

PROPOSED RULE 12

RULE 12. Pleas and Plea Agreements

(a) Pleas In General.

(1) Pleas Which May Be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18(b). Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to Sufficient Facts. In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts. A judge may accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts only after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission. A plea or admission may be conditioned upon a judge's acceptance of a plea agreement pursuant to Rule 12(b)(5). A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts.

(b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement

(1) In General. The defendant may tender a guilty plea, a plea of nolo contendere, or an admission to sufficient facts to warrant a finding of guilty without entering into a plea agreement with the prosecutor. Alternatively, if the defendant intends to tender a plea of guilty or an admission to sufficient facts, the prosecutor and the defendant may enter into a plea agreement under Rule 12(b)(5).

(2) Plea Discussions. The judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.

(3) Inquiry as to the Existence of a Plea Agreement. After being informed that a defendant intends to plead guilty or to admit to sufficient facts, the judge shall inquire as to the existence of a plea agreement.

(4) Pleas Without an Agreement. If the defendant intends to plead guilty or nolo contendere or to admit to sufficient facts and there is no agreement under Rule 12(b)(5), the parties may each request that the judge dispose of the case on any terms within the court's jurisdiction, and the judge shall follow the procedures set forth in Rule 12(c).

(5) Pleas Conditioned Upon an Agreement. The defendant may enter into a plea agreement with the prosecutor if the defendant intends to plead guilty or admit to sufficient facts but not if the defendant intends to plead nolo contendere. A plea agreement may specify that the prosecutor will amend an indictment or complaint; dismiss, reduce, or partially dismiss charges; not seek an indictment; not bring other charges; and/or that the parties agree on a specific sentence, sentencing range, and/or probationary term and any special probationary conditions. An agreement on a sentencing range is one in which the parties expressly agree to a particular sentencing range and to make disparate sentencing recommendations within that range. If there is a plea agreement containing at least one of the specified terms listed above, the judge shall follow the procedures set forth in Rule 12(d).

(c) Procedure When There is No Plea Agreement

The following procedure applies when the defendant intends to plead guilty or nolo contendere or to admit to sufficient facts, and the parties have not entered into a plea agreement under Rule 12(b)(5).

(1) Tender of Plea. The defendant's plea or admission shall be tendered to the judge.

(2) Colloquy. The judge shall:

(A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:

(i) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to

be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

- (ii) of the maximum possible sentence on the charge, and, if applicable,
 - (a) the possibility of community parole supervision for life;
 - (b) any different or additional punishment based upon subsequent offense provisions of the General Laws;
 - (c) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;
 - (d) the mandatory minimum sentence on the charge; and
 - (e) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;
- (iii) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(B) Factual basis for the charge. Except for pleas of nolo contendere, the prosecutor shall present the factual basis of the charge.

(C) Rights of Victims and Witnesses of Crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. The judge shall give any person

entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(3) Disposition Requests. The judge shall give both parties the opportunity to request that the judge dispose of the case on any terms within the court's jurisdiction. In the District Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the defendant's request without first giving the defendant the right to withdraw the plea. In the Superior Court, the defendant may request, and the judge may indicate to the defendant, what sentence the judge would impose. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(4) Findings of Judge; Acceptance of Plea. The judge shall inquire whether the defendant still wishes to plead guilty or nolo contendere or admit to sufficient facts. If so, the judge will then make findings as to whether the plea or admission is knowing and voluntary, and, with respect to admissions and guilty pleas, whether there is an adequate factual basis for the charge. The defendant's failure to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(5) Sentencing.

(A) Imposition of Sentence. After acceptance of a plea of guilty or nolo contendere or an admission, the judge shall proceed with sentencing.

(B) Refusal to Accept Defendant's Dispositional Request. In District Court, if the judge decides to impose a sentence that will exceed defendant's request for disposition under Rule 12(c)(3), the judge shall, on the record, advise the defendant personally of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. The judge may indicate to the parties what sentence the judge would impose.

(d) Procedure When There is a Plea Agreement

The following procedure applies if the defendant intends to plead guilty or to admit to sufficient facts, and the parties have entered into a plea agreement under Rule 12(b)(5). The judge must accept or reject the plea agreement before accepting the defendant's plea or admission.

(1) Disclosure of the Terms of the Plea Agreement. The parties shall disclose the terms of the plea agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

(2) Tender of Plea. The defendant's plea or admission shall be tendered to the judge.

(3) Colloquy. The judge shall:

(A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:

(i) that by a plea of guilty or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(ii) of the maximum possible sentence on the charge, and, if applicable,

(a) the possibility of community parole supervision for life;

(b) any different or additional punishment based upon subsequent offense provisions of the General Laws;

(c) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;

(d) the mandatory minimum sentence on the charge; and

(e) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of

said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;

(iii) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.

(C) Rights of Victims and Witnesses of Crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. The judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(4) Review; Acceptance or Rejection of Plea Agreement. Prior to accepting any guilty plea or admission, the judge must accept or reject the plea agreement. At any time prior to the acceptance or rejection of the plea agreement, the judge may continue the plea hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination whether the plea agreement provides for a just disposition in the case.

(A) Accepted Plea Agreement. If the judge accepts the plea agreement, the judge shall inform the defendant that the judge will impose the disposition provided in the plea agreement.

(B) Rejected Plea Agreement. If the judge rejects the plea agreement, the judge shall, on the record and in open court (or, for good cause, in camera on the record):

- (i) inform the parties that the judge rejects the plea agreement, but the judge may indicate to the parties what sentence the judge would impose;
- (ii) allow either party to withdraw from the plea agreement; and
- (iii) allow the defendant to withdraw his or her plea or admission.

(5) Findings of Judge as to Plea Agreement and Plea; Acceptance of Plea. If the judge has accepted the plea agreement, the judge shall inquire whether the defendant still wishes to plead guilty or admit to sufficient facts. If so, the judge will then make findings as to whether the plea agreement and plea or admission are knowing, voluntary, and supported by an adequate factual basis. The defendant's failure to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(6) Sentencing. After accepting the plea agreement and the plea or admission, the judge shall impose sentence according to the terms of the plea agreement. If the plea agreement includes a sentencing range, the judge must sentence within that range.

(e) Availability of Criminal Record and Presentence Report.

The criminal record of the defendant shall be made available. Upon the written motion of either party made at the tender of a plea of guilty or nolo contendere or an admission to sufficient facts, the presentence report as described in Rule 28(d)(2) shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements.

Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.