

2.01 Taking pleas of guilty or nolo contendere

Fed. R. Crim. P. 11

Introductory note

This section is intended to serve as a guide to district judges when they conduct the formal plea taking, whether it occurs before or after review of the presentence report. It is important to emphasize that, while the plea of guilty is entered at the Rule 11 proceeding, the court may defer deciding whether to accept the terms of a plea agreement until after review of the presentence report.⁴ If after review of the report the district court rejects an agreement made pursuant to Rule 11(e)(1)(A) or (C), the court shall give defendant the option to withdraw the plea. In either event, the judge's goal in taking the plea must be to establish that defendant is competent, that the plea is free and voluntary, that the defendant understands the charges and penalties, and that there is a factual basis for the plea. This section is not intended to be all-inclusive. Circumstances may require that additional matters be established of record. In some cases, moreover, the court may find it necessary to resolve disputes about the presentence report before determining whether a plea agreement is acceptable. See 4.01: Guideline sentencing.

Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not be familiar to persons from different cultures.

Some courts have developed Application for Permission to Enter Plea of Guilty forms and Written Plea Agreement forms. If used, such forms do not obviate the need for complete oral proceedings in open court that meet the requirements of Fed. R. Crim. P. 11.

Outline

- A. Determine, on the record, the purpose of defendant's appearance, that is, obtain a statement from defense counsel⁵ that defendant wishes to enter a plea of guilty (or nolo contendere).

4. Fed. R. Crim. P. 11(e)(2); U.S.S.G. § 6B1.1(c), p.s.

5. If defendant lacks counsel, you must advise defendant of the right to an attorney. See 1.02: Assignment of counsel or pro se representation; Fed. R. Crim. P. 11(c)(2).

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- B. If it has not previously been established, determine whether the plea is being made pursuant to a plea agreement of any kind. If so, require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(e)(2).
- C. Have the clerk administer oath to defendant.⁶
- D. Ask defendant:
 - 1. Do you understand that you are now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making a false statement? [See Fed. R. Crim. P. 11(c)(5).]
 - 2. What is your full name?
 - 3. How old are you?
 - 4. How far did you go in school?
 - 5. Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

[Note: If the answer to this question is yes, pursue the subject with defendant and with counsel in order to determine that defendant is currently competent to plead.]

- 6. Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind?

[Note: Again, if the answer is yes, pursue the subject with defendant and with counsel to determine that defendant is currently competent to plead.]

- 7. Have you received a copy of the indictment (information)⁷ pending against you—that is, the written charges made against you in this case—and have you fully discussed those charges, and the case in general, with Mr./Ms. _____ as your counsel?

6. An oath is not required by Fed. R. Crim. P. 11 but is strongly recommended to avoid any subsequent contention in a proceeding under 28 U.S.C. § 2255 that defendant did not answer truthfully at the taking of the plea because he or she was not sworn.

7. If the case involves a felony offense being prosecuted by information rather than indictment, and if a waiver of indictment has not previously been obtained in open court (see Fed. R. Crim. P. 7(b)), refer to 1.06: Waiver of indictment.

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8. Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney, Mr./Ms. _____?
 9. Is your willingness to plead guilty (nolo contendere) the result of discussions that you or your attorney have had with the attorney for the government?
[See Fed. R. Crim. P. 11(d).]
- E. *If there is a plea agreement of any kind, ask defendant:*
1. [If the agreement is written:]
Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?
 2. Does the plea agreement represent in its entirety any understanding you have with the government?
 3. Do you understand the terms of the plea agreement?
 4. Has anyone made any other or different promise or assurance of any kind to you in an effort to induce you plead guilty (nolo contendere) in this case?
 5. [If the terms of the plea agreement are nonbinding recommendations pursuant to Rule (11)(e)(1)(B).⁸]
Do you understand that the terms of the plea agreement are merely recommendations to the court—that I can reject the recommendations without permitting you to withdraw your plea of guilty and impose a sentence that is more severe than you may anticipate?
 6. [If any or all of the terms of the plea agreement are pursuant to Rule 11(e)(1)(A) or (C):]
Do you understand that if I choose not to follow the terms of the plea agreement [if some, but not all, terms are binding, identify those terms] I will give you the opportunity to withdraw your plea of guilty, and that if you

8. Note that a plea agreement may contain factual stipulations which, unless part of a Rule 11(e)(1)(C) agreement, are not binding under the Rules or the Guidelines. However, some cases have held that a factual stipulation that directly affected the severity of the sentence should have been construed as a Rule 11(e)(1)(C) agreement, or that the stipulation was otherwise relied on by the parties so that it should have been followed or defendant allowed to withdraw the plea. *See, e.g.,* United States v. Bohn, 959 F.2d 389 (2d Cir. 1992); United States v. Torres, 926 F.2d 321 (3d Cir. 1991); United States v. Kemper, 908 F.2d 33 (6th Cir. 1990); United States v. Jeffries, 908 F.2d 1520 (11th Cir. 1990); United States v. Mandell, 905 F.2d 970 (6th Cir. 1990). *See also* Guideline Sentencing: An Outline of Appellate Case Law, at section IX.A.4 (Federal Judicial Center). Courts are advised to discuss any such stipulations before accepting the plea and to warn defendant that it might not follow them and that defendant will not be allowed to withdraw the plea.

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choose not to withdraw your plea I may impose a more severe sentence, without being bound by the plea agreement [or the specific terms rejected by the court]?

F. *If there is no plea agreement* of any kind, ask defendant:

Has anyone made any promise or assurance to you of any kind in an effort to induce you to plead guilty (nolo contendere) in this case? [See Fed. R. Crim. P. 11(d).]

G. Ask defendant:

Has anyone attempted in any way to force you to plead guilty (nolo contendere) in this case? Are you pleading guilty of your own free will because you are guilty? [See Fed. R. Crim. P. 11(d).]

H. *If the plea relates to a felony offense*, consider asking defendant:

Do you understand that the offense(s) to which you are pleading guilty (nolo contendere) is a (are) felony offense(s), that if your plea is accepted you will be adjudged guilty of that offense, and that such adjudication *may* deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?

I. Inform defendant of the following:

1. The maximum possible penalty provided by law, and any mandatory minimum penalty:

(a) *For drug offenses*: Determine whether the drug quantity involved or other aggravating factors will trigger application of a mandatory minimum sentence. Because this may not be known at the time the plea is taken, the court is advised to warn defendant of any *possible* maximum and mandatory minimum sentences that may be imposed after a final determination of quantity and other conduct.

(b) Determine whether defendant faces a mandatory minimum sentence or an increase in the statutory maximum sentence because of one or more prior firearms offenses, violent felonies, or drug offenses. If this is not known at the time of the plea, advise defendant of the *possible* maximum sentence.

(c) Include the duration of any authorized or mandatory term of supervised release, and ask defendant:

Do you understand that if you violate the conditions of supervised release, you can be given additional time in prison?

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- (d) *If the offense carries a maximum sentence of twenty-five years or more, include a reference to the unavailability of a probation sentence under 18 U.S.C. § 3561(a)(1).*
2. *If applicable, that the court may also order, or be required to order,⁹ defendant to make restitution to any victim of the offense.*
 3. *If applicable, that the court may require defendant to forfeit certain property to the government.*
 4. *If the offense involved fraud or other intentionally deceptive practices, that the court may order defendant to provide notice of the conviction to victims of the offense. See 18 U.S.C. § 3555.*
 5. That for each offense, defendant must pay a special assessment of \$50 (\$25 for a Class A misdemeanor, \$10 for Class B, \$5 for Class C or infraction) required by 18 U.S.C. § 3013.
- J. Ask defendant:
- Do you understand those possible consequences of your plea? [See Fed. R. Crim. P. 11(c)(1).]
- K. Inform defendant that, under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case.
- L. Ask defendant:
1. Have you and your attorney talked about how the sentencing guidelines might apply to your case?

[*Note: If there is a plea agreement that a specific sentence will be imposed (Fed. R. Crim. P. 11(e)(1)(C)), skip to question 4.*]

2. Do you understand that the court will not be able to determine the guideline sentence for your case until after the presentence report has been completed and you and the government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer, and that the sentence imposed may be different from any estimate your attorney may have given you?
3. Do you also understand that, after your guideline range has been determined, the court has the authority in some circumstances to depart from the guide-

9. See 18 U.S.C. § 3663A, Mandatory restitution to victims of certain crimes (effective April 24, 1996).

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lines and impose a sentence that is more severe or less severe than the sentence called for by the guidelines?

4. Do you also understand that parole has been abolished and that if you are sentenced to prison you will not be released on parole?

M. Ask defendant:

1. Do you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?
2. [*If the plea agreement involves a waiver of the right to appeal the sentence, ask defendant:*]

Do you understand that by entering into this plea agreement and entering a plea of guilty you will have waived or given up your right to appeal or collaterally attack all or part of this sentence?

[The court should discuss the specific terms of the waiver with defendant to ensure that the waiver is knowingly and voluntarily entered into and that defendant understands the consequences.¹⁰]

N. Ask defendant:

1. Do you understand that you have a right to plead not guilty to any offense charged against you and to persist in that plea; that you would then have the right to a trial by jury; that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt; and that you would have the right to the assistance of counsel for your defense, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to the issuance of subpoenas or compulsory process to compel the attendance of witnesses to testify in your defense? Do you understand that should you decide not to testify or put on any evidence, these facts cannot be used against you?

10. Most circuits have held that a defendant may waive the right to appeal a sentence if the waiver is knowing and voluntary. See, e.g., *United States v. Ashe*, 47 F.3d 770 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188 (7th Cir. 1995); *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993); *United States v. Salcido-Contreras*, 990 F.2d 51 (2d Cir. 1993); *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992); *United States v. Rutan*, 956 F.2d 827 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990). See also *Guideline Sentencing: An Outline of Appellate Case Law*, at section IX.A.5 (Federal Judicial Center). Note that the waiver may not be enforceable if the sentence is not in accordance with the terms of the plea agreement.

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2. Do you further understand that by entering a plea of guilty (nolo contendere), if that plea is accepted by the court, there will be no trial and you will have waived or given up your right to a trial as well as those other rights associated with a trial as I just described them?

[See Fed. R. Crim. P. 11(c)(3) and (4).]

- O. Inform defendant of the charge(s) to which he or she is pleading guilty (nolo contendere) by reading or summarizing the indictment (information). Then:
 1. further explain the essential elements of the offense, i.e., what the government would be required to prove at trial;¹¹ and/or (except in pleas of nolo contendere)
 2. have defendant explain and assent to the facts constituting the crime(s) charged. See Fed. R. Crim. P. 11(c)(1).
- P. *In the case of a plea of guilty (including an Alford plea¹²),* have government counsel make a representation concerning the facts the government would be prepared to prove at trial (to establish an independent factual basis for the plea). See Fed. R. Crim. P. 11(f).

If defendant's plea is nolo contendere, he or she is neither admitting nor denying guilt.¹³ Fed. R. Crim. P. 11(f) is therefore not applicable. The court may wish to consider having the government make a representation concerning the facts of the case.

- P. If there is a plea agreement involving dismissal of other charges, or an agreement that a specific sentence will be imposed, and if consideration of the agreement is to be deferred, ask defendant:

Do you understand that if you plead guilty, a presentence report will be prepared, and I will then consider whether or not to accept the plea agreement, and that if I decide to reject the plea agreement, you will then have an opportunity to withdraw your plea and change it to not guilty?

11. Reference may be made to the standard or pattern jury instructions normally used in your court.

12. *North Carolina v. Alford*, 400 U.S. 25 (1970). See also *U.S. v. Tunning*, 69 F.3d 107, 110–14 (6th Cir. 1995) (discussing establishment of factual basis for *Alford* plea and difference between *Alford* plea and plea of nolo contendere).

13. The plea of nolo contendere is never entertained as a matter of course. Fed. R. Crim. P. 11(b) provides that the plea may be entered “with the consent of the court.” It provides further that the plea shall be accepted “only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.” In general, courts accept a plea of nolo contendere only in certain types of cases involving nonviolent crimes where civil implications may arise from a guilty plea.

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Q. Ask defendant:

How do you now plead to the charge: guilty or not guilty?

R. If you are satisfied with the responses given during the hearing, make the following finding on the record:

It is the finding of the court in the case of *United States v. _____* that the defendant is fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty (nolo contendere) is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea is therefore accepted, and the defendant is now adjudged guilty of that offense.

S. If a presentence report has been reviewed before plea taking or is not required (see Fed. R. Crim. P. 32(b)(1)), proceed to disposition. (See 4.01: Guideline sentencing.) Otherwise, inform defendant:

1. that a written presentence report will be prepared by the probation office to assist the judge in sentencing;
2. that defendant will be asked to give information for the report, and that his or her attorney may be present if defendant wishes;
3. that the court shall permit defendant and counsel to read the presentence report and file any objections to the report before the sentencing hearing (Fed. R. Crim. P. 32(b)(6)); and
4. that defendant and his or her counsel shall have an opportunity to speak on behalf of defendant at the sentencing hearing (Fed. R. Crim. P. 32(c)(1)).

T. Refer defendant to the probation officer for a presentence investigation and report (pursuant to Fed. R. Crim. P. 32(b)(1)), set disposition date for sentencing, and determine bail or conditions of release pending sentencing. See 2.11: Release or detention pending sentence or appeal.

1. If defendant has been at liberty on bond or personal recognizance, invite defense counsel to argue for release pending sentencing. See 18 U.S.C. § 3143(a). Give the U.S. attorney an opportunity to respond.
2. If defendant is to be released pending sentencing, advise defendant:
 - (a) when and where he or she is required to appear for sentencing;
 - (b) that failure to appear as required is a criminal offense for which he or she could be sentenced to imprisonment;

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- (c) that all the conditions on which he or she was released up to now continue to apply; and
 - (d) that the penalties for violating those conditions can be severe.
- U. If appropriate, consider entering a preliminary order of forfeiture under Fed. R. Crim. P. 32(d)(2). Note that defendant must be provided notice and a reasonable opportunity to be heard on the timing and form of the order.

2.02 Taking pleas of guilty or nolo contendere (organization¹)

- A. Before accepting a plea of guilty or nolo contendere from the representative of an organization, you will want to satisfy yourself:
1. that the person appearing before you is an officer or authorized employee of the organization;
 2. that the board of directors is empowered to authorize a person to enter a plea of guilty or nolo contendere to a charge brought against the organization;
 3. that the person before you is authorized by a valid resolution to enter a plea of guilty or nolo contendere to the charge before you;
 4. that the organization is financially able to pay a substantial fine that could be imposed by the court for the charge involved in the plea of guilty or nolo contendere.
- B. After receiving the information set out above and satisfying yourself that the plea can be taken from the person before you, the person should be placed under oath and informed of the following:
1. the nature of the charge(s) to which the plea is offered;
 2. the mandatory minimum penalty provided by law, if any;
 3. the special assessment for each offense of \$200 (\$125 for a Class A misdemeanor, \$50 for Class B, \$25 for Class C or infraction) required by 18 U.S.C. § 3013;
 4. the maximum possible penalty provided by law;
 5. *if applicable*, that the court may also order the organization to make restitution to any victim of the offense;
 6. *if applicable*, that the court may require the organization to forfeit certain property to the government;
 7. *if the offense involved fraud or other intentionally deceptive practices*, that the court may order the organization to provide notice of the conviction to victims of the offense (see 18 U.S.C. § 3555);
 8. if appropriate, the right to be represented by an attorney;

1. Effective Dec. 1, 1999, Fed. R. Crim. P. 11(a) substitutes "organization" for "corporation." Organization is defined in 18 U.S.C. § 18 as "a person other than an individual."