

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

NOTICE OF COMMENT

Supreme Court No. 20220032

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

[¶1] The Joint Procedure Committee submitted proposed amendments to North Dakota Supreme Court Administrative Rule 52 regarding reliable electronic means proceedings. Following the Court's consideration, it remanded the matter to the Joint Procedure Committee to consider the approach taken in other jurisdictions. The proposal is 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.

[¶2] **IT IS ORDERED**, any person wishing to comment on the proposals may do so by email to Petra H. Mandigo Hulm, Clerk of the Supreme Court, at supclerkofcourt@ndcourts.gov or in writing addressed to 600 E. Boulevard Ave., Bismarck, ND 58505-0530, no later than **Monday, June 20, 2022**.

[¶3] The Supreme Court of the State of North Dakota convened this 18th day of June, 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

STATE OF NORTH DAKOTA
SUPREME COURT
JOINT PROCEDURE COMMITTEE
600 E. Boulevard Avenue
Bismarck, ND 58505-0530

20220032
FILED MAY 12, 2022
CLERK OF THE SUPREME COURT
STATE OF NORTH DAKOTA

CHAIR
Justice Lisa Fair McEvers

STAFF ATTORNEY
Michael J. Hagburg

May 12, 2022

Honorable Jon J. Jensen, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Proposed Amendments to N.D.Sup.Ct.Admin.R. 52

Dear Chief Justice:

You recently requested that the Joint Procedure Committee review Rule 52 to establish a standard procedure for parties to request reliable electronic means proceedings. The committee discussed the rule at its January meeting and provided you with proposed amendments. You asked the committee to review the approaches taken by other states and to consider additional amendments. The committee took up the rule at its April meeting and drafted additional amendments.

– Proposed amendments to the title and Section 1 would eliminate the “contemporaneous audio or audiovisual transmission” terminology. This language has already been removed from the other parts of the rule.

– Proposed amendments to Section 2 would require a party filing a motion to conduct a proceeding by reliable electronic means to attempt to contact the other parties to determine whether they agree or object. The proposed amendments would also provide detailed content requirements for a motion along with time deadlines for making and responding to a motion.

– Proposed amendments to Sections 3 and 4 would clarify that reliable electronic means can be used for trials with the consent of the parties and the approval of the court.

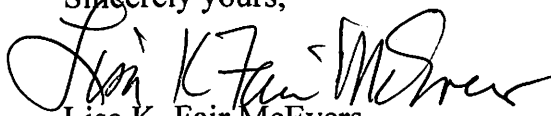
– Proposed amendments to Section 4 would eliminate the requirement that a court make a finding of necessity before allowing an attorney’s participation from a separate site in a guilty plea proceeding.

– Proposed amendments to Section 6 on mental health hearings would remove language allowing a party to block a reliable electronic means hearing by making an objection.

The committee discussed whether to develop a list of proceedings that presumptively would be held by reliable electronic means as other states such as Minnesota are doing. The committee decided that requiring certain proceedings to be held by reliable electronic means would impair the discretion of the court to choose the method it preferred for proceedings.

A copy of the proposed amended rule is attached. We appreciate the opportunity to assist the Court on this issue.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Lisa K. Fair McEvers". The signature is fluid and cursive, with the first name "Lisa" being particularly prominent.

Lisa K. Fair McEvers
Chair, Joint Procedure Committee

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 (1) the respondent or patient;

90 (2) a witness;

91 (3) legal counsel for a party.

92 (b) Notice, Objection, and Waiver.

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

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

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

99 (2) Objection.

100 ~~(A) Reliable electronic means may not be used in a mental health proceeding if any~~
101 ~~party objects.~~ The respondent must be given the opportunity to consult with an attorney
102 about the right to object to the use of reliable electronic means.

103 (B) If the respondent fails to make an objection or fails to make a timely objection
104 to the use of reliable electronic means, the court may nevertheless continue the
105 proceeding for good cause.

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

109 (D) ~~▲~~ If the court decides to hold a face-to-face hearing, it must be scheduled to
110 occur within four days, exclusive of weekends and holidays, of the date the objection was
111 made, unless good cause is shown for holding it at a later time.

112 (3) Waiver. Upon mutual consent of the parties, and with the approval of the court,
113 notice requirements in a mental health proceeding may be waived to allow for the conduct
114 of proceedings without prior notice or with notice that does not conform to subsection 5
115 6(b)(1).

116 EXPLANATORY NOTE

117 This rule was adopted effective May 1, 2005. Amended effective June 1, 2005;
118 March 1, 2015; March 1, 2019; March 1, 2021; August 11, 2021; March 1,
119 2022;_____.

120 This rule was amended, effective March 1, 2015, to extend the application of the
121 rule to proceedings conducted by ~~contemporaneous audio or audiovisual transmission~~
122 using reliable electronic means.

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

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

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

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

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

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

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

143 SOURCES: Joint Procedure Committee Minutes of April 29, 2022, pages _____;
144 January 27, 2022, pages 4-16; September 30, 2021, pages 13-14; January 28, 2021, pages
145 20-22; January 30, 2020, page 24; September 26, 2019, pages 21-22; January 25, 2018,
146 pages 15-16; April 24-25, 2014, pages 15-16; April 27-28, 2006, pages 22-24; April
147 28-29, 2005, pages 21-22; April 24-25, 2003, pages 20-23; September 26-27, 2002, pages

148 4-12.

149 STATUTES AFFECTED:

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

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;~~