

## **PROPOSED RULE 12(b) - (e) REPORTER'S NOTES**

### **Rule 12(b)-(e)**

This amendment responds to the Supreme Judicial Court's interpretation of Rule 12 in *Commonwealth v. Rodriguez*, 461 Mass. 256 (2012), and *Commonwealth v. Dean-Ganek*, 461 Mass. 305 (2012), holding that former Rule 12 permitted a judge to impose a sentence more lenient than that jointly recommended in a plea agreement accepted by the judge. The Court further held that jeopardy attaches when the judge accepts a plea, *see Dean-Ganek*, 461 Mass. at 312-313, thus preventing the prosecution's withdrawal in such a case, even when the plea agreement included negotiated charge concessions, a core prosecutorial prerogative.

As amended, Rule 12 provides that the parties may enter a plea agreement to a specific sentence or sentencing range that, if accepted by the judge, binds the judge to impose the agreed sentence or a sentence within the agreed range. If, on the other hand, the judge rejects the agreement, either party may withdraw. In all other pleas or admissions, the amended rule provides that the judge is not bound by the sentencing recommendations of the parties, and, except for a District Court defendant who requested a sentence less than that imposed, neither party may withdraw. Finally, in order to promote fair and efficient plea bargaining and to establish rules to govern the previously unregulated and widely varying practice of lobby conferences, amended Rule 12 provides for limited judicial participation in plea negotiations.

Structurally, amended Rule 12 treats plea discussions and agreements in Rule 12(b) and plea procedures in Rule 12(c)-(d). Amended Rule 12(b) provides that the parties may tender a guilty plea or admission to sufficient facts with or without a plea agreement, permits the judge to participate in plea discussions at either party's request, and identifies a category of plea agreements that, if accepted by the judge, will bind the judge to impose the agreed sentence or one within an agreed sentencing range. Amended Rule 12(c) sets out the procedure applicable to pleas or admissions in which there is no binding plea agreement, and amended Rule 12(d) provides for the parallel procedure applicable to pleas or admissions in which there is such an agreement. In an unrelated, technical amendment, amended Rule 12(e) makes criminal records and presentence reports available in cases of admissions to sufficient facts to the same extent as in cases of guilty or nolo-contendere pleas.

### **Rule 12 (b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement**

#### **Rule 12(b)(1) In General**

Rule 12(b)(1) makes it clear that the defendant may tender a guilty plea, a nolo contendere plea, or, in District Court, an admission to sufficient facts, without entering into a plea agreement. (Rule 2(b)(7) defines "District Court" to include all divisions of the District Court, Boston Municipal Court, and Juvenile Court.) The rule further provides, however, that the parties may condition a guilty plea (or, in District Court, an admission to sufficient facts) on

a plea agreement that, if accepted, will bind the judge in sentencing. Rule 12(b)(1) omits nolo contendere pleas from this latter category, thus limiting the benefits of a potentially binding plea agreement to those defendants who take responsibility for the crimes to which they are pleading.

### **Rule 12(b)(2) Plea Discussions**

Rule 12(b)(2) provides that the judge may participate in plea discussions at the request of either party provided that any such discussions are recorded and made part of the record. Although unrestricted judicial participation in plea discussions has been generally discouraged, *see, e.g., Commonwealth v. Gordon*, 410 Mass. 498, 501 n. 3 (1991) (stating in *dicta* that judges may not “participate as active negotiators in plea discussions”); *Commonwealth v. Bowen*, 63 Mass. App. Ct. 579, 586 n. 5 (2005) (calling for “delicate caution” on the part of the plea judge to avoid falling into active negotiation); *Commonwealth v. Johnson*, 27 Mass. App. Ct. 746, 750 (1989) (noting “participation by a trial judge in plea bargaining, although not proscribed in Massachusetts, is discouraged”), the rule’s provision for narrowly circumscribed judicial discretion to conduct a lobby or sidebar conference maintains the recognized benefits of this practice while providing important safeguards to curb its potential for abuse. Such limited judicial participation in plea negotiations facilitates fair and efficient case management, particularly in courts with crowded dockets, and it has been a longstanding though largely unregulated practice in many courts.

Recognizing that judicial participation in plea negotiations can be coercive and leave the impression of unfairness, this provision addresses these concerns by conditioning such participation on the request of one or both parties and further requiring that these discussions be recorded and made a part of the record. *See Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 57 n. 15 (2007) (stressing the importance of recording lobby conferences). The rule’s requirement that the discussions be recorded and made part of the record is not meant to require that they invariably be conducted in open court. As with other potentially sensitive matters, judges have discretion under the appropriate circumstances to conduct plea discussions in a manner that restricts immediate public access, most likely at sidebar. Judges are experienced in determining when sidebars or other such restrictions are appropriate, and the rule anticipates that they will continue to apply that experience in judiciously exercising this discretion.

### **Rule 12(b)(3) Inquiry as to the Existence of a Plea Agreement.**

Rule 12(b)(3) provides that when a defendant indicates an intent to plead guilty or to admit to sufficient facts, the judge shall inquire if there is a plea agreement. Because the plea procedures vary depending on whether there is an agreement that will bind the judge if accepted, such an inquiry is necessary in order to determine which procedure is applicable. Because a nolo contendere plea may not be conditioned on a binding plea agreement, the rule does not explicitly require the judge to ask if there is a plea agreement in such a case. However, it may make sense for the judge nevertheless to make this preliminary inquiry in the case of a nolo plea, if only to

ensure that the parties understand that a plea agreement would not bind the judge even if it is accepted.

#### **Rule 12(b)(4) Pleas Without an Agreement.**

Rule 12(b)(4) provides that if there is no binding plea agreement under Rule 12(b)(5), the procedure for taking a plea or admission set forth in Rule 12(c) applies. In such a case, as the rule makes clear, the parties are each free to make any dispositional request within the court's jurisdiction.

#### **Rule 12(b)(5) Pleas Conditioned Upon an Agreement.**

Rule 12(b)(5) identifies those plea agreements that, if accepted by the judge, bind the judge to sentence in accordance with the agreement. *See* Rule 12(d)(4)(A), discussed below. Under Rule 12(b)(5), potentially binding plea agreements are those in which the parties agree to particular charge concessions by the prosecutor and/or to a specific sentence or sentencing range, either of which may include a term of probation or special probationary conditions.

A sentencing-range agreement is one in which the parties expressly agree that the sentence imposed be within a particular range and that the parties are free to make disparate sentencing recommendations within that range. If the parties intend to make disparate sentencing recommendations, the requirement that a sentencing-range agreement be express is important. Such an agreement permits the parties to make their respective recommendations secure in the knowledge that, if the judge accepts the agreement, the judge must impose a sentence within the agreed range but that, if the judge rejects the agreement, either party may withdraw. *See* Rule 12(d)(4), discussed below.

Rule 12(b)(5) provides that a binding plea agreement may include a probationary term and/or special probationary conditions. This provision is not intended to reduce the probation department's role in determining appropriate terms and conditions of probation. *See, e.g.*, Dist./Mun. Cts. R. Crim. P. 4(c) (requiring the parties' consultation with the probation department if the proposed disposition in a tendered plea or admission includes a probationary term or condition). Given that a judge's acceptance of a plea agreement containing provisions for probation binds the judge to impose the agreed term and/or condition(s) as part of the sentence, a judge will want to hear any probation department recommendation when considering such an agreement. If, based on that consultation or otherwise, the judge decides that a different probationary term or set of conditions is appropriate, the judge is free to reject a plea agreement unless the parties agree to the probationary term and/or conditions that the judge believes are necessary to a just disposition. *See* Rule 12(d)(4)(B)(i), discussed below. Finally, nothing in Rule 12 is intended to limit a judge's lawful discretion to amend probationary conditions during the course of probation. *See Commonwealth v. Goodwin*, 458 Mass. 11, 17-19 (2010).

As an example of Rule 12(b)(5)'s operation, consider a Superior Court case in which the defendant is charged with a single count of unarmed robbery, G.L. c. 265, § 19(b). The parties might expressly agree (1) that the prosecutor will move to dismiss so much of the indictment as charges a forcible taking, reducing the charge to larceny from the person, G.L. c. 266, § 25(b), (2) that the defendant will plead guilty to the larceny charge, (3) that the sentence will be within a range of from two and one-half years in the house of correction, as a minimum, to three to five years in state prison, as a maximum, and (4) that the defendant will recommend the former sentence and the prosecutor will recommend the latter. If the judge accepts this agreement, *see* Rule 12(d)(4)(A), discussed below, the judge would be bound to accept the reduction in charges and to sentence within the agreed sentencing range. The sentence imposed could be anywhere within the agreed range; the judge is not required to accept one recommendation or the other. *See* Rule 12(d)(6), discussed below.

In the above example, the agreement contains both a bargained-for charge concession and an agreed sentencing range. Of course, an agreed sentence or sentencing range is potentially binding even if unaccompanied by a charge concession. For example, the defendant might agree to plead guilty to the robbery charge, the parties expressly agreeing that an acceptable sentencing range is a state prison sentence of from a minimum of four to five years to a maximum of six to eight years, with the defendant recommending the former and the prosecutor the latter. If the judge accepts the agreement, he or she would be similarly bound to sentence within the agreed range, that is, to impose a sentence no more lenient than four to five years in state prison and no more strict than six to eight years in state prison.

In contrast, if in the above Superior Court case the prosecutor decides unilaterally to reduce the robbery charge to the lesser-included larceny from the person and the defendant then decides to plead guilty to the reduced charge without any agreement concerning the sentence, the judge would not be bound in sentencing and would be free to impose any sentence that the statute permits. In such a case, neither party would have a right to withdraw based on the sentence imposed. If, on the other hand, this reduced larceny-from-the-person case is brought in District Court, the defendant would have a statutory right to withdraw if the sentence exceeds his or her disposition request. *See* G.L. c. 278, § 18 and Rule 12(c)(5)(B), discussed below.

Finally, by providing for particular plea agreements that bind the judge if accepted, Rule 12(b)(5) is not intended to foreclose other agreements that the parties might make as part of a tendered plea. As was so under former Rule 12(b)(1), the parties are free to agree jointly to recommend any lawful action that a judge might take in disposing of a case. However, unless the plea agreement contains at least one of the terms specified in Rule 12(b)(5), the judge is not required to accept or reject that agreement and is not bound by its terms.

### **Rule 12(c) Procedure When There is No Plea Agreement.**

Rule 12(c) provides for the plea procedure in cases in which the parties have not entered a binding plea agreement under Rule 12(b)(5). This procedure is parallel to that set forth in Rule 12(d), which is applicable to pleas and admissions in which there is a binding plea agreement. The two sections, of course, diverge in their respective treatment of the parties' sentencing recommendations, *compare* Rule 12(c)(3) *with* Rule 12(d)(4), and sentencing. *Compare* Rule 12(c)(5) *with* Rule 12(d)(6). Otherwise, the two plea procedures are virtually identical.

### **Rule 12(c)(1) Tender of Plea.**

Rule 12(c)(1) moves the tender of plea or admission to the beginning of the plea procedure so that from the outset the terms of the plea or admission are clear. Although the plea tender precedes Rule 12(c)(2)'s colloquy, which includes the notice of the consequences of the plea, Rule 12(c)(4) permits the defendant to withdraw the tendered plea or admission subsequent to the colloquy but prior to the judge's acceptance of the plea or admission.

### **Rule 12(c)(2) Colloquy**

Rule 12(c)(2)(A) requires the judge to begin the plea colloquy by notifying the defendant of the consequences of the tendered plea or admission. The notice of consequences is substantively identical to former Rule 12(c)(3)'s required notice of consequences except that Rule 12(c)(2)(A)(ii)(e) additionally requires the notice mandated by the 2012 amendments to the habitual-offender statute. *See* G.L. c. 279, § 25(d) (requiring notice of potential habitual-offender consequences "prior to accepting a guilty plea for any qualifying offense listed in subsection (b) [of the statute]" but further providing that the failure to give such notice is not a basis to vacate an otherwise valid plea or conviction).

Rule 12(c)(2)(A)(iii) is identical to former Rule 12(c)(3)(C)'s required alien warning, advising a noncitizen defendant that his or her plea or admission "may" result in deportation, exclusion of admission, or denial of naturalization. Even though many guilty pleas or admissions will almost certainly result in adverse immigration consequences, the amended rule leaves unchanged former Rule 12(c)(3)(C)'s more equivocal warning that the plea or admission "may" result in deportation, exclusion of admission, or denial of naturalization. It does so for three reasons. First, "may have the consequences" are the words mandated by G.L. c. 278, § 29D. Second, it is accurate; all pleas and admissions "may" have such consequences, some more likely – in many cases, far more likely – than others. Third, the immigration consequences of a particular guilty plea or admission, while often relatively clear, in the end lie with federal authorities afforded a measure of discretion in enforcing a complicated array of federal immigration statutes and regulations, making it impossible categorically to predict the immigration consequences of pleas or admissions with any more precision. *See, e.g.,* L. Rosenberg, D. Kanstroom & J. Smith, *Immigration Consequences of Criminal Proceedings*, Massachusetts Criminal Practice (E. Blumenson & A. Leavens eds., 4th ed. 2012), §§ 42.2-42.5; *Commonwealth v. Gordon*, 82 Mass. App. Ct. 389, 397-400 (2012) (discussing the complexity of

federal immigration law and the potential difficulties of predicting the immigration consequences of a guilty plea). As is so for other collateral consequences of a guilty plea or admission, the rule depends on defense counsel to provide specific advice in this regard. *See Padilla v. Kentucky*, 559 U.S. 356, 368-369 (2010) (*Commonwealth v. Clarke*, 460 Mass. 30, 45-46, 48-49 & n. 20 (2011) (noting that the Rule 12's requirement of "[immigration] warnings is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea"), *partially abrogated on other grounds, Chaidez v. United States*, -- U.S. --, 133 S.Ct. 1103 (2013).

As the final part of the colloquy, Rule 12(c)(2)(B) and (C) respectively require the prosecutor to present the factual basis of the charge and any victim-impact statements mandated by G.L. c. 258B. The prosecutor can present the factual basis in the traditional manner, stating the facts that he or she expects to prove if the case goes to trial, but the rule also permits presenting sworn testimony, at the request of the judge or otherwise, as a way to satisfy this requirement. If the plea is an *Alford* plea, i.e., one in which the defendant declines to admit one or more elements of the offense to which he or she is nevertheless pleading guilty, the Supreme Court requires "strong evidence of [the defendant's] guilt." *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). In such a case, the prosecutor should give particular attention to this testimonial option. *See* K. Smith, Procedure if Defendant pleads Guilty or Nolo Contendere but does not admit Participation in Crime, 30A Mass. Prac., Criminal Practice & Procedure, § 23.66 n. 4 (3rd ed. 2007) ("[I]f an Alford plea is offered, the Commonwealth should ... [offer] sworn testimony to show the case is strong against the defendant, his defense is non-existent, and the defendant has presented reasons why the plea should be accepted").

The requirement that the facts underlying the charge and any victim-impact statements be presented at this point in the plea procedure is meant to provide the judge with all of the information about the charged offense necessary to determining a just disposition in the case. It also anticipates Rule 12(c)(3)'s provision, discussed below, permitting a Superior Court defendant to request and the judge to indicate what sentence the judge would impose. Before choosing to exercise that discretion, a judge would need to know the facts underlying the charged offense. Further, assuming that a judge who indicated a particular sentence would ordinarily then impose it, the statutorily required victim-impact statement would have to precede this sentencing decision in order to have any effect upon it.

As did former Rule 12(c)(5)(A), Rule 12(c)(2)(B) excludes nolo contendere pleas from the requirement that the prosecutor present a factual basis for the tendered plea or admission. Unlike convictions resulting from guilty pleas, neither a nolo plea nor the resulting conviction is admissible against the defendant in a subsequent proceeding. *Compare* Mass. Guide to Evidence, Section 803(22) (explicitly excluding judgments based on nolo contendere pleas from the hearsay exception generally applicable to judgments of conviction); *Flood v. Southland Corp.*, 416 Mass. 62, 70 (1993) (adopting Proposed Mass. R. Evid. 803(22)) *with Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737, 747 (1985) (holding that "a plea of guilty is admissible in

evidence as an admission in subsequent civil litigation, but is not conclusive”). The main reason, then, for a defendant to plead *nolo contendere* plea as opposed to guilty is to deny any benefit from the plea to potential adversaries in subsequent litigation. *See* Standard 14-1.1, ABA Standards for Criminal Justice Pleas of Guilty, comment at 15 (3d ed. 1997). This purpose would be undercut by requiring a record of the facts underlying the plea, even though such a factual record would not itself be admissible at a subsequent proceeding. Federal Rule 11(b)(3) similarly exempts *nolo contendere* pleas from its requirement of a factual-basis determination, the Federal Rules Advisory Committee Note observing: “it is desirable in some cases to permit entry of judgment upon a plea of *nolo contendere* without inquiry into the factual basis for the plea.”

### **Rule 12(c)(3) Disposition Requests**

Having provided the judge with the facts concerning the charged offense and its impact on any victims, Rule 12(C)(3) gives the parties the opportunity to make their respective sentencing recommendations. If in considering these recommendations the judge decides that he or she needs more information or time to determine a just disposition in the case, the rule provides the judge with the discretion to continue the plea hearing for that purpose. In District Court, the rule requires notifying the defendant of the right to withdraw his or her plea or admission if the sentence exceeds the defendant’s request. *See* G.L. c. 278, § 18. In Superior Court, the rule permits the defendant to ask, and gives the judge discretion to indicate, what sentence the judge would impose. This provides a measure of protection against a so-called “blind plea” to a Superior Court defendant who has not negotiated a binding plea agreement under Rule 12(b)(5). Because the judge has not yet accepted the plea, the defendant is free to withdraw the plea prior to the judge’s final consideration of it. The judge’s indicated sentence, or even the judge’s declining to indicate a sentence, would provide important information to a defendant deciding whether or not to proceed with the plea.

### **Rule 12(c)(4) Findings of Judge; Acceptance of Plea**

Rule 12(c)(4) requires the judge to inquire if the defendant still wishes to plead guilty or admit to sufficient facts. At this point, the defendant has received the notice of consequences of the plea or admission, has heard the factual basis for the charged offense(s) and any victim-impact statement, is aware of the respective sentencing recommendations of the parties, and, in Superior Court, has had the opportunity to inquire of the judge concerning the sentence to be imposed. The defendant must now elect to go forward with his or her tendered plea or admission, or choose to withdraw it and go to trial. If the defendant elects to go forward, the judge then makes the necessary inquiries to ensure that the plea or admission is knowing and voluntary. The amended rule is intended to make no change to former Rule 12(c)(5)’s provision for this voluntariness hearing, either in its form or substance.

The rule also requires the judge to find that there is an adequate factual basis for the plea or admission. As did its predecessor, Rule 12(c)(4) provides that “the defendant’s failure to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea.” See former Rule 12(c)(5)(A). Requiring every defendant to acknowledge the elements of the charged offense would eviscerate *Alford* pleas, guilty pleas that the law permits in spite of the defendant’s unwillingness to admit the factual basis of the plea. See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (holding that a guilty plea in which the defendant asserts his innocence is constitutionally permissible); *Commonwealth v. Nikas*, 431 Mass. 453, 455 (2000) (same). A judge remains free under the rule to reject such pleas, even if the reason is the defendant’s refusal to admit one or more elements of the offense. See *Commonwealth v. Lawrence*, 404 Mass. 378, 389 (1989) (no abuse of discretion to reject *Alford* pleas as a matter of practice); *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982) (acceptance of a guilty plea is “wholly discretionary with the judge”); K. Smith, 30A Mass. Prac., Criminal Practice & Procedure, § 23.66 (3rd ed. 2007). However, so long as the judge finds that there is a strong factual basis for the plea, thus protecting concerns for justice and finality, see *Alford*, 400 U.S. at 37-38, the rule – like its predecessor – does not preclude its acceptance.

If the judge is satisfied that the plea or admission is knowing, voluntary, and supported by an adequate factual basis, the judge is then in a position to accept the tendered plea or admission. Of course, if the judge is not satisfied in this regard, or, if for some other reason the judge determines that the plea or admission would not result in a just disposition of the case, the judge is permitted to reject the plea or admission. Nothing in the rule is meant to deprive the judge of this longstanding discretion. See *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982) (acceptance of a guilty plea is “wholly discretionary with the judge,” citing *Santobello v. New York*, 404 U.S. 257 (1971)); K. Smith, 30A Mass. Prac., Criminal Practice & Procedure, § 23.49 (3rd ed. 2007).

### **Rule 12(c)(5) Sentencing**

If the plea or admission is accepted, the judge then imposes sentence under Rule 12(c)(5)(A). As required by G.L. c. 278, § 18, Rule 12(c)(5)(B) explicitly permits a District Court defendant to withdraw his or her tendered plea or admission if the sentence exceeds the defendant’s requested disposition. In contrast, under the rule, a Superior Court defendant may not withdraw a plea once it is accepted, even if the sentence exceeds the recommendations of both parties. Rule 12 principally protects against sentencing uncertainty in its provision for binding plea agreements under Rule 12(b)(5) and the parties’ attendant right to withdraw under Rule 12(d)(4) if the judge rejects such an agreement. As noted, Rule 12(c)(3) provides a measure of such protection to a defendant who has tendered a plea without an agreement, allowing the defendant to inquire, and giving the judge discretion to indicate, what the sentence would be if the plea goes forward. However, the rule neither binds a judge who chooses to predict the sentence then to impose that sentence nor allows the defendant to withdraw if the judge does not.

## **Rule 12(d) Procedure When There is a Plea Agreement**

The procedure set out in Rule 12(d) applies to pleas and admissions conditioned on a plea agreement under Rule 12(b)(5). Because jeopardy attaches when the judge accepts a tendered plea or admission, at that point foreclosing the prosecutor's withdrawal from any plea agreement, the rule requires that the judge accept or reject a Rule 12(b)(5) plea agreement prior to accepting the plea or admission. And, because a Rule 12(b)(5) plea agreement binds the judge if accepted, Rule 12(d) is structured to ensure that, at the time the judge must accept or reject the agreement, he or she has the necessary information to determine if the agreed disposition would be just.

### **Rule 12(d)(1) Disclosure of the Terms of the Plea Agreement**

Rule 12(d)(1) requires disclosure of the plea agreement at the beginning of the plea hearing. Because acceptance of the agreement binds the judge to sentence according to its terms, it is essential that this disclosure include a clear explanation on the record of those terms.

### **Rule 12(d)(2) Tender of Plea**

Rule 12(d)(2) moves the tender of plea to the beginning of the plea procedure so that the terms of the plea or admission are clear at the outset. The plea tender precedes Rule 12(d)(3)'s colloquy, which includes the notice of the consequences of the plea or admission, but Rule 12(d)(5) permits the defendant to withdraw the tendered plea or admission subsequent to being informed of its consequences and prior to the judge's acceptance of it.

### **Rule 12(d)(3) Colloquy**

Rule 12(d)(3)(A) provides for the notice of consequences in terms identical to those of 12(c)(2)(A). The above discussion of Rule 12(c)(2)(A) thus applies here with equal force.

Rule 12(d)(3)(B) and (C) respectively require the prosecutor's presentation of the factual basis for the charge and any victim-impact statements mandated by G.L. c. 258B. As with Rule 12(c)(2)(B), the prosecutor can satisfy this obligation to inform the judge of the factual basis of the charge in the traditional manner, stating the facts that he or she expects to prove if the case goes to trial, but the rule also permits presenting sworn testimony, at the request of the judge or otherwise. Particularly if the tendered plea is an *Alford* plea, the prosecutor should consider this testimonial option, given the Supreme Court's admonition that such a plea should not be accepted absent "strong evidence of [the defendant's] guilt." *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). See K. Smith, Procedure if Defendant pleads Guilty or Nolo Contendere but does not admit Participation in Crime, 30A Mass. Prac., Criminal Practice & Procedure, § 23.66 n. 4 (3d. ed. 2007) ("[I]f an Alford plea is offered, the Commonwealth should ... [offer] sworn testimony to show the case is strong against the defendant, his defense is non-existent, and the defendant has presented reasons why the plea should be accepted").

Rule 12(d)'s placement of the facts describing the offense and its impact on the victims at this point in the procedure is necessary because, as noted, the rule requires that the judge accept or reject the plea agreement prior to accepting the plea itself, and that, if accepted, the plea agreement binds the judge to sentence according to the agreement. It is thus essential that a judge have access to all of the facts pertinent to a just disposition in the case prior to deciding whether to accept or reject the plea agreement under Rule 12(d)(4). Finally, because pleas of nolo contendere cannot be conditioned on a binding plea agreement under Rule 12(b)(5), there is no need to exclude them from Rule 12(d)(3)(B)'s requirement of a factual-basis presentation.

### **Rule 12(d)(4) Review; Acceptance or Rejection of Plea Agreement**

As noted, to avoid the double-jeopardy bar to the prosecutor's withdrawal from a rejected plea agreement, the judge must accept or reject the plea agreement before accepting the plea or admission. See *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 312-13 (2012). Rule 12(d)(4) imposes that timing requirement. At this point in the procedure, the judge has heard the facts of the charged offense and its impact on any victims as part of the Rule 12(d)(3) colloquy. Moreover, in reviewing the plea agreement, the judge will hear from the parties concerning the agreed disposition and will have access to the probation department concerning the defendant, including any criminal history. However, if the judge believes that there might be other information pertinent to a just disposition in the case, such as that which a pre-sentence report might provide, the rule permits the judge *sua sponte* to continue the plea hearing in order to obtain and consider that information. The only timing requirement imposed by Rule 12(d)(4) is that the judge accept or reject a binding Rule 12(b)(5) plea agreement prior to accepting any guilty plea.

If the judge accepts the plea agreement, Rule 12(d)(4)(A) requires the judge to inform the defendant that the judge will impose the sentence provided in the agreement. If the judge rejects the agreement, Rule 12(d)(4)(B) requires that the judge so inform the parties and permit either party to withdraw from the plea agreement and further permit the defendant to withdraw the tendered plea. Rule 12(d)(4)(B)(i) here gives the judge discretion to inform the parties what sentence he or she would impose if the plea were to go forward, giving the parties the opportunity to proceed on that basis without agreement under Rule 12(c), to re-fashion their plea agreement to conform to the judge's suggestion (thus binding the judge if the judge accepts that amended agreement), or to forego the plea and try the case.

### **Rule 12(d)(5) Findings of Judge as to Plea Agreement and Plea; Acceptance of Plea.**

If the judge accepts the plea agreement, Rule 12(d)(5) provides that the judge ask the defendant if the defendant wishes to go forward with the tendered plea or admission. At this point, the judge has informed the defendant of the consequences of the plea, including what the sentence (or sentencing range) will be, and the defendant has heard the factual basis of the charged offense and any victim statements as to its impact. If the defendant elects to go forward

with the plea on that basis, the judge then makes the necessary inquiries to satisfy the judge that the plea agreement and the plea or admission are knowing and voluntary. Rule 12(d)(5) is intended to make no change to former Rule 12(c)(5)'s provision for a voluntariness hearing except that the hearing also applies to the plea agreement on which the plea or admission is conditioned.

Rule 12 (d)(5) requires the judge to find that there is an adequate factual basis for the plea or admission. Rule 12(d)(5) preserves the former Rule 12(c)(5)(A)'s provision that "the defendant's failure to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea." As noted above, requiring a defendant to acknowledge the elements of the charged offense would effectively eviscerate an *Alford* plea, a plea that the law permits in spite of the defendant's unwillingness to admit the factual basis of the plea. See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (holding that a guilty plea in which the defendant asserts his innocence is constitutionally permissible); *Commonwealth v. Nikas*, 431 Mass. 453, 455 (2000) (same). As noted above, a judge is, of course, free to reject an *Alford* plea, see, e.g., *Commonwealth v. Lawrence*, 404 Mass. 378, 389 (1989) (no abuse of discretion to reject *Alford* pleas as a matter of practice); *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982) (acceptance of a guilty plea is "wholly discretionary with the judge"); K. Smith, 30A Mass. Prac., Criminal Practice & Procedure, § 23.66 (3d ed. 2007), but, assuming a strong factual basis for the plea, the rule does not preclude its acceptance.

Once satisfied that the plea agreement and the plea or admission are knowing and voluntary, and that the plea or admission is supported by an adequate factual basis, the judge is then in a position to accept the tendered plea or admission. Of course, if the judge is not satisfied in this regard, or, if for some other reason the judge determines that the plea or admission is not just, the judge is permitted to reject the plea or admission. Rule 12(d)(5) is not intended to deprive the judge of this longstanding discretion, even if the judge has accepted the plea agreement on which the plea or admission is conditioned. See *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982) (acceptance of a guilty plea is "wholly discretionary with the judge," citing *Santobello v. New York*, 404 U.S. 257 (1971)); K. Smith, 30A Mass. Prac., Criminal Practice & Procedure, § 23.49 (3rd ed. 2007).

### **Rule 12(d)(6) Sentencing**

If the judge accepts the plea or admission, the judge must impose a sentence according to the terms of the plea agreement. If the agreement provides for a sentencing range, the sentence may fall anywhere within that range, even if it is a sentence that neither party recommended. It is the agreed sentencing range which limits the judge's sentencing discretion, not the respective recommendations of the parties.

Unlike Rule 12(c)(5), Rule 12(d)(6) does not provide for the defendant's right to withdraw his or her plea in District Court. That right, afforded by G.L. c. 278, § 18, does not

here apply. Under Rule 12(b)(5), the defendant agreed to and thus requested the sentence set forth in the plea agreement, including any sentence within an agreed sentencing range. A sentence that comports with that agreement therefore cannot exceed the defendant's requested disposition. That is so even if the defendant recommends a sentence within an agreed range that is more lenient than that imposed by the judge. As long as the sentence imposed is within the agreed range, the statutory right of withdrawal does not apply.

**Rule 12(e) Availability of Criminal Record and Presentence Report.**

This is a technical amendment intended to make Rule 12(e)'s provisions applicable to admissions to sufficient facts. In 2004, Rule 12 was amended to recognize an admission to sufficient facts in District Court as the equivalent of a guilty plea, *see, e.g.*, Rule 12(a)(2), but the provisions of Rule 12(e) were not included in that amendment. Rule 28(d)(2) applies to District Court, and any presentence reports there generated should be made available to defendants who admit to sufficient facts on the same basis as they are made available to District Court defendants who plead guilty. This amendment corrects that disparity.