, will create a framework where the parties and mediator always can agree to whatever method of attendance works best for them, this anticipated change to the Superior Court mediation rule is not expected to pose any new economic costs on Industrial Commission mediation participants, nor is it expected to provide any new economic benefits, because it does not, in practice, change the *status quo* in any appreciable way.

Therefore, the proposed amendment to the Industrial Commission rule, which merely clears up any potential confusion and makes it clear that Industrial Commission mediation attendance is determined in the same way that Superior Court mediation attendance is determined, appears to be cost and benefit neutral.

All Parties and Mediators Already have Experience with Filing Motions when a Method of Attendance Other Than the Default Method is Sought But No Agreement is Reached

As things currently stand, any party or mediator in an Industrial Commission case may file a motion for an Order allowing an alternative method of attendance at mediation, if they cannot agree among themselves on the method of attendance and if one or more mediation participants seeks a method of attendance other than the default.

So, for example, currently the default method under paragraph (b) of Rule 11 NCAC 23G .0104 is remote attendance because the Superior Court mediation rule currently provides that remote attendance is the default in Superior Court mediations. Usually, if one or more Industrial Commission mediation participants does not want to appear remotely, the parties and mediator will be able to reach an agreement for a different attendance arrangement. However, in rare circumstances, an agreement cannot be reached, in which case a motion can be filed asking the Industrial Commission to order that a method of attendance other than remote can be utilized by one or more of the mediation participants.

Therefore, the anticipated change to the Superior Court mediation rule (which allows the filing of a motion when the parties cannot agree on the method of attendance and one or more parties seeks a method of attendance other than the method determined by looking at what the mediator has declared in the Dispute Resolution Commission Mediator Information Directory) is not expected to pose any new economic costs on Industrial Commission mediation participants, nor is it expected to provide any new economic benefits, because it does not, in practice, change the *status quo* in any appreciable way.

Consequently, the proposed amendment to the Industrial Commission rule, which merely clears up any potential confusion and makes it clear that Industrial Commission mediation attendance is determined in the same way that Superior Court mediation attendance is determined, appears to be cost and benefit neutral.

Unrepresented Plaintiffs: Unlikely to be Affected at All; Economic Impact is None or *De Minimus*

The proposed rule amendment is expected to have little or no economic impact on unrepresented plaintiffs because Rule 11 NCAC 23G .0101(j) states: “Unless an unrepresented plaintiff requests that the plaintiff’s case be mediated, the Commission shall enter an order dispensing with mediation.”

In Industrial Commission cases, it is very rare for an unrepresented plaintiff to request a mediation. Further, even if a mediation is requested by an unrepresented plaintiff, the case will not proceed to mediation unless the Dispute Resolution Coordinator is satisfied, following a careful inquiry, that the unrepresented plaintiff fully understands the mediation process and that the case is appropriate for mediation.

This process results in an extremely small number of cases, if any, going to mediation in a given year where the plaintiff is unrepresented. Therefore, the proposed rule amendment should have little or no economic impact on unrepresented plaintiffs.

Industrial Commission: Unlikely to be Affected at All; Economic Impact is None or *De Minimus*

Because the Industrial Commission already receives and rules on motions filed by parties or mediators requesting an Order allowing or requiring a method of attendance other than the default method when an agreement on an alternate method of attendance cannot be reached, the anticipated mediation attendance framework in the Superior Court mediation rules is not expected to impose any new economic costs on the Industrial Commission. It also is not expected to create any appreciable benefits through reduction of workload, because any potential reduction in the number of motions is expected to be very small relative to the number of motions received under the current rule.

Likewise, the Industrial Commission already receives and rules on motions filed by mediators asking permission to withdraw/disqualify themselves from a case under Rule 11 NCAC 23G .0102(c), and no new economic costs or benefits are expected for the Industrial Commission associated with the provision in the anticipated new mediation attendance framework that allows mediators to file a motion to withdraw from the case if an Order is entered requiring a method of attendance that differs from the method of attendance type declared by the mediator in the Dispute Resolution Commission Mediator Information Directory.

C. Summary of Aggregate Impact:

As discussed above, this proposed rule amendment is not expected to have any quantifiable economic impact on the State, on local government, or on the private sector.

The proposed rule amendment is expected, however, to have two non-quantifiable but important benefits. The first is the benefit of having a rule that is flexible enough to allow the Industrial Commission to stay in compliance with the statutory mandate that its mediation rules

be “substantially similar” to the rules approved by the North Carolina Supreme Court for use in the Superior Court division (*i.e.*, the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions*). Depending on the nature and frequency of future changes to the Superior Court mediation rules, the Industrial Commission may realize this benefit in the form of avoided staff time spent on rulemaking to realign Rule 11 NCAC 23G .0104 with the Superior Court mediation rules. Notwithstanding recent amendments made in response to unique circumstances, amendments to the Superior Court mediation rules are relatively uncommon. As such, the time savings associated with this benefit is expected to be minimal.

The second is the benefit of avoiding potential confusion on the part of the regulated public regarding how to interpret paragraph (b) of Rule 11 NCAC 23G .0104 following the anticipated amendment and other future amendments to the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions*. This should translate into less time spent by the regulated public on trying to interpret the mediation attendance rule as well as less time spent by the Industrial Commission staff answering questions about how the rule works. The amount of time saved will be negligible and will not represent a significant economic benefit; however, it is noted here for completeness.

1 11 NCAC 23G .0104 is proposed for amendment as follows:

2 **11 NCAC 23G .0104 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS**

3 (a) Attendance. The following persons shall attend the mediated settlement conference:

4 (1) all individual parties;

5 (2) in a workers' compensation case, a representative of the employer at the time of injury if:

6 (A) the employer, instead of or in addition to the insurance company or administrator, has
7 decision-making authority with respect to settlement;

8 (B) the employer is offering the claimant employment and the suitability of that employment
9 is in issue;

10 (C) the employer and the claimant have agreed to simultaneously mediate non-compensation
11 issues arising from the injury; or

12 (D) the Commission orders the employer representative to attend the conference if the
13 representative's attendance is necessary to resolve matters in dispute in the subject action;

14 (3) an officer, employee, or agent of any party that is not a natural person or a governmental entity who
15 is not the party's outside counsel and who has the authority to decide on behalf of the party whether
16 and on what terms to settle the action;

17 (4) in a workers' compensation case, an employee or agent of any party that is a governmental entity
18 who is not the party's outside counsel or Attorney General's counsel responsible for the case and
19 who has the authority to decide on behalf of the party and on what terms to settle the action;

20 (5) when the governing law prescribes that the terms of a proposed settlement may be approved only
21 by a Board, an employee or agent who is not the party's outside counsel or Attorney General's
22 counsel responsible for the case and who has the authority to negotiate on behalf of and to make a
23 recommendation to the Board. Pursuant to G.S. 143-295, an employee or agent of the named
24 governmental entity or agency is not required to attend the mediated settlement conference. The
25 Attorney General shall attempt to make an employee or agent of the named governmental entity or
26 agency in a State tort claim available via telecommunication, and mediation shall not be delayed
27 due to the absence or unavailability of the employee or agent of the named governmental entity or
28 agency;

29 (6) the counsels of record. Appearance by counsel does not dispense with or waive the required
30 attendance of the parties listed in Subparagraphs (1) through (4);

31 (7) a representative of each defendant's primary workers' compensation or liability insurance carrier or
32 self-insured that may be obligated to pay all or part of any claim presented in the action. Each carrier
33 or self-insured shall be represented at the conference by an officer, employee, or agent who is not
34 the party's outside counsel and who has the authority to decide on behalf of the carrier or self-insured
35 whether and on what terms to settle the action, or who has been authorized to negotiate on behalf of
36 the carrier or self-insured and can communicate during the conference with persons who have the
37 decision making authority; and

1 (8) by order of the Commission, other representatives of parties, employers, or carriers, who may be
2 obligated to pay all or part of any claim presented in the action and who are not required to attend
3 the conference pursuant to Subparagraphs (1) through (6) of this Paragraph, if the Commission
4 determines that the representative's attendance is necessary for purposes of resolving the matters in
5 dispute in the subject action. Any employer or carrier who may be obligated to pay all or part of any
6 claim presented in the action and who is not required to attend the mediated settlement conference
7 pursuant to Subparagraphs (1) through (6) of this Paragraph or by Commission orders, may attend
8 the conference if the employer or carrier elects to attend. If, during the conference, the mediator
9 determines that the attendance of one or more additional persons is necessary to resolve the matters
10 in dispute in the subject action, the mediator may recess the conference and reconvene the
11 conference at a later date and time to allow the additional person or persons to attend.

12 (b) Any party or person required to attend a mediated settlement conference shall attend the conference until an
13 agreement is reduced to writing and signed as provided in Paragraph (e) of this Rule, or until an impasse has been
14 declared. ~~"Attendance" shall mean in person attendance whenever the mediation rules approved by the North Carolina
15 Supreme Court that are in effect at the time of the mediation for use in the Superior Court division require in person
16 attendance. During any time that attendance means in person attendance, any party or person, including the mediator,
17 may have the in person attendance requirement excused or modified by agreement of all the parties and persons
18 required to attend the mediation conference, including the mediator, or by order of the Commission in the interests of
19 justice upon motion of a party and notice to all parties and persons required to attend the conference, including the
20 mediator. "Attendance" shall mean attendance using remote technology whenever the mediation rules approved by
21 the North Carolina Supreme Court that are in effect at the time of the mediation for use in the Superior Court division
22 require attendance through the use of remote technology. During any time that attendance means attendance through
23 the use of remote technology, any party or person required to attend the conference, including the mediator, may have
24 the remote technology attendance requirement excused or modified by agreement of all parties and persons required
25 to attend the conference, including the mediator, or by order of the Commission in the interests of justice upon motion
26 of a party and notice to all parties and persons required to attend the conference, including the mediator. The attendance
27 method for Industrial Commission mediations shall be the same as the attendance method set forth in the mediation
28 rules approved by the North Carolina Supreme Court that are in effect at the time of the mediation for use in the
29 Superior Court division. All parties and persons required to attend the conference, including the mediator, shall
30 comply with all public health and safety requirements set forth in the mediation rules approved by the North Carolina
31 Supreme Court that are in effect at the time of the mediation for use in the Superior Court division.~~

32 (c) In appropriate cases, the Commission or the mediator, with the consent of the parties, may allow a party or
33 insurance carrier representative who is required to attend a mediated settlement conference in person under this Rule
34 to attend the conference by telephone, conference call, speaker telephone, or videoconferencing; the attending party
35 or representative shall bear all costs of the telephone calls or videoconferencing. In addition, the mediator may
36 communicate directly with the insurance representative with regard to matters discussed in mediation, and the
37 mediator may set a subsequent mediated settlement conference at which all parties and representatives shall attend the

1 mediated settlement conference in person, subject to Paragraph (b) of this Rule. The failure to appear by telephone or
2 videoconferencing in accordance with this Paragraph shall subject the responsible party(ies) or representative(s) to
3 sanctions pursuant to Rule .0105 of this Subchapter.

4 (d) Notice of Mediation Order. Within seven days after the receipt of an order for a mediated settlement conference,
5 the carrier or self-insured named in the order shall provide a copy of the order to the employer and all other carriers
6 who may be obligated to pay all or part of any claim presented in the workers' compensation case or any related third-
7 party tortfeasor claims, and shall provide the mediator and the other parties in the action with the name, address, and
8 telephone number of all such carriers.

9 (e) Finalizing Agreement. If an agreement is reached in the mediated settlement conference, the parties shall reduce
10 the agreement to writing, specifying all terms of the agreement that bear on the resolution of the dispute before the
11 Commission, and shall sign the agreement along with their counsel. The parties may use IC Form MSC8, Mediated
12 Settlement Agreement, or MSC9, Mediated Settlement Agreement – Alternative Form, for this purpose. Execution by
13 counsel of a mediated settlement agreement for an employer or carrier who does not physically attend the mediated
14 settlement conference shall be deemed to be in compliance with this Rule and 11 NCAC 23A .0502. By stipulation of
15 the parties and at the parties' expense, the agreement may be electronically or stenographically recorded. All
16 agreements for payment of compensation shall be submitted for Commission approval in accordance with 11 NCAC
17 23A .0501 and .0502.

18 (f) Payment of Mediator's Fee. The mediator's fee shall be paid at the conclusion of the mediated settlement
19 conference, unless otherwise provided by Rule .0107 of this Subchapter, or by agreement with the mediator.

20 (g) Related Cases. Upon application by any party or person and upon notice to all parties, the Commission may, in
21 the interests of justice, order an attorney of record, party, or representative of an insurance carrier who may be liable
22 for all or any part of a claim pending in a Commission case to attend a mediated settlement conference convened in
23 another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the
24 other pending case consent to the attendance ordered pursuant to this Paragraph. Any disputed issues concerning such
25 an order shall be addressed to the Commission's Dispute Resolution Coordinator. Unless otherwise ordered, any
26 attorney, party, or carrier representative who attends a mediated settlement conference pursuant to this Paragraph shall
27 not be required to pay any of the mediation fees or costs related to that conference. Requests that a party, attorney of
28 record, or insurance carrier representative in a related case attend a mediated settlement conference in a Commission
29 case shall be addressed to the court or agency where the related case is pending, provided that all parties in the
30 Commission case consent to the requested attendance.

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32 *History Note: Authority G.S. 97-80; 143-296; 143-300; Rule 4 of Rules for Mediated Settlement Conferences and*
33 *Other Settlement Procedures in Superior Court Civil Actions;*
34 *Eff. January 16, 1996;*
35 *Amended Eff. October 1, 1998;*
36 *Recodified from 04 NCAC 10A .0616;*
37 *Amended Eff. July 1, 2014; January 1, 2011; June 1, 2000;*

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Recodified from 04 NCAC 10G .0104 Eff. June 1, 2018;
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Temporary Amendment Eff. August 28, 2020;
Amended Eff. March 1, 2021;
Amended Eff. _____.