

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20220032

**Amendments to North Dakota Supreme Court Administrative Rule
52 Regarding Reliable Electronic Means Proceedings**

[¶1] On February 2, 2022, the Joint Procedure Committee submitted proposed amendments to N.D. Sup. Ct. Admin. R. 52 regarding use of reliable electronic means. On February 23, 2022, this Court referred the matter back to the committee for it to consider information on this rule from other states. On May 13, 2022, the committee returned a proposal to this Court. After a public comment period, this Court referred the matter back to the committee for it to consider use of reliable electronic means in mental health matters. On October 24, 2022, the committee again referred a proposal to this Court. The proposals are available at <https://www.ndcourts.gov/supreme-court/dockets/20220032>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court considered the matter, and

[¶2] IT IS HEREBY ORDERED, that N.D. Sup. Court Admin. R. is ADOPTED effective December 1, 2022.

[¶3] The Supreme Court of the State of North Dakota convened this 9th day of November 2022, with, the Honorable Jon J. Jensen, Chief Justice, and the Honorable Gerald W. VandeWalle, the Honorable Daniel J. Crothers, the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, Justices, directing the Clerk of the Supreme Court to enter the above order.

/s/ Petra H. Mandigo Hulm
Clerk
North Dakota Supreme Court

RULE 52. ~~CONTEMPORANEOUS TRANSMISSION BY~~ RELIABLE ELECTRONIC
MEANS PROCEEDINGS

Section 1. Purpose and Definition. This rule provides a framework for the use of ~~contemporaneous audio or audiovisual transmission by~~ reliable electronic means for proceedings in North Dakota's district and municipal courts. This rule is intended to enhance the current level of judicial services available within the North Dakota court system through the use of reliable electronic means and not in any way to reduce the current level of judicial services.

Section 2. In General.

(a) Subject to the limitations in sections 3, 4 and 5, a ~~district or municipal~~ court may conduct a proceeding by reliable electronic means on its own motion or on a party's motion.

(b) ~~A party wishing to use reliable electronic means must obtain prior approval from the court after providing notice to other parties.~~ Prior to filing a motion to conduct a proceeding by reliable electronic means, a party must attempt to contact the other parties to determine whether they agree or object.

(c) A party's motion must:

(1) be written;

(2) contain a short and plain statement of the reasons why conducting the proceeding by reliable electronic means is appropriate;

22 (3) indicate whether the parties agree to conducting the proceeding by reliable
23 electronic means:

24 (4) provide a statement of good cause if a party is requesting to shorten the time
25 requirements under subsection (e).

26 (d) Neither a notice of motion nor supporting brief is required.

27 (e) A motion to conduct a proceeding by reliable electronic means must be served
28 at least seven days before the proceeding. Any response must be served at least four days
29 prior to the proceeding. The court for good cause may shorten the time requirements of
30 this rule.

31 (e f) Parties If a reliable electronic means motion is approved, the parties must
32 coordinate approved reliable electronic means proceedings with the court to facilitate
33 scheduling and ensure equipment compatibility manage technical aspects of the
34 proceeding.:-

35 (d) Each site where reliable electronic means are used in a court proceeding must
36 provide equipment or facilities including arranging for confidential attorney-client
37 communication.

38 (e g) A method for electronic transmission of documents must be available at each
39 site where reliable electronic means are used in a court proceeding for use in conjunction
40 with the proceeding.

41 Section 3. Civil Action.

42 (a) In a civil action, a district or municipal court may conduct a trial, hearing,

43 conference, or other proceeding, or take testimony, by reliable electronic means.

44 (b) A trial may not be conducted by reliable electronic means unless the parties
45 consent and the court approves. The court retains discretion to allow any witness to
46 appear by reliable electronic means.

47 Section 4. Criminal Action.

48 (a) In a criminal action, a ~~district or municipal~~ court may conduct a trial, hearing,
49 conference, or other proceeding by reliable electronic means, except as otherwise
50 provided in subsection 4(b).

51 (b) Exceptions.

52 (1) A defendant may not be tried, plead guilty, nor or be sentenced by reliable
53 electronic means unless the parties consent and the court approves.

54 (2) Except when otherwise allowed by rule or law, a witness may not testify at trial
55 by reliable electronic means unless the defendant knowingly and voluntarily waives the
56 right to have the witness testify in person.

57 (3) An attorney for a defendant must be present at the site where the defendant is
58 located unless the attorney's participation by reliable electronic means from another
59 location is approved by the court with the consent of the defendant. ~~In a guilty plea~~
60 ~~proceeding, the court may not allow the defendant's attorney to participate from a site~~
61 ~~separate from the defendant unless:~~

62 ~~(A) the court makes a finding on the record that the attorney's participation from~~
63 ~~the separate site is necessary;~~

64 ~~(B) the~~ The court confirms must confirm on the record that the defendant has
65 knowingly and voluntarily consented to the attorney's participation from a separate site;
66 and

67 ~~(C) the court allows~~ allow confidential attorney-client communication, if
68 requested.

69 Section 5. Revocation of Probation Proceedings for Out of State Offenders.

70 (a) When a petition for revocation of probation has been issued for a probationer
71 who is in another state and who has been sentenced by a court having jurisdiction in the
72 other state to a period of incarceration, a North Dakota district court may conduct the
73 revocation of probation hearing by reliable electronic means. Before a district court may
74 conduct a revocation of probation hearing by reliable electronic means for a probationer
75 serving a sentence of incarceration in another state, the district court must:

76 (1) confirm on the record that the probationer has knowingly and voluntarily
77 consented to a revocation of probation hearing by reliable electronic means;

78 (2) confirm on the record that the probationer has knowingly and voluntarily
79 consented to the probationer's attorney's representation from a site separate from the
80 probationer; and

81 (3) allow the probationer opportunity for confidential attorney-client ~~representation~~
82 communication.

83 (b) If the district court orders probation be revoked, the district court must state on
84 the record whether the period of incarceration imposed by the other state fully or partially

85 satisfies the sentence imposed by the district court.

86 Section 6. Mental Health Proceeding.

87 (a) In a mental health proceeding, a district court may conduct a proceeding by
88 reliable electronic means and allow the following persons to appear or present testimony
89 remotely:

90 (1) the respondent or patient;

91 (2) a witness;

92 (3) legal counsel for a party.

93 (b) ~~Notice, Objection, and Waiver~~ and Respondent's Rights.

94 (1) Notice. Before holding any mental health proceeding by reliable electronic
95 means, the court must give notice to the petitioner and the respondent. The notice must:

96 (A) advise the parties of their right to object to the use of reliable electronic means;

97 (B) inform the respondent that the proceedings may be recorded on video and that,
98 if there is an appeal, the video recording may be made part of the appendix on appeal and
99 is part of the record on appeal.

100 (2) ~~Objection~~ Respondent's Rights.

101 (A) ~~Reliable electronic means may not be used in a mental health proceeding if any~~
102 ~~party objects.~~ The respondent or patient must be allowed to appear in person if requested.

103 The respondent must be given the opportunity to consult with an attorney about the right
104 to object to the use of reliable electronic means.

105 (B) If the respondent fails to make a request to appear in person or an objection or

106 ~~fails to make~~ a timely objection to the use of reliable electronic means, the court may
107 nevertheless continue the proceeding for good cause.

108 (C) If the proceeding is continued for any reason, the respondent will continue to
109 be held at the facility where the respondent was receiving treatment or, at the choice of
110 the treatment provider in a less restrictive setting, until ~~a face-to-face~~ the hearing can be
111 completed.

112 (D) ~~A face-to-face hearing~~ A requested in person appearance must be scheduled to
113 occur within four days, exclusive of weekends and holidays, of the date the ~~objection~~
114 request was made, unless good cause is shown for holding it at a later time. The court
115 retains discretion to allow any witness at the proceeding to appear by reliable electronic
116 means.

117 (3) Waiver. Upon mutual consent of the parties, and with the approval of the court,
118 notice requirements in a mental health proceeding may be waived to allow for the conduct
119 of proceedings without prior notice or with notice that does not conform to subsection 5
120 6(b)(1).

121 EXPLANATORY NOTE

122 This rule was adopted effective May 1, 2005. Amended effective June 1, 2005;
123 March 1, 2015; March 1, 2019; March 1, 2021; August 11, 2021; March 1,
124 2022; _____.

125 This rule was amended, effective March 1, 2015, to extend the application of the
126 rule to proceedings conducted by ~~contemporaneous audio or audiovisual transmission~~

127 using reliable electronic means.

128 Section 2 was amended, effective _____, to clarify the procedure for
129 making a motion to request a reliable electronic means proceeding, objecting to a reliable
130 electronic means proceeding, and preparing for a reliable electronic means proceeding.
131 The requirements of N.D.R.Ct. 3.2 do not apply to motions under this rule.

132 Sections 3 and 4 were amended, effective _____, to allow a trial to
133 be conducted by reliable electronic with the consent of the parties and the approval of the
134 court.

135 Subsection 4(b)(2) was amended, effective March 1, 2021, to allow witness
136 testimony by reliable electronic means when authorized by rule or law.

137 Subsection 4(B)(2) was amended, effective March 1, 2022, to allow witness
138 testimony by reliable electronic means in a criminal action at a proceeding other than the
139 trial.

140 Subsection 4(b)(3) was amended, effective _____, to eliminate the
141 requirement that a court make a finding of necessity before allowing an attorney's
142 participation from a separate site in a guilty plea proceeding.

143 A new section 5 was added, effective March 1, 2019, to establish a procedure for
144 the use of contemporaneous audio or audiovisual transmission using reliable electronic
145 means in proceedings to revoke probation for probationers who are in another state.

146 Section 6 was amended, effective _____, to allow the court to exercise
147 its discretion on whether to hold a mental health proceeding by reliable electronic means.

148 Under the amendments, the respondent or patient must be allowed to appear in person at
149 any proceeding upon request.

150 SOURCES: Joint Procedure Committee Minutes of September 29, 2022, pages
151 _____; April 29, 2022, pages 2-8; January 27, 2022, pages 4-16; September 30, 2021,
152 pages 13-14; January 28, 2021, pages 20-22; January 30, 2020, page 24; September 26,
153 2019, pages 21-22; January 25, 2018, pages 15-16; April 24-25, 2014, pages 15-16; April
154 27-28, 2006, pages 22-24; April 28-29, 2005, pages 21-22; April 24-25, 2003, pages
155 20-23; September 26-27, 2002, pages 4-12.

156 STATUTES AFFECTED:

157 CONSIDERED: N.D.C.C. § 31-04-04.2.