RULE 12 REPORTER'S NOTES

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Rule 12 Pleas and Plea Agreements

As the title of Rule 12 suggests, the 2015 revision of the rule resulted in a more carefully delineated and somewhat expanded role for plea agreements in the process of a judge's consideration and acceptance of a proffered guilty plea. The rule's amendment was in response 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 the sentence agreed to 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.

As amended, Rule 12 provides that, if (1) the parties enter a plea agreement which includes both a specific, agreed sentence and a prosecutorial charge concession and (2) the judge accepts that agreement, then the judge is bound to impose the agreed sentence. If, on the other hand, the judge rejects such an agreement, either party may withdraw. In all other pleas or admissions, whether conditioned on a plea agreement or not, the amended rule provides that the judge is not bound by the sentencing recommendations of the parties. However, in such cases, the amended rule permits the defendant to withdraw the plea if the judge indicates an intent to impose a sentence more severe than (1) an agreed recommendation (but without charge concessions), (2) the prosecutor's recommendation if there is no agreed sentencing recommendation, or (3) in District Court, the disposition requested by the defendant. 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 judicial participation in plea negotiations at the request of a party and requires that plea discussions with judicial participation be recorded.

Rule 12(a) Pleas in General

The 2015 amendments made no substantive changes to Rule 12(a). The only changes were stylistic, designed to make the rule more specific and clear.

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. *See* Rule 2(b)(7) (defining "District Court" to include all divisions of the District Court, Boston Municipal Court, and Juvenile Court). However, the rule also provides that the parties may condition a guilty plea (or, in District Court, an admission to sufficient facts) on a plea agreement under Rule 12(b)(5), discussed below. Rule 12(b)(1) omits nolo contendere pleas from those that can be conditioned on a plea agreement, an omission that Rule 12(b)(5) makes explicit, thus limiting the benefits of a 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. 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. The rule maintains the recognized benefits of this practice while providing important safeguards to curb its potential for abuse.

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 does not, however, preclude a judge's uninvited announcement that he or she is willing to participate in plea discussions if invited to do so by either party. 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, provided they are recorded. 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 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 Rule 12 does not permit a nolo contendere plea to be conditioned on a plea agreement, the rule does not 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 any such plea agreement is outside the rule, constituting at best a joint recommendation that the judge is free to disregard.

Rule 12(b)(4) Pleas Without an Agreement

If there is no plea agreement under Rule 12(b)(5), Rule 12(b)(4) provides that the procedure for taking a plea or admission set forth in Rule 12(c) applies. In such a case, the parties are each free to make any dispositional request permitted by law.

Rule 12(b)(5) Pleas Conditioned Upon an Agreement

Rule 12(b)(5) provides that a defendant may condition an intended guilty plea or admission on a plea agreement with the prosecutor. As noted, the rule explicitly precludes a plea agreement if the intended plea is nolo contendere. The rule divides plea agreements into two categories. Rule 12(b)(5)(A) provides for a type of plea agreement that, if accepted by the judge, binds the judge to sentence in accordance with the agreement, and Rule 12(b)(5)(B) provides, in effect, that no other plea agreement binds the judge to impose a particular sentence.

Under Rule 12(b)(5)(A), an accepted plea agreement will bind the judge if the parties have agreed both to a particular charge concession(s) by the prosecutor and to a specific sentence, including the length of any probationary term. Rule 12(b)(5)(A)'s reach is intentionally narrow. The rule carves out an exception to judicial sentencing discretion, an exception applicable only to a plea bargain that expressly includes both a prosecutorial charge concession and an agreed sentence to a specific term of incarceration, to a specific period of probation, or to a specific term of incarceration coupled with a specific period of probation (e.g., a term of probation to be served in lieu of a suspended sentence of incarceration, or a term of probation to be served on and after a term of incarceration). If the parties enter into such an agreement, the rule requires the judge to follow the plea procedures set forth in Rule 12(d), noting that those procedures mandate imposition of the agreed sentence if the judge accepts the plea agreement and the plea. *See* Rule 12(d)(4)(A) and (6), discussed below. As discussed below, Rule 12(d) further provides that, if the judge rejects such a plea agreement, either party may withdraw from the agreement and thus from the plea. *See* Rule 12(d)(4)(B).

Even though Rule 12(b)(5)(A) permits the parties to include a specific period of probation within a binding plea agreement, the rule does not permit the parties to bind the judge to impose specific conditions of probation. Any agreement by the parties concerning conditions of probation is treated as a non-binding recommendation for the judge to consider, with the assistance of probation, in deciding what probationary conditions are appropriate in the case. *See* Rule 12(d)(6), discussed below. Finally, nothing in Rule 12 is intended to limit a judge's lawful discretion to modify probationary conditions during the course of probation or to adjust the probationary term upon a finding of a probation violation. In short, a plea agreement containing a charge concession and an agreed-upon period of probation will bind a judge who accepts that agreement to impose the agreed term of probation, but the parties may not by agreement trench upon the longstanding prerogative of the judge to determine and subsequently to modify any

conditions of probation during that probationary term. *See Commonwealth v. Goodwin*, 458 Mass. 11, 17-19 (2010).

Under Rule 12(b)(5)(B), pleas conditioned on plea agreements other than those described in Rule 12(b)(5)(A) are governed by the procedures set forth in Rule 12(c), the procedures that also govern pleas in which there is no plea agreement. As discussed below, Rule 12(c) treats any agreement contained in a Rule 12(b)(5)(B) plea agreement as a non-binding, joint recommendation. For example, if the parties agree to a specific sentence unaccompanied by a charge concession, to a charge concession unaccompanied by an agreement to a specific sentence, or to some other dispositional alternative such as incarceration in a particular facility, that agreement would not bind the judge in imposing sentence. As was true under former Rule 12(b), the parties are free to enter into an agreement to recommend any disposition, or kind of disposition, permitted by law in the case in question. However, unless the agreement provides for both a charge concession and a specific sentence, the judge cannot be bound to follow that recommendation.

Rule 12(c) Procedure If No Plea Agreement or If Plea Agreement Does Not Include Both a Specific Sentence and a Charge Concession

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)(A). Rule 12(c)'s procedure is parallel to that set forth in Rule 12(d), which is applicable to pleas and admissions when there is a Rule 12(b)(5)(A) binding plea agreement. The two sections diverge in their respective timing of receipt of victim impact statements, *compare* Rule 12(c)(3)(C) *with* Rule 12(d)(3)(C), treatment of the parties' sentencing recommendations, *compare* Rule 12(c)(4) *with* Rule 12(d)(4), and sentencing, *compare* Rule 12(c)(6) *with* Rule 12(d)(6). Otherwise, the two plea procedures are substantively identical.

Rule 12(c)(1) Disclosure of Terms of Plea Agreement

As discussed above, if the plea is conditioned on a plea agreement, the applicability of Rule 12(c)'s procedures depends on the provisions of that agreement. If the agreement provides for both a prosecutorial charge concession and an agreed specific sentence, the procedures under Rule 12(d) apply; if not, Rule 12(c) applies. It is thus important for the parties and the judge to be clear about the terms of any agreement before the plea procedure begins.

Rule 12(c)(2) Tender of Plea

Because Rule 12(c) applies to pleas in which there is no agreement as well as to pleas conditioned on an agreement, Rule 12(c)(2) 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 even if there is no agreement. Although the plea tender precedes Rule 12(c)(3)'s colloquy, which includes the notice of the consequences of the plea, Rule 12(c)(5) 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. In a District-Court plea in which there will be a recommendation of probation, whether unagreed or agreed, the party(ies) must consult with the probation department before tendering the plea so that probation will be in a position to provide any assistance that the judge may require in sentencing. *See* Dist./Mun. Ct. R. Crim. P. 4(c).

Rule 12(c)(3) Colloquy

Rule 12(c)(3)(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 with two exceptions. First, unlike its predecessor, Rule 12(c)(3)(A)(ii)(d) 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).

Second, Rule 12(c)(3)(A)(iii) expands former Rule 12(c)(3)(C)'s required noncitizen warning. As did former Rule 12(c)(3)(C), Rule 12(c)(3)(A)(iii)(a) requires the warning mandated by G.L. c. 278, § 29D, advising a defendant that, if he or she is a noncitizen, his or her plea or admission may result in deportation, exclusion from admission, or denial of naturalization. Rule 12(c)(3)(A)(iii)(b) advises further that, if (1) the offense to which the defendant is pleading is under federal law one that "presumptively mandates removal from the United States" (a so-called "removable offense," *see Padilla v. Kentucky*, 559 U.S. 356, 363-364 (2010)) and (2) federal officials seek removal, it is "practically inevitable that [defendant's] conviction would result in deportation, exclusion from admission, or denial of naturalization."

This additional warning recognizes that under federal immigration law there are a substantial number of crimes – including "all controlled substances convictions except for the most trivial of marijuana possession offenses," *see Padilla*, 559 U.S. at 368; 8 U.S.C. § 1227(a)(2)(B)(i) (2008) – the conviction for which make "deportation practically inevitable" if federal officials seek the defendant's removal. *See Commonwealth v. DeJesus*, 468 Mass. 174, 181 & n. 5 (2014). *See also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013) (cited in *DeJesus*, noting that the federal Immigration and Nationality Act prohibits discretionary relief for deportations based on convictions for a wide range of crimes no matter how compelling the circumstances). Further, as the warning states, once deported due to such a conviction, a defendant would almost certainly be denied both re-admission to the United States and naturalization. *See, e.g.*, L. Rosenberg, D. Kanstroom & J. Smith, *Immigration Consequences of Criminal Proceedings*, Massachusetts Criminal Practice § 42.2 (E. Blumenson & A. Leavens eds., 4th ed. 2012). It is important to appreciate that Rule 12(c)(3)(A)(iii)(b)'s warning is limited to the consequences of a conviction for a "removable offense." The narrow focus of this enhanced warning is purposeful and should not be read to suggest that convictions for other

crimes would have no serious immigration consequences. Under federal law, conviction for – or even an admission to conduct constituting – a broader range of crimes than those presumptively mandating removal can also result in denial of re-admission and of naturalization. *Id*. §§ 42.2-42.3.

Finally, as Rule 12(c)(3)(A)(iii)'s warning provides, under federal immigration law, "convictions" include admissions to sufficient facts even when the result is a continuance without a finding (CWOF), if the continuance is conditioned on "some form of punishment, penalty or restraint" such as payment of costs or restitution. *See DeVaga v. Gonzalez*, 503 F.3d 45, 49 (1st Cir. 2007) (holding that a CWOF conditioned on payment of restitution satisfies 8 U.S.C. § 1101(a)(48)(A)(ii)'s provision that an admission to sufficient facts constitutes a "conviction" if the admission results in "some form of punishment, penalty or restraint"); *Matter of Cabrera*, 24 I. & N. Dec. 459, 462 (BIA 2008) (holding that imposition of costs and surcharges following a plea is a "penalty" or "punishment" for purposes of § 1101(a)(48)(A)(ii)).

This noncitizen warning is not meant to displace the critical role of counsel in providing more particular advice concerning the immigration consequences of a particular plea. Quite the contrary, the warning is meant to trigger that advice if, under circumstances best known by counsel, a defendant is risking serious immigration consequences by pleading guilty or admitting to sufficient facts. *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 then-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*, 133 S. Ct. 1103 (2013); *DeJesus*, 468 Mass. at 182 (holding that counsel's advice to a noncitizen defendant that he would be "eligible for deportation" and would "face deportation" if he pled guilty to possession of cocaine with intent to distribute (a removable offense under the immigration statute) was constitutionally inadequate).

Rule 12(c)(3)(B) requires the prosecutor to present the factual basis of the charge. Unlike former Rule 12(c)(5)(A), Rule 12(c)(3)(B) does not exclude nolo contendere pleas from the requirement that the prosecutor present a factual basis for the tendered plea or admission. The factual basis of a nolo plea provides information essential to crafting an appropriate sentence, but, because the defendant is not called upon to acknowledge or admit those facts, they will not be admissible in any subsequent proceeding against the defendant. *See, e.g.*, Mass. Guide to Evidence § 803(22) (2014) (explicitly excluding judgments based on nolo contendere pleas from the hearsay exception generally applicable to judgments of conviction).

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* E. Cypher, Procedure if Defendant pleads Guilty or Nolo Contendere but does not admit Participation in Crime, 30A Mass. Prac., Criminal Practice & Procedure, § 24:78 n. 4 (2014) ("[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").

As the final part of the colloquy, Rule 12(c)(3)(C) requires the judge to inquire of the prosecutor as to compliance with G.L. c. 258B. However, the judge is granted discretion concerning when to hear any victim-impact statements. The judge does not need this input until deciding whether to accept or reject the plea and then to impose sentence. However, hearing victim-impact statements at this stage of the proceeding – just before hearing the parties' respective sentencing recommendations and arguments – may provide the judge with the proper perspective for considering those recommendations and deciding what is a just disposition in the case.

Rule 12(c)(4) Disposition Requests

Rule 12(c)(4) gives the parties the opportunity to make their respective sentencing recommendations. This section has two subdivisions: Rule 12(c)(4)(A) applies to cases in which there is no agreed-upon sentence recommendation, and Rule 12(c)(4)(B) applies to cases in which there is. Rule 12(c)(4)(A) requires a District Court judge to inform a defendant of the statutory right to withdraw the plea if the judge imposes a sentence that exceeds the defendant's request, *see* G.L. c. 278, § 18, and a Superior Court judge to inform a defendant of the right to withdraw the plea if the disposition imposed exceeds the prosecutor's recommendation. If the parties have agreed on a sentence recommendation, Rule 12(c)(4)(B) requires the judge to inform the defendant that the plea may be withdrawn if the sentence imposed exceeds the agreed-upon recommendation. However, unlike Rule 12(d)(4)(B)(ii), which applies to binding plea agreements, Rule 12(c)(4)(B) does not give the prosecution the right to withdraw from the plea agreement and the plea if the judge announces an intent to impose a sentence more lenient than the sentence jointly recommended.

If in considering the parties' joint or respective recommendations the judge decides that he or she needs more information or time to determine a just disposition in the case, both subsections of Rule 12(c)(4) allow the judge to continue the plea hearing for that purpose. Among the factors pertinent to the judge's sentencing decision are the nature of the offense committed, the manner in which it was committed, the impact that the offense had on any victims, the defendant's criminal history, and the defendant's circumstances (e.g., his or her mental health, substance abuse, and/or psychological issues). The judge, in consultation with probation where appropriate, should take the time and consider the facts necessary to craft a

sentence, including any term and conditions of probation, that is fair, appropriate to the crime, and designed to diminish the risk of recidivism.

Rule 12(c)(5) Findings of Judge; Acceptance of Plea

Rule 12(c)(5) 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 is aware of the respective sentencing recommendations of the parties. The defendant may have also heard the victim-impact statement(s), if any. 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)(5) provides that the defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea. The rule is not intended to work any change to former Rule 12(c)(5)(A) in this regard.

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); E. Cypher, 30A Mass. Prac., Criminal Practice & Procedure, Judge may refuse to accept guilty plea, plea of nolo contendere or admission to sufficient facts, § 24:60 (4th ed. 2014).

Rule 12(c)(6) Sentencing

If the judge accepts the plea or admission, the judge then imposes sentence under Rule 12(c)(6). As required by G.L. c. 278, § 18, Rule 12(c)(6)(B) explicitly permits a District Court defendant to withdraw his or her tendered plea or admission if the intended sentence exceeds the defendant's requested disposition. Similarly, in Superior Court a defendant may withdraw his or her plea if the intended sentence exceeds the parties' agreed-upon recommendation or, if there is no agreed-upon recommendation, the recommendation of the prosecutor. In either event, the judge may indicate to the parties what sentence the judge would impose if the plea were to go forward.

Rule 12(d) Procedure If Plea Agreement Includes Both a Specific Sentence and a Charge Concession

The procedure set out in Rule 12(d) applies to pleas and admissions conditioned on a plea agreement that includes both an agreed charge concession by the prosecutor and an agreement to a specific sentence. *See* Rule 12(b)(5)(A), discussed above. Under Rule 12(d)(6), discussed below, if the judge accepts such a plea agreement, the judge is bound to impose the agreed sentence. If, however, the judge rejects the plea agreement, either party may withdraw from the agreement. *See* Rule 12(d)(4)(B), discussed below. Because jeopardy attaches when the judge accepts a tendered plea or admission, at that point foreclosing the prosecutor's withdrawal from any plea agreement, *see Commonwealth v. Dean-Ganek*, 461 Mass. 305, 312-313 (2012), the rule requires that the judge accept or reject a Rule 12(b)(5)(A) plea agreement prior to accepting the plea or admission. And, because such a 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, the judge has the necessary information to determine if the agreed disposition would be just and appropriate for the case.

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. In District Court, if the plea agreement includes any probationary terms or conditions, the parties must consult with the probation department before tendering the plea so that probation will be in a position to provide any assistance that the judge may require in considering the plea or the plea agreement. *See* Dist./Mun. Ct. R. Crim. P. 4(c). 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 substantively identical to those of 12(c)(3)(A). The above discussion of Rule 12(c)(3)(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)(3)(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. Rule 12(d)(3)(C) provides for the receipt of any victim-impact statements at this time. While in some instances it may not be necessary for the judge to hear the victim-impact statements before deciding whether to accept the plea agreement, the judge should not defer hearing from the victims absent the most unusual circumstances. Victim-impact statements delivered after the judge accepts the plea agreement can have no effect on the sentence.

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 and appropriate disposition in the case prior to deciding whether to accept or reject the plea agreement under Rule 12(d)(4).

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. S*ee Dean-Ganek*, 461 Mass. at 312-313. 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. 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. *See* Rule 12(e), discussed below. However, if the judge believes that there might be other information pertinent to a just disposition in the case, the rule permits the judge *sua sponte* to continue the plea hearing in order to obtain and consider that information. Once the judge accepts the agreement, he or she is bound by its terms, and it is therefore essential that at this point the judge be fully satisfied that the agreed-upon sentence is fair, appropriate to the crime, and designed to diminish the risk of recidivism. The only timing requirement imposed by Rule 12(d)(4) is that the judge accept or reject such a plea agreement prior to accepting the 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. The judge's doing so gives 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. If the judge has

doubts concerning the wisdom or fairness of the agreed disposition and believes that additional information might help to resolve those doubts, Rule 12(d)(4)(B)(i) permits the judge so to inform the parties. This gives the parties the opportunity, if one or the other has the requested information and is in a position to divulge it, to do so before the judge decides whether to accept or reject the agreement.

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 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, the judge must then make 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 aspects of the factual basis shall not preclude a judge from accepting a guilty plea, and the rule is not intended to work any change on its predecessor in this regard.

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 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); E. Cypher, 30A Mass. Prac., Criminal Practice & Procedure, Judge may refuse to accept guilty plea, plea of nolo contendere or admission to sufficient facts, § 24:60 (4th ed. 2014).

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, including any agreed-upon probationary term. It lies with the judge, however, in consultation with probation where appropriate, to decide what conditions of probation are appropriate. To the extent that the plea agreement contains agreed-upon recommended conditions of probation, they are not binding on the judge; rather, they are to be

considered as joint recommendations for the judge to consider, and neither party has the right to withdraw the plea or from the agreement if the judge declines to follow such recommendations. Unlike Rule 12(c)(6), 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. A sentence that comports with that agreement therefore cannot exceed the defendant's requested disposition.

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

Rule 12(e) is 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), and to omit the requirement that the parties must file a written motion to obtain a presentence report. The former amendment conforms Rule 12(e) to Rule 12(a)(2) as it was amended in 2004, and the latter amendment achieves consistency between Rule 12(e) and Rule 28(d)(2). Further, the rule is amended to ensure that a judge considering whether to accept a binding plea agreement under Rule 12(d)(4) has both an updated record of the defendant's criminal record and any presentence report prepared by probation under Rule 28(d)(2).

Rule 12(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements

The 2015 amendments made no changes to Rule 12(f).