

**Regulatory Impact Analysis  
Codification of and/or changes to filing requirements**

Agency: North Carolina Industrial Commission  
Contact: Ashley Snyder – (919) 807-2524  
Proposed New Rule Title:  
Rules proposed for amendment: Rule 11 NCAC 23B .0202  
Rule 11 NCAC 23B .0205  
(See proposed rule text in Appendix 1)

State Impact: Yes  
Local Impact: No  
Private Impact: Yes  
Substantial Economic Impact: No

Statutory Authority: G.S. § 143-300

Introduction/Background:

Rule 11 NCAC 23B .0202 governs medical malpractice claims filed against the State under the Tort Claims Act by prison inmates. The North Carolina Rules of Civil Procedure, which apply to claims under the State Tort Claims Act, have special pleading requirements for medical malpractice claims. Rule 9(j) of the N.C. Rules of Civil Procedure describe these standards. Rule 11 NCAC 23B .0202 provides the procedure for evaluating whether a claim must comply with Rule 9(j). The rule also provides a procedure for the plaintiff to obtain medical records from the State which can be difficult logistically for prison inmates who do not have legal representation.

Many of the proposed amendments for Rule 11 NCAC 23B .0202 merely re-word the rule to provide greater clarity or remove unnecessary or confusing language. The substantive changes include a change to apply the rule only to those prison inmates without legal representation and a change in the time allowed for defendant to produce medical records to plaintiff from 45 days to the time period ordered by the Commission.

Rule 11 NCAC 23B .0205 governs mediation in state tort claims, indicating what rules apply and who must attend the mediation. The proposed amendment to Rule .0205 updates the rule to reflect that most tort claims are not mediated and are not required by the Commission to be mediated.

Proposed Rule Changes and Their Estimated Impact:

1. *Amendment of Rule 11 NCAC 23B .0202*

- a. Several of the proposed changes to Rule 11 NCAC 23B .0202(a) are intended to re-word the rule or provide clarification to improve understanding and compliance and should not have any fiscal impact. This includes the changes to Rule .0202(a)(1)(B) and (C), which may appear significant, but the new language in proposed (a) and (b) conveys essentially the same thing using direct references to Rule 9(j) and language from Rule 9(j).
- b. The proposed amendment to .0202(a) to apply the rule only to claims filed by prison inmates without legal representation is likely to have minimal impact. Most prison inmates who file claims with the Commission do not have legal representation. For those who have legal representation, Rule .0202 is unnecessary as their attorneys will be responsible for properly stating a claim for medical malpractice and obtaining the needed medical records.
- c. There are several proposed changes to Rule .0202(a) that address the references in the rule to Motions to Dismiss. In .0202(a), the word “and” is changed to “or” to make clear that a Motion to Dismiss does not have to be made for the Commission to consider whether the claim complies with Rule 9(j). This brings the rule in line with the Commission’s current practice and with Rule 9(j), which does not require a motion to dismiss. Along the same lines, the deletion of current .0202(a)(2), (b), and the first sentence of (c) remove unnecessary language from the rule. The Tort Claims Act and other Industrial Commission rules provide the procedure for filing motions. Therefore, there is no need to set out the procedure for filing a motion to dismiss, setting a hearing, and appealing to the Full Commission in Rule .0202. The presence of these provisions in the rule, as well as the wording of Rule .0202(c), may give the impression that a Motion to Dismiss must be filed and denied before the defendant shall produce medical records to plaintiff. Although in most cases the State does move to dismiss medical malpractice claims by prison inmates for failure to comply with Rule 9(j), the Commission will proceed with a determination regarding Rule 9(j) if necessary in the absence of a motion to dismiss. Rule 9(j) is not a waivable defense, but rather an independent requirement for a medical malpractice claim. In terms of behavioral impact, it is unlikely that the State as defendant will choose to file more or fewer motions to dismiss based on the proposed changes. It is not anticipated that any of these changes will result in a fiscal impact.
- d. The second sentence of current Rule .0202(c) is repeated in the proposed last paragraph of the rule without significant changes. The only change is that the defendant shall produce the medical records within the time period ordered by the Commission, as opposed to the 45 days currently in the rule. This change may have an impact on the State and private parties. In FY 2018-19, 678 state torts were filed. Of these, 481 were filed by prison inmates. The Commission does not separately track the number of medical malpractice claims filed by prison inmates, but it is the Commission’s experience that about 10% of the torts filed by prison inmates are medical malpractice claims affected by Rule .0202, or 48 claims per year.

It is difficult to estimate the impact of the rule change because it is unknown whether the Commission will order a time period of more or less than 45 days in any given case. A primary potential benefit of the rule change to the State as the Commission, the State as the defendant, and the plaintiff is flexibility. The State or plaintiff may be able to request a number of days that is more advantageous than 45 days and the Commission will have more discretion. However, there may be a cost to either the State or the plaintiff, as well. The Commission has no information regarding the State's cost of obtaining medical records and providing them to plaintiff, but it stands to reason that there may be some slight increase in opportunity cost if it must be done in less than 45 days. Likewise, there would be a savings if the State is allowed more than 45 days. The opposite effect is expected for the plaintiff, who presumably wants the claim to proceed as quickly as possible. The State as the Commission may experience some costs if it has to review and decide more requests related to the time period in the absence of the current 45-day standard. It is not feasible to quantify these costs or savings. Because this rule change is expected to affect approximately 48 cases filed per year, any fiscal effect of this rule change will be minimal.

## 2. *Amendment of Rule 11 NCAC 23B .0205*

The only change to Rule 11 NCAC 23B .0205 is the deletion of the first sentence which states, "The parties to tort claims, by agreement or Order of the commission, shall participate in mediation."<sup>1</sup> This deletion is intended to update the rule to current practice. It has been many years since the Commission required mediation in tort claims. Currently, there are typically no more than 10 mediations in tort claims a year reported to the Commission, though there are around 650 tort claims filed per year. It is possible that these 10 or fewer mediations per year might decline if the rule no longer requires mediation, but the Commission has no information on whether these mediations were voluntary and by agreement. Deletion of the requirement does not mean that the parties cannot agree to mediate if they want to. It would be speculative to estimate the effect of the rule change on such a small number of mediations without more data. The rule change also does not prevent the Commission from being able to order mediation in a claim as there is direct authority to do so in G.S. 143-296. On the whole, the rule change is expected to have little to no impact on the State and private parties in state tort claims.

### Summary of impact:

Benefits and costs related to the changes to 11 NCAC 23B .0202 and .0205 are not quantified in this analysis due to lack of data.

It is anticipated that the rule will go into effect on February 1, 2019, and that the same level of cost and benefit will recur each year.

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<sup>1</sup> There is also a deletion of an unnecessary date from the title of the rule.

## APPENDIX 1

### Proposed Rule Text

#### 11 NCAC 23B .0202      MEDICAL MALPRACTICE CLAIMS BY UNREPRESENTED PRISON INMATES

~~(a) In any tort claim medical malpractice cases filed by or on behalf of an unrepresented prison inmates inmate where the plaintiff is alleging in which the Commission determines that the plaintiff is alleging that a health care provider provider, as defined in G.S. 90-21.11 90-21.11, failed to comply with the applicable standard of care under G.S. 90-21.12 90-21.12, and or the defendant has filed a Motion to Dismiss moved to dismiss the claim; claim for failure to comply with Rule 9(j) of the North Rules of Civil Procedure, all discovery is stayed until the following occur: a recorded non-evidentiary hearing before the Commission is held for the purpose of determining whether a claim for medical malpractice has been stated and, if so, whether:~~

- ~~(1) — A recorded hearing in which no evidence is taken is held before a Deputy Commissioner or a Special Deputy Commissioner for the purpose of determining:
  - ~~(A) whether a claim for medical malpractice has been stated;~~
  - ~~(B)(a) whether expert testimony is necessary for the plaintiff to prevail; and plaintiff must meet the requirements of Rule 9(j)(1) or (2) of the North Carolina Rules of Civil Procedure to proceed with the claim; and or~~
  - ~~(b) whether plaintiff has alleged facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.~~
  - ~~(C) — if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.~~~~
- ~~(2) — Upon receipt of a Motion to Dismiss and Request for Hearing from the defendant, the Commission issues an order setting the motion on a hearing docket and the case is assigned to a Deputy Commissioner or a Special Deputy Commissioner.~~

~~If the Commission determines that a claim for medical malpractice has been stated, and plaintiff must meet the requirements of Rule 9(j)(1) or (2) of the North Carolina Rules of Civil Procedure, the defendant shall produce medical records to the plaintiff within the time period prescribed by the Commission. Upon receipt of the medical records, the plaintiff shall then have one hundred and twenty (120) days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.~~

~~(b) If the defendant's Motion to Dismiss is granted, an appeal lies to the Full Commission.~~

~~(c) If defendant's Motion to Dismiss is denied, the case shall proceed as any other tort claims case. Defendant shall produce medical records to plaintiff within 45 days of the Order of the Commission denying defendant's Motion to Dismiss. Plaintiff shall then have 120 days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.~~

*History Note: Authority G.S. 143-300;*

*Eff. January 1, 1989;*  
*Recodified from 04 NCAC 10B .0206 Eff. April 17, 2000;*  
*Amended Eff. \_\_\_\_\_; July 1, 2014; May 1, 2000.*

**11 NCAC 23B .0205      MEDIATION (EFFECTIVE JULY 1, 2014)**

(a) ~~The parties to tort claims, by agreement or Order of the Commission, shall participate in mediation.~~ Any party participating in mediation is bound by the Rules for Mediated Settlement and Neutral Evaluation Conferences of the Commission found in 11 NCAC 23G, except to the extent the same conflict with the Tort Claims Act or the rules in this Subchapter, in which case the Tort Claims Act and the rules in this Subchapter apply.

(b) An employee or agent of the named governmental entity or agency shall be available via telecommunication. Mediation shall not be delayed due to the absence or unavailability of the employee or agent of the named governmental entity or agency.

*History Note:      Authority G.S. 143-295; 143-296; 143-300;*  
*Eff. January 1, 1989;*  
*Amended Eff. \_\_\_\_\_; July 1, 2014; January 1, 2011; May 1, 2000.*