

conferencing is conducive to the solemnity of a federal criminal proceeding. That might require additional coordination, for example, with the detention facility to insure that the room, furniture, and furnishings reflect the dignity associated with a federal courtroom. Provision should also be made to insure that the judge, or a surrogate, is in a position to carefully assess the condition of the defendant. And the court should also consider establishing procedures for insuring that counsel and the defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

Rule 11. Pleas

(a) ENTERING A PLEA.

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected

from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) **WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA.** A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) **FINALITY OF A GUILTY OR NOLO CONTENDERE PLEA.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) **ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS.** The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) **RECORDING THE PROCEEDINGS.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) **HARMLESS ERROR.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, §3(5)-(10),

July 31, 1975, 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Pub. L. 100-690, title VII, §7076, Nov. 18, 1988, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. [former] 564 (Standing mute); *Fogus v. United States*, 34 F.2d 97 (C.C.A. 4th) (duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of *nolo contendere* has always existed in the Federal courts, *Hudson v. United States*, 272 U.S. 451; *United States v. Norris*, 281 U.S. 619. The use of the plea is recognized by the Probation Act, 18 U.S.C. 724 [now 3651]. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States v. Diggs*, 304 F.2d 929 (6th Cir. 1962); *Domenica v. United States*, 292 F.2d 483 (1st Cir. 1961); *Gundlach v. United States*, 262 F.2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and *Julian v. United States*, 236 F.2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks v. United States*, 298 F.2d 204 (5th Cir. 1962); *Nunley v. United States*, 294 F.2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and *United States v. Von der Heide*, 169 F.Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948); *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Munich v. United States*, 337 F.2d 356 (9th Cir. 1964); *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963); *Smith v. United States*, 324 F.2d 436 (D.C. Cir. 1963); but cf. *Marvel v. United States*, 335 F.2d 101 (5th Cir. 1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann.

§28.1058 (1954); Mich. Sup. Ct. Rule 35A; *In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961); *People v. Barrows*, 358 Mich. 267, 99 N.W.2d 347 (1959); *People v. Bumpus*, 355 Mich. 374, 94 N.W.2d 854 (1959); *People v. Coates*, 337 Mich. 56, 59 N.W.2d 83 (1953). See also *Stinson v. United States*, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons 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. The new third sentence is not, therefore, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See e.g., *Lott v. United States*, 367 U.S. 421, 426 (1961).

NOTES OF ADVISORY COMMITTEE ON RULES—1974
AMENDMENT

The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the views of the prosecution and of the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, *Hudson v. United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926), the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, *Nolo Contendere in North Carolina*, 34 N.C.L.Rev. 280, 290-291 (1956), with Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 Neb.L.Rev. 428, 434 (1954), favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of the plea. ABA, *Standards Relating to Pleas of Guilty* §1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the nolo plea in *North Carolina v. Alford*, 400 U.S. 25, 35-36 n. 8, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 Neb.L.Rev. 428, 430 (1954). A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L.J. 1255, 1265 (1942). Unlike a plea of guilty, however, it cannot be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore §1066(4), at 58 (3d ed. 1940, Supp. 1970); *Rules of Evidence for United States Courts and Magistrates*, rule 803(22) (Nov. 1971). See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L.J. 1255 (1942); ABA *Standards Relating to Pleas of Guilty* §§1.1(a) and (b), Commentary at 15-18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit the plea of nolo contendere vary. Compare *United States v. Bagliore*, 182 F.Supp. 714, 716 (E.D.N.Y. 1960), where the view is taken

that the plea should be rejected unless a compelling reason for acceptance is established, with *United States v. Jones*, 119 F.Supp. 288, 290 (S.D.Cal. 1954), where the view is taken that the plea should be accepted in the absence of a compelling reason to the contrary.

A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilty or innocence either for correctional purposes or for reasons of subsequent litigation. ABA *Standards Relating to Pleas of Guilty* §1.1(b) Commentary at 16-18 (Approved Draft, 1968). Under subdivision (b) of the new rule the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Subdivision (c) retains the requirement that the court address the defendant personally. See *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). There is also an amendment to rule 43 to make clear that a defendant must be in court at the time of the plea.

Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA *Standards Relating to Pleas of Guilty* §1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402(a)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(a)(1). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, *The Judge's Responsibility on a Plea of Guilty* 62 W.Va.L.Rev. 213, 220 (1960); *Resolution of Judges of U.S. District Court for D.C.*, June 24, 1959.

Former rule 11 required the court to inform the defendant of the "consequences of the plea." Subdivision (c)(2) changes this and requires instead that the court inform the defendant of and determine that he understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered." The objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty.

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty. *Durant v. United States*, 410 F.2d 689 (1st Cir. 1969), held that a defendant must be informed of his ineligibility for parole. *Trujillo v. United States*, 377 F.2d 266 (5th Cir. 1967), cert. denied 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967), held that advice about eligibility for parole is not required. It has been suggested that a defendant be advised that a jury might find him guilty only of a lesser included offense. C. Wright, *Federal Practice and Procedure: Criminal*

§173 at 374 (1969). See contra *Dorrough v. United States*, 385 F.2d 887 (5th Cir. 1967). The ABA Standards Relating to Pleas of Guilty §1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant. Currently, certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant. For example, the judge may impose a sentence under 18 U.S.C. §4202 making the defendant eligible for parole when he has served one third of the judicially imposed maximum; or, under 18 U.S.C. §4208(a)(1), making parole eligibility after a specified period of time less than one third of the maximum; or, under 18 U.S.C. §4208(a)(2), leaving eligibility to the discretion of the parole board. At the time the judge is required to advise the defendant of the consequences of his plea, the judge will usually not have seen the presentence report and thus will have no basis for giving a defendant any very realistic advice as to when he might be eligible for parole. Similar complications exist with regard to other, particularly collateral, consequences of a plea of guilty in a given case.

Subdivisions (c)(3) and (4) specify the constitutional rights that the defendant waives by a plea of guilty or nolo contendere. These subdivisions are designed to satisfy the requirements of understanding waiver set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Subdivision (c)(3) is intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment rights. The rule takes the position that the defendant's right not to incriminate himself is best explained in terms of his right to plead not guilty and to persist in that plea if it has already been made. This is language identical to that adopted in Illinois for the same purpose. See Illinois Supreme Court Rule 402(a)(3) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(a)(3).

Subdivision (c)(4) assumes that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow. Illinois has recently adopted similar language. Illinois Supreme Court Rule 402(a)(4) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(a)(4). In explaining to a defendant that he waives his right to trial, the judge may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify. What is required, in this respect, to conform to *Boykin* is left to future case-law development.

Subdivision (d) retains the requirement that the court determine that a plea of guilty or nolo contendere is voluntary before accepting it. It adds the requirement that the court also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior plea discussions between the attorney for the government and the defendant or his attorney. See *Santobello v. New York*, 404 U.S. 257, 261-262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971): "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." Subdivisions (d) and (e) afford the court adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises.

The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea.

By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack. * * * Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. *McCarthy v. United States*, 394 U.S. 459, 466, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

Subdivision (e) provides a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge.

Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1-2 (Approved Draft, 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); L. Weinreb, Criminal Process 437 (1969); Note, Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964).

There is increasing acknowledgement of both the inevitability and the propriety of plea agreements. See, e.g., ABA Standards Relating to Pleas of Guilty §3.1 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (1970), Ill.Rev.Stat. 1973, ch. 110A, §402.

In *Brady v. United States*, 397 U.S. 742, 752-753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the court said:

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

In *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), the court said:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report. The Courts 9 (1967); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964). But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty §1.8 (Approved Draft, 1968); the ABA Standards Relating to The Prosecution Function and The Defense Function pp. 243-253 (Approved Draft, 1971); and the ABA Standards Relating to the Function of the Trial Judge, §4.1 (App.Draft, 1972). The Supreme Court of California recently recognized the propriety of plea bargaining. See *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970). A plea agreement procedure has recently been decided in the District of Columbia Court of General Sessions upon the recommendation of the United States Attorney. See 51 F.R.D. 109 (1971).

Where the defendant by his plea aids in insuring prompt and certain application of correctional meas-

ures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. Cf. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 211 (1956). Where the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct, it has been thought proper to recognize this in sentencing. See also ALI, Model Penal Code §7.01 (P.O.D. 1962); NPPA Guides for Sentencing (1957). Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, chs. 2 and 3 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 881 (1964).

Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge.

We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record [The Bench Book prepared by the Federal Judicial Center for use by United States District Judges now suggests that the defendant be asked by the court "if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive." Bench Book for United States District Judges, Federal Judicial Center (1969) at 1.05.3.] and publicly disclosed. *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969). * * * In the future we think that the district judges should not only make the general inquiry under Rule 11 as to whether the plea of guilty has been coerced or induced by promises, but should specifically inquire of counsel whether plea bargaining has occurred. Logically the general inquiry should elicit information about plea bargaining, but it seldom has in the past. *Raines v. United States*, 423 F.2d 526, 530 (4th Cir. 1970).

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115 (1967). There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated. ABA Standards Relating to Pleas of Guilty §3.1, Commentary at 60-69 (Approved Draft 1968); Task Force Report: The Courts 9. Consequently, there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness. See ABA Standards Relating to Pleas of Guilty §3.1, Commentary at 60 et seq.; Task Force Report: The Courts 9-13.

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Subdivision (e)(1) specifies that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may" participate in plea discussions. The inclusion of "the defendant when acting pro se" is intended to reflect the fact that there are situations in which a defendant insists upon representing himself. It may be desirable that an attorney for the government not enter plea discussions with a defendant personally. If necessary, counsel can be appointed for purposes of plea discussions. (Subdivision

(d) makes it mandatory that the court inquire of the defendant whether his plea is the result of plea discussions between him and the attorney for the government. This is intended to enable the court to reject an agreement reached by an unrepresented defendant unless the court is satisfied that acceptance of the agreement adequately protects the rights of the defendant and the interests of justice.) This is substantially the position of the ABA Standards Relating to Pleas of Guilty §3.1(a), Commentary at 65-66 (Approved Draft, 1968). Apparently, it is the practice of most prosecuting attorneys to enter plea discussions only with defendant's counsel. Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See *Anderson v. North Carolina*, 221 F.Supp. 930, 935 (W.D.N.C.1963); *Shape v. Stigler*, 230 F.Supp. 601, 606 (D.Neb. 1964).

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 898 (1964).

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty §3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32-52, 78-104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty §3.3(a), Commentary at 72-74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891-892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180-183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B.A.J. 444 (1965). As has been recently pointed out:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, as once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. *United States ex rel. Elksnis v. Gilligan*, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions

either after the agreement is reached or to help elicit facts and an agreement. Enker, *Perspectives on Plea Bargaining*, in *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts* 108, 117-118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(d)(1). As to what may constitute "participation," contrast *People v. Earegood*, 12 Mich.App. 256, 268-269, 162 N.W.2d 802, 809-810 (1968), with *Kruse v. State*, 47 Wis.2d 460, 177 N.W.2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970), the court said:

[T]he basis of the bargain should be disclosed to the court and incorporated in the record. * * *

Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. 91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted. For a discussion of the use of conditional plea acceptance, see ABA Standards Relating to Pleas of Guilty §3.3(b), Commentary at 74-76, and Supplement, Proposed Revisions §3.3(b) at 2-3 (Approved Draft, 1968); Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(d)(2).

The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.

Subdivision (e)(3) makes it mandatory, if the court decides to accept the plea agreement, that it inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This serves the purpose of informing the defendant immediately that the agreement will be implemented.

Subdivision (e)(4) requires the court, if it rejects the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw his plea and must be advised that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to him than that contemplated by the plea agreement. That the defendant should have the opportunity to withdraw his plea if the court rejects the plea agreement is the position taken in ABA Standards Relating to Pleas of Guilty, Supplement, Proposed Revisions §2.1(a)(ii)(5) (Approved Draft, 1968). Such a rule has been adopted in Illinois. Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(d)(2).

If the court rejects the plea agreement and affords the defendant the opportunity to withdraw the plea, the court is not precluded from accepting a guilty plea from the same defendant at a later time, when such plea conforms to the requirements of rule 11.

Subdivision (e)(5) makes it mandatory that, except for good cause shown, the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the government. ABA Standards Relating to Pleas of Guilty §1.3 (Approved Draft, 1968). The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

Subdivision (e)(6) is taken from rule 410, Rules of Evidence for United States Courts and Magistrates (Nov. 1971). See Advisory Committee Note thereto. See also the ABA Standards Relating to Pleas of Guilty §2.2 (Approved Draft, 1968); Illinois Supreme Court Rule 402(f) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(f).

Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea. The draft does not specify that any particular type of inquiry be made. See *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); "Fed.Rule Crim.Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case. This is the position of the ABA Standards Relating to Pleas of Guilty §1.6 (Approved Draft, 1968). Where inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath. With regard to a determination that there is a factual basis for a plea of guilty to a "lessor or related offense," compare ABA Standards Relating to Pleas of Guilty §3.1(b)(ii), Commentary at 67-68 (Approved Draft, 1968), with ALI, Model Penal Code §1.07(5) (P.O.D. 1962). The rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The procedure in such case would seem to be to deal with this as a plea of nolo contendere, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with "the interest of the public in the effective administration of justice" [new rule 11(b)]. The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions. The rule is intended to make clear that a judge may reject a plea of nolo contendere and require the defendant either to plead not guilty or to plead guilty under circumstances in which the judge is able to determine that the defendant is in fact guilty of the crime to which he is pleading guilty.

Subdivision (g) requires that a verbatim record be kept of the proceedings. If there is a plea of guilty or nolo contendere, the record must include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea. Such a record is important in the event of a postconviction attack. ABA Standards Relating to Pleas of Guilty §1.7 (Approved Draft, 1968). A similar requirement was adopted in Illinois: Illinois Supreme Court Rule 402(e) (1970), Ill.Rev.Stat. 1973, ch. 110A, §402(e).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE
REPORT NO. 94-247; 1975 AMENDMENT

A. Amendments Proposed by the Supreme Court.
Rule 11 of the Federal Rules of Criminal Procedure

deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant may plead guilty, not guilty, or nolo contendere. The Supreme Court's amendments to Rule 11(b) provide that a nolo contendere plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

The Supreme Court amendments to Rule 11(c) spell out the advice that the court must give to the defendant before accepting the defendant's plea of guilty or nolo contendere. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take to insure that a guilty or nolo contendere plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court amendments to Rule 11(g) require that a verbatim record be kept of the proceedings at which the defendant enters a plea.

B. Committee Action. The proposed amendments to Rule 11, particularly those relating to the plea negotiating procedure, have generated much comment and criticism. No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with. The Committee accepts the basic structure and provisions of Rule 11(e).

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements. [Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, e.g., the remarks of United States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289-90.]

Proposed Rule 11(e) contemplates 4 different types of plea agreements. First, the defendant can plead guilty or nolo contendere in return for the prosecutor's reducing the charge to a less serious offense. Second, the defendant can plead guilty or nolo contendere in return for the prosecutor dropping, or not bringing, a charge or charges relating to other offenses. Third, the defendant can plead guilty or nolo contendere in return for the prosecutor's recommending a sentence. Fourth, the defendant and prosecutor can agree that a particular sentence is the appropriate disposition of the case. [It is apparent, though not explicitly stated, that Rule 11(e) contemplates that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. For example, the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement.]

The Committee added language in subdivisions (e)(2) and (e)(4) to permit a plea agreement to be disclosed to the court, or rejected by it, in camera. There must be

a showing of good cause before the court can conduct such proceedings in camera. The language does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is left for the courts to resolve on a case-by-case basis. These changes in subdivisions (e)(2) and (e)(4) will permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement.

The Committee added an exception to subdivision (e)(6). That subdivision provides:

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. [The Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.]

The Committee recast the language of Rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that *Boykin v. Alabama*, 395 U.S. 238 (1969), said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought it only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 94-414; 1975 AMENDMENT

Note to subdivision (c). Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Note to subdivision (e)(1). Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Note to subdivision (e)(6). Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere, offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like

the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

NOTES OF ADVISORY COMMITTEE ON RULES—1979
AMENDMENT

Note to Subdivision (e)(2). The amendment to rule 11(e)(2) is intended to clarify the circumstances in which the court may accept or reject a plea agreement, with the consequences specified in subdivision (e)(3) and (4). The present language has been the cause of some confusion and has led to results which are not entirely consistent. Compare *United States v. Sarubbi*, 416 F.Supp. 633 (D. N.J. 1976); with *United States v. Hull*, 413 F.Supp. 145 (E.D. Tenn. 1976).

Rule 11(e)(1) specifies three types of plea agreements, namely, those in which the attorney for the government might

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

A (B) type of plea agreement is clearly of a different order than the other two, for an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do. By comparison, critical to a type (A) or (C) agreement is that the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable, nor is there a need for rejection with opportunity for withdrawal under subdivision (e)(4) in light of the fact that the defendant knew the nonbinding character of the recommendation or request. *United States v. Henderson*, 565 F.2d 1119 (9th Cir. 1977); *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977).

Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness. This provision conforms to ABA Standards Relating to Pleas of Guilty §1.5 (Approved Draft, 1968), which provides that "the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."

Sometimes a plea agreement will be partially but not entirely of the (B) type, as where a defendant, charged with counts 1, 2 and 3, enters into an agreement with the attorney for the government wherein it is agreed that if defendant pleads guilty to count 1, the prosecutor will recommend a certain sentence as to that count and will move for dismissal of counts 2 and 3. In such a case, the court must take particular care to ensure that the defendant understands which components of the agreement involve only a (B) type recommendation and which do not. In the above illustration, that part of the agreement which contemplates the dismissal of counts 2 and 3 is an (A) type agreement, and thus under rule 11(e) the court must either accept the agreement to dismiss these counts or else reject it and allow the defendant to withdraw his plea. If rejected, the defendant must be allowed to withdraw the plea on count 1 even if the type (B) promise to recommend a certain sentence on that count is kept, for a multi-faceted plea agreement is nonetheless a single agreement. On the

other hand, if counts 2 and 3 are dismissed and the sentence recommendation is made, then the defendant is not entitled to withdraw his plea even if the sentence recommendation is not accepted by the court, for the defendant received all he was entitled to under the various components of the plea agreement.

Note to Subdivision (e)(6). The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed.R.Ev. 410, as originally adopted by Pub. L. 93-595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." (This rule was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise." The amendment of Fed.R.Crim.P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R.Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R.Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to" the inadmissible pleas or offers. Pub. L. 94-64; Fed.R.Ev. 410 was then amended to conform. Pub. L. 94-149.)

While this history shows that the purpose of Fed.R.Ev. 410 and Fed.R.Crim.P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977) (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not "in position" to make any deals in this regard; held, defendant's statement inadmissible under rule 11(e)(6) because

the defendant "made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea"; *United States v. Brooks*, 536 F.2d 1137 (6th Cir. 1976) (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made "in the course of any proceedings under this rule regarding" either a plea of guilty later withdrawn or a plea of nolo contendere, and also statements "made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arrest Procedure, art. 140 and §150.2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if "a law enforcement officer induces any person to make a statement by promising leniency"). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the per se rule of 11(e)(6) and thus must be resolved by that body of law dealing with police interrogations.

If there has been a plea of guilty later withdrawn or a plea of nolo contendere, subdivision (e)(6)(C) makes inadmissible statements made "in the course of any proceedings under this rule" regarding such pleas. This includes, for example, admissions by the defendant when he makes his plea in court pursuant to rule 11 and also admissions made to provide the factual basis pursuant to subdivision (f). However, subdivision (e)(6)(C) is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, as authorized by subdivision (e)(2), statements made to the probation officer in connection with the preparation of that report would come within this provision.

This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arrest Procedure §350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty §3.4 (Approved Draft, 1968) both provide:

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. *State v. Christian*, 245 S.W.2d 895 (Mo.1952). If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif.R.Crim.P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances "no discussion between the parties or statement by the defendant or his lawyer under this Rule," i.e., the rule providing "the parties may meet to discuss the possibility of pretrial diversion * * * or of a plea agreement," are admissible. The amendment is likewise con-

sistent with the typical state provision on this subject; see, e.g., Ill.S.Ct. Rule 402(f).

The language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinions in *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977), concerning the meanings and effect of the phrases "connection to" and "relevant to" in the present rule. Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment ensures "that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." *United States v. Brooks*, 536 F.2d 1137 (6th Cir. 1976).

The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of non-admissibility of the described statements. Under the amendment, such a statement is also admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in Fed.R.Evid. 106, as the considerations involved are very similar.

The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the latter construction is correct. No change is intended with respect to provisions making evidence rules inapplicable in certain situations. See, e.g., Fed.R.Evid. 104(a) and 1101(d).

Unlike ABA Standards Relating to Pleas of Guilty §3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arrest Procedure §350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible "in favor of" the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as *United States v. Verdoorn*, 528 F.2d 103 (8th Cir. 1976), holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

NOTES OF ADVISORY COMMITTEE ON RULES—1982 AMENDMENT

Note to Subdivision (c)(1). Subdivision (c)(1) has been amended by specifying "the effect of any special parole term" as one of the matters about which a defendant who has tendered a plea of guilty or nolo contendere is to be advised by the court. This amendment does not make any change in the law, as the courts are in agreement that such advice is presently required by Rule 11. See, e.g., *Moore v. United States*, 592 F.2d 753 (4th Cir. 1979); *United States v. Eaton*, 579 F.2d 1181 (10th Cir. 1978); *Richardson v. United States*, 577 F.2d 447 (8th Cir. 1978); *United States v. Del Prete*, 567 F.2d 928 (9th Cir. 1978);

United States v. Watson, 548 F.2d 1058 (D.C.Cir. 1977); *United States v. Crusco*, 536 F.2d 21 (2d Cir. 1976); *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975). In *United States v. Timmreck*, 441 U.S. 780 (1979), 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure. As noted in *Moore v. United States*, supra:

Special parole is a significant penalty. * * * Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty provided by law."

As the aforesaid cases indicate, in the absence of specification of the requirement in the rule it has sometimes happened that such advice has been inadvertently omitted from Rule 11 warnings.

The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen. *Moore v. United States* supra, recommends that in an appropriate case the judge

inform the defendant and determine that he understands the following:

- (1) that a special parole term will be added to any prison sentence he receives;
- (2) the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;
- (3) that special parole is entirely different from—and in addition to—ordinary parole; and
- (4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

The amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief. See *United States v. Timmreck*, supra. Likewise, the amendment makes no change in the existing law to the effect that many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned.

Bunker v. Wise, 550 F.2d 1155, 1158 (9th Cir. 1977).

Note to Subdivision (c)(4). The amendment to subdivision (c)(4) is intended to overcome the present conflict between the introductory language of subdivision (c), which contemplates the advice being given "[b]efore accepting a plea of guilty or nolo contendere," and thus presumably after the plea has been tendered, and the "if he pleads" language of subdivision (c)(4) which suggests the plea has not been tendered.

As noted by Judge Doyle in *United States v. Sinagub*, 468 F.Supp. 353 (W.D.Wis.1979):

Taken literally, this wording of subsection (4) of 11(c) suggests that before eliciting any plea at an arraignment, the court is required to insure that a defendant understands that if he or she pleads guilty or nolo contendere, the defendant will be

waiving the right to trial. Under subsection (3) of 11(c), however, there is no requirement that at this pre-plea stage, the court must insure that the defendant understands that he or she enjoys the right to a trial and, at trial, the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself. It would be incongruous to require that at the pre-plea stage the court insure that the defendant understands that if he enters a plea of guilty or nolo contendere he will be waiving a right, the existence and nature of which need not be explained until after such a plea has been entered. I conclude that the insertion of the words "that if he pleads guilty or nolo contendere," as they appear in subsection (4) of 11(c), was an accident of draftsmanship which occurred in the course of Congressional rewriting of 11(c) as it has been approved by the Supreme Court. Those words are to be construed consistently with the words "Before accepting a plea of guilty or nolo contendere," as they appear in the opening language of 11(c), and consistently with the omission of the words "that if he pleads" from subsections (1), (2), and (3) of 11(c). That is, as they appear in subsection (4) of 11(c), the words, "that if he pleads guilty or nolo contendere" should be construed to mean "that if his plea of guilty or nolo contendere is accepted by the court."

Although this is a very logical interpretation of the present language, the amendment will avoid the necessity to engage in such analysis in order to determine the true meaning of subdivision (c)(4).

Note to Subdivision (c)(5). Subdivision (c)(5), in its present form, may easily be read as contemplating that in every case in which a plea of guilty or nolo contendere is tendered, warnings must be given about the possible use of defendant's statements, obtained under oath, on the record and in the presence of counsel, in a later prosecution for perjury or false statement. The language has prompted some courts to reach the remarkable result that a defendant who pleads guilty or nolo contendere without receiving those warnings must be allowed to overturn his plea on appeal even though he was never questioned under oath, on the record, in the presence of counsel about the offense to which he pleaded. *United States v. Artis*, No. 78-5012 (4th Cir. March 12, 1979); *United States v. Boone*, 543 F.2d 1090 (4th Cir. 1976). Compare *United States v. Michaelson*, 552 F.2d 472 (2d Cir. 1977) (failure to give subdivision (c)(5) warnings not a basis for reversal, "at least when, as here, defendant was not put under oath before questioning about his guilty plea"). The present language of subdivision (c)(5) may also have contributed to the conclusion, not otherwise supported by the rule, that "Rule 11 requires that the defendant be under oath for the entirety of the proceedings" conducted pursuant to that rule and that failure to place the defendant under oath would itself make necessary overturning the plea on appeal. *United States v. Aldridge*, 553 F.2d 922 (5th Cir. 1977).

When questioning of the kind described in subdivision (c)(5) is not contemplated by the judge who is receiving the plea, no purpose is served by giving the (c)(5) warnings, which in such circumstances can only confuse the defendant and detract from the force of the other warnings required by Rule 11. As correctly noted in *United States v. Sinagub*, supra,

subsection (5) of section (c) of Rule 11 is qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made, nor to whether the plea should be accepted and judgment entered. Rather, it does go to the possible consequences of an event which may or may not occur during the course of the arraignment hearing itself, namely, the administration of an oath to the defendant. Whether this event is to occur is wholly within the control of the presiding judge. If the event is not to occur, it is pointless to inform the defendant of its conse-

quences. If a presiding judge intends that an oath not be administered to a defendant during an arraignment hearing, but alters that intention at some point, only then would the need arise to inform the defendant of the possible consequences of the administration of the oath.

The amendment to subdivision (c)(5) is intended to make it clear that this is the case.

The amendment limits the circumstances in which the warnings must be given, but does not change the fact, as noted in *Sinagub* that these warnings are “qualitatively distinct” from the other advice required by Rule 11(c). This being the case, a failure to give the subdivision (c)(5) warnings even when the defendant was questioned under oath, on the record and in the presence of counsel would in no way affect the validity of the defendant’s plea. Rather, this failure bears upon the admissibility of defendant’s answers pursuant to subdivision (e)(6) in a later prosecution for perjury or false statement.

NOTES OF ADVISORY COMMITTEE ON RULES—1983
AMENDMENT

Note to Subdivision (a). There are many defenses, objections and requests which a defendant must ordinarily raise by pretrial motion. See, e.g., 18 U.S.C. §3162(a)(2); Fed.R.Crim.P.12(b). Should that motion be denied, interlocutory appeal of the ruling by the defendant is seldom permitted. See *United States v. Mac-Donald*, 435 U.S. 850 (1978) (defendant may not appeal denial of his motion to dismiss based upon Sixth Amendment speedy trial grounds); *DiBella v. United States*, 369 U.S. 121 (1962) (defendant may not appeal denial of pretrial motion to suppress evidence); compare *Abney v. United States*, 431 U.S. 651 (1977) (interlocutory appeal of denial of motion to dismiss on double jeopardy grounds permissible). Moreover, should the defendant thereafter plead guilty or nolo contendere, this will usually foreclose later appeal with respect to denial of the pretrial motion “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258, (1973). Though a nolo plea differs from a guilty plea in other respects, it is clear that it also constitutes a waiver of all nonjurisdictional defects in a manner equivalent to a guilty plea. *Lott v. United States*, 367 U.S. 421 (1961).

As a consequence, a defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review. This results in a waste of prosecutorial and judicial resources, and causes delay in the trial of other cases, contrary to the objectives underlying the Speedy Trial Act of 1974, 18 U.S.C. §3161 et seq. These unfortunate consequences may be avoided by the conditional plea device expressly authorized by new subdivision (a)(2).

The development of procedures to avoid the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections has been consistently favored by the commentators. See ABA Standards Relating to the Administration of Criminal Justice, standard 21-1.3(c) (2d ed. 1978); Model Code of Pre-Arraignment Procedure §§ 290.1(4)(b) (1975); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974); 1 C. Wright, *Federal Practice and Procedure — Criminal* §175 (1969); 3 W. LaFare, *Search and Seizure* §11.1 (1978). The Supreme Court has characterized the New York practice, whereby appeals from suppression motions may be appealed notwithstanding a guilty plea, as a “commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution.” *Lefkowitz v. Newsome*, 420 U.S. 283, 293 (1975). That Court has never discussed conditional pleas as such, but has permitted without comment a federal appeal on issues preserved by a conditional plea. *Jaben v. United States*, 381 U.S. 214 (1965).

In the absence of specific authorization by statute or rule for a conditional plea, the circuits have divided on the permissibility of the practice. Two circuits have actually approved the entry of conditional pleas, *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975); *United States v. Moskow*, 588 F.2d 882 (3d Cir. 1978); and two others have praised the conditional plea concept, *United States v. Clark*, 459 F.2d 977 (8th Cir. 1972); *United States v. Dorsey*, 449 F.2d 1104 (D.C.Cir. 1971). Three circuits have expressed the view that a conditional plea is logically inconsistent and thus improper, *United States v. Brown*, 499 F.2d 829 (7th Cir. 1974); *United States v. Sepe*, 472 F.2d 784, aff’d en banc, 486 F.2d 1044 (5th Cir. 1973); *United States v. Cox*, 464 F.2d 937 (6th Cir. 1972); three others have determined only that conditional pleas are not now authorized in the federal system, *United States v. Benson*, 579 F.2d 508 (9th Cir. 1978); *United States v. Nooner*, 565 F.2d 633 (10th Cir. 1977); *United States v. Matthews*, 472 F.2d 1173 (4th Cir. 1973); while one circuit has reserved judgment on the issue, *United States v. Warwar*, 478 F.2d 1183 (1st Cir. 1973). (At the state level, a few jurisdictions by statute allow appeal from denial of a motion to suppress notwithstanding a subsequent guilty plea, Cal. Penal Code §1538.5(m); N.Y.Crim. Proc. Law §710.20(1); Wis.Stat. Ann. §971.31(10), but in the absence of such a provision the state courts are also in disagreement as to whether a conditional plea is permissible; see cases collected in Comment, 26 U.C.L.A. L.Rev. 360, 373 (1978).)

The conditional plea procedure provided for in subdivision (a)(2) will, as previously noted, serve to conserve prosecutorial and judicial resources and advance speedy trial objectives. It will also produce much needed uniformity in the federal system on this matter; see *United States v. Clark*, supra, noting the split of authority and urging resolution by statute or rule. Also, the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of non-jurisdictional defects. See *United States v. Nooner*, supra (defendant sought appellate review of denial of pretrial suppression motion, despite his prior unqualified guilty plea, claiming the Second Circuit conditional plea practice led him to believe a guilty plea did not bar appeal of pretrial issues).

The obvious advantages of the conditional plea procedure authorized by subdivision (a)(2) are not outweighed by any significant or compelling disadvantages. As noted in Comment, supra, at 375: “Four major arguments have been raised by courts disapproving of conditioned pleas. The objections are that the procedure encourages a flood of appellate litigation, militates against achieving finality in the criminal process, reduces effectiveness of appellate review due to the lack of a full trial record, and forces decision on constitutional questions that could otherwise be avoided by invoking the harmless error doctrine.” But, as concluded therein, those “arguments do not withstand close analysis.” *Ibid*.

As for the first of those arguments, experience in states which have permitted appeals of suppression motions notwithstanding a subsequent plea of guilty is most relevant, as conditional pleas are likely to be most common when the objective is to appeal that kind of pretrial ruling. That experience has shown that the number of appeals has not increased substantially. See Comment, 9 Hous.L.Rev. 305, 315-19 (1971). The minimal added burden at the appellate level is certainly a small price to pay for avoiding otherwise unnecessary trials.

As for the objection that conditional pleas conflict with the government’s interest in achieving finality, it is likewise without force. While it is true that the conditional plea does not have the complete finality of the traditional plea of guilty or nolo contendere because “the essence of the agreement is that the legal guilt of the defendant exists only if the prosecution’s case” survives on appeal, the plea

continues to serve a partial state interest in finality, however, by establishing admission of the defendant’s factual guilt. The defendant stands guilty

and the proceedings come to an end if the reserved issue is ultimately decided in the government's favor.

Comment, 26 U.C.L.A. L.Rev. 360, 378 (1978).

The claim that the lack of a full trial record precludes effective appellate review may on occasion be relevant. Cf. *United States v. MacDonald*, supra (holding interlocutory appeal not available for denial of defendant's pretrial motion to dismiss, on speedy trial grounds, and noting that "most speedy trial claims * * * are best considered only after the relevant facts have been developed at trial"). However, most of the objections which would likely be raised by pretrial motion and preserved for appellate review by a conditional plea are subject to appellate resolution without a trial record. Certainly this is true as to the very common motion to suppress evidence, as is indicated by the fact that appellate courts presently decide such issues upon interlocutory appeal by the government.

With respect to the objection that conditional pleas circumvent application of the harmless error doctrine, it must be acknowledged that "[a]bsent a full trial record, containing all the government's evidence against the defendant, invocation of the harmless error rule is arguably impossible." Comment, supra, at 380. But, the harmless error standard with respect to constitutional objections is sufficiently high, see *Chapman v. California*, 386 U.S. 18 (1967), that relatively few appellate decisions result in affirmance upon that basis. Thus it will only rarely be true that the conditional plea device will cause an appellate court to consider constitutional questions which could otherwise have been avoided by invocation of the doctrine of harmless error.

To the extent that these or related objections would otherwise have some substance, they are overcome by the provision in Rule 11(a)(2) that the defendant may enter a conditional plea only "with the approval of the court and the consent of the government." (In this respect, the rule adopts the practice now found in the Second Circuit.) The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial; cf. *United States v. MacDonald*, supra. As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. Although it was suggested in *United States v. Moskow*, supra, that the government should have no right to prevent the entry of a conditional plea because a defendant has no comparable right to block government appeal of a pretrial ruling pursuant to 18 U.S.C. §3731, that analogy is unconvincing. That statute requires the government to certify that the appeal is not taken for purposes of delay. Moreover, where the pretrial ruling is case-dispositive, §3731 is the only mechanism by which the government can obtain appellate review, but a defendant may always obtain review by pleading not guilty.

Unlike the state statutes cited earlier, Rule 11(a)(2) is not limited to instances in which the pretrial ruling the defendant wishes to appeal was in response to defendant's motion to suppress evidence. Though it may be true that the conditional plea device will be most commonly employed as to such rulings, the objectives of the rule are well served by extending it to other pretrial rulings as well. See, e.g., ABA Standards, supra (declaring the New York provision "should be enlarged

to include other pretrial defenses"); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974) ("any pretrial motion which, if granted, would be dispositive of the case").

The requirement that the conditional plea be made by the defendant "reserving in writing the right to appeal from the adverse determination of any specified pretrial motion," though extending beyond the Second Circuit practice, will ensure careful attention to any conditional plea. It will document that a particular plea was in fact conditional, and will identify precisely what pretrial issues have been preserved for appellate review. By requiring this added step, it will be possible to avoid entry of a conditional plea without the considered acquiescence of the government (see *United States v. Burke*, supra, holding that failure of the government to object to entry of a conditional plea constituted consent) and post-plea claims by the defendant that his plea should be deemed conditional merely because it occurred after denial of his pretrial motions (see *United States v. Nooner*, supra).

It must be emphasized that the *only* avenue of review of the specified pretrial ruling permitted under a rule 11(a)(2) conditional plea is an appeal, which must be brought in compliance with Fed.R.App.P. 4(b). Relief via 28 U.S.C. §2255 is not available for this purpose.

The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. *Menna v. New York*, 423 U.S. 61 (1975) (double jeopardy violation); *Blackledge v. Perry*, 417 U.S. 21 (1974) (due process violation by charge enhancement following defendant's exercise of right to trial de novo). Subdivision 11(a)(2) has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application.

Note to Subdivision (h). Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11. The provision does not, however, attempt to define the meaning of "harmless error," which is left to the case law. Prior to the amendments which took effect on Dec. 1, 1975, Rule 11 was very brief; it consisted of but four sentences. The 1975 amendments increased significantly the procedures which must be undertaken when a defendant tenders a plea of guilty or nolo contendere, but this change was warranted by the "two principal objectives" then identified in the Advisory Committee Note: (1) ensuring that the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into the open in court. An inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.

This being so, it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance. As stated in *United States v. Scarf*, 551 F.2d 1124 (8th Cir. 1977), concerning amended Rule 11: "It is a salutary rule, and district courts are required to act in substantial compliance with it although * * * ritualistic compliance is not required." As similarly pointed out in *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977),

the Rule does not say that compliance can be achieved only by reading the specified items *in haec verba*. Congress meant to strip district judges of freedom to decide *what* they must explain to a defendant who wishes to plead guilty, not to tell them precisely *how* to perform this important task in the great variety of cases that would come before them. While a judge who contents himself with literal application of the Rule will hardly be reversed, it cannot be supposed that Congress preferred this to a more meaningful explanation, provided that all the specified elements were covered.

Two important points logically flow from these sound observations. One concerns the matter of construing Rule 11: it is not to be read as requiring a litany or other ritual which can be carried out only by word-for-

word adherence to a set "script." The other, specifically addressed in new subdivision (h), is that even when it may be concluded Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.

Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations. In large part, this is attributable to uncertainty as to the continued vitality and the reach of *McCarthy v. United States*, 394 U.S. 459 (1969). In *McCarthy*, involving a direct appeal from a plea of guilty because of noncompliance with Rule 11, the Court concluded

that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew * * *.

McCarthy has been most frequently relied upon in cases where, as in that case, the defendant sought relief because of a Rule 11 violation by the avenue of direct appeal. It has been held that in such circumstances a defendant's conviction must be reversed whenever the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," *United States v. Boone*, 543 F.2d 1090 (4th Cir. 1976), and that in this context any reliance by the government on the Rule 52(a) harmless error concept "must be rejected." *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976). On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea. *United States v. Peters*, No. 77-1700 (4th Cir., Dec. 22, 1978) (where judge failed to comply fully with Rule 11(c)(1), in that defendant not correctly advised of maximum years of special parole term but was told it is at least 3 years, and defendant thereafter sentenced to 15 years plus 3-year special parole term, government's motion for summary affirmance granted, as "the error was harmless"); *United States v. Coronado*, 554 F.2d 166 (5th Cir. 1977) (court first holds that charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then finds no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explicitation of the charges, that Coronado understood them").

But this conflict has not been limited to cases involving nothing more than a direct appeal following defendant's plea. For example, another type of case is that in which the defendant has based a post-sentence motion to withdraw his plea on a Rule 11 violation. Rule 32(d) says that such a motion may be granted "to correct manifest injustice," and some courts have relied upon this latter provision in holding that post-sentence plea withdrawal need not be permitted merely because Rule 11 was not fully complied with and that instead the district court should hold an evidentiary hearing to determine "whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand." *United States v. Scarf*, 551 F.2d 1124 (8th Cir. 1977). Others, however, have held that *McCarthy* applies and prevails over the language of Rule 32(d), so that "a failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice." *United States v. Cantor*, 469 F.2d 435 (3d Cir. 1972).

Disagreement has also existed in the context of collateral attack upon pleas pursuant to 28 U.S.C. §2255. On the one hand, it has been concluded that "[n]ot every violation of Rule 11 requires that the plea be set

aside" in a §2255 proceeding, and that "a guilty plea will be set aside on collateral attack only where to not do so would result in a miscarriage of justice, or where there exists exceptional circumstances justifying such relief." *Evers v. United States*, 579 F.2d 71 (10th Cir. 1978). The contrary view was that *McCarthy* governed in §2255 proceedings because "the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11." *Timmreck v. United States*, 577 F.2d 377 (6th Cir. 1978). But a unanimous Supreme Court resolved this conflict in *United States v. Timmreck*, 441 U.S. 780 (1979), where the Court concluded that the reasoning of *Hill v. United States*, 368 U.S. 424 (1962) (ruling a collateral attack could not be predicated on a violation of Rule 32(a))

is equally applicable to a formal violation of Rule 11.* * *

Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the *Hill* case. For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.

"Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

This interest in finality is strongest in the collateral attack context the Court was dealing with in *Timmreck*, which explains why the Court there adopted the *Hill* requirement that in a §2255 proceeding the rule violation must amount to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." The interest in finality of guilty pleas described in *Timmreck* is of somewhat lesser weight when a direct appeal is involved (so that the *Hill* standard is obviously inappropriate in that setting), but yet is sufficiently compelling to make unsound the proposition that reversal is required even where it is apparent that the Rule 11 violation was of the harmless error variety.

Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that *McCarthy* dealt only with the much simpler pre-1975 version of Rule 11, which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a truly harmless error (which was not involved in *McCarthy* in any event, as the judge made no inquiry into the defendant's understanding of the nature of the charge, and the government had presented only the extreme argument that a court "could properly assume that petitioner was entering that plea with a complete understanding of the charge against him" merely from the fact he had stated he desired to plead guilty) are much greater under present Rule 11 than under the version before the Court in *McCarthy*. It also means that the more elaborate and lengthy procedures of present Rule 11, again as compared with the version applied in *McCarthy*, make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather "a grave and solemn act," which is "accepted only with care and discernment." *United States v. Barker*, 514 F.2d 208 (D.C.Cir.1975), quoting from *Brady v. United States*, 397 U.S. 742 (1970). A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

Secondly, while *McCarthy* involved a situation in which the defendant's plea of guilty was before the

court of appeals on direct appeal, the Supreme Court appears to have been primarily concerned with §2255-type cases, for the Court referred exclusively to cases of that kind in the course of concluding that a per se rule was justified as to Rule 11 violations because of “the difficulty of achieving [rule 11’s] purposes through a post-conviction voluntariness hearing.” But that reasoning has now been substantially undercut by *United States v. Timmreck*, supra, for the Court there concluded §2255 relief “is not available when all that is shown is a failure to comply with the formal requirements of the Rule,” at least absent “other aggravating circumstances,” which presumably could often only be developed in the course of a later evidentiary hearing.

Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would *not* be harmless error under subdivision (h) where, for example, as in *McCarthy*, there had been absolutely no inquiry by the judge into defendant’s understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be “assumed” defendant possessed such understanding merely because he expressed a desire to plead guilty. Likewise, it would *not* be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this “results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11.” *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976).

Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter “must be resolved solely on the basis of the Rule 11 transcript” and the other portions (e.g., sentencing hearing) of the limited record made in such cases. *United States v. Coronado*, supra. Illustrative are: where the judge’s compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant’s responses clearly indicate his awareness of that element, see *United States v. Coronado*, supra; where the judge’s compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings, see *United States v. Peters*, supra; and where the judge completely failed to comply with subdivision (c)(5), which of course has no bearing on the validity of the plea itself, cf. *United States v. Sinagub*, supra.

The second cautionary note is that subdivision (h) should *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in *McCarthy*, that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice, as it

will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

It must also be emphasized that a harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings. Thus, the addition

of subdivision (h) should *not* be read as suggesting that Rule 52(a) does not apply in other circumstances because of the absence of a provision comparable to subdivision (h) attached to other rules.

NOTES OF ADVISORY COMMITTEE ON RULES—1985
AMENDMENT

Note to Subdivision (c)(1). Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982), adds 18 U.S.C. §3579, providing that when sentencing a defendant convicted of a Title 18 offense or of violating various subsections of the Federal Aviation Act of 1958, the court “may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.” Under this law restitution is favored; if the court “does not order restitution, or orders only partial restitution, . . . the court shall state on the record the reasons therefor.” Because this restitution is deemed an aspect of the defendant’s sentence, S. Rept. No. 97-532, 97th Cong., 2d Sess., 30-33 (1982), it is a matter about which a defendant tendering a plea of guilty or nolo contendere should be advised.

Because this new legislation contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court’s power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea. Failure of a court to advise a defendant of the possibility of a restitution order would constitute harmless error under subdivision (h) if no restitution were thereafter ordered.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989
AMENDMENT

The amendment mandates that the district court inform a defendant that the court is required to consider any applicable guidelines but may depart from them under some circumstances. This requirement assures that the existence of guidelines will be known to a defendant before a plea of guilty or nolo contendere is accepted. Since it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts, the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant. The advice that the court is required to give cannot guarantee that a defendant who pleads guilty will not later claim a lack of understanding as to the importance of guidelines at the time of the plea. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines. A defendant represented by competent counsel will be in a position to enter an intelligent plea.

The amended rule does not limit the district court’s discretion to engage in a more extended colloquy with the defendant in order to impart additional information about sentencing guidelines or to inquire into the defendant’s knowledge concerning guidelines. The amended rule sets forth only the minimum advice that must be provided to the defendant by the court.

COMMITTEE NOTES ON RULES—1999 AMENDMENT

Subdivision (a). The amendment deletes use of the term “corporation” and substitutes in its place the term “organization,” with a reference to the definition of that term in 18 U.S.C. §18.

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including

provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. Second, under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it. As is the situation under the current Rule, the court retains absolute discretion whether to accept a plea agreement.

GAP Report—Rule 11. The Committee made no changes to the published draft amendments to Rule 11. But it did add language to the Committee Note which reflects the view that the amendment is not intended to signal its approval of the underlying practice of including waiver provisions in pretrial agreements.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The Committee determined to expand upon the incomplete listing in the current rule of the elements of the “maximum possible penalty” and any “mandatory minimum” penalty to include advice as to the maximum or minimum term of imprisonment, forfeiture, fine, and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release. The outmoded reference to a term of “special parole” has been eliminated.

Amended Rule 11(b)(2), formerly Rule 11(d), covers the issue of determining that the plea is voluntary, and not the result of force, threats, or promises (other than those in a plea agreement). The reference to an inquiry in current Rule 11(d) whether the plea has resulted from plea discussions with the government has been deleted. That reference, which was often a source of confusion to defendants who were clearly pleading guilty as part of a plea agreement with the government, was considered unnecessary.

Rule 11(c)(1)(A) includes a change, which recognizes a common type of plea agreement—that the government will “not bring” other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that “the court shall not participate in any discussions between the parties concerning such plea agreement.” Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant’s plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. See, e.g., *United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court’s consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. See *United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; “guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time.”). Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of the defendant to withdraw a plea. See *United States v. Hyde*, *supra*.

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

The reference to a “motion under 28 U.S.C. § 2255” has been changed to the broader term “collateral attack” to recognize that in some instances a court may grant collateral relief under provisions other than § 2255. See *United States v. Jeffers*, 234 F.3d 277 (5th Cir. 2000) (petition under § 2241 may be appropriate where remedy under § 2255 is ineffective or inadequate).

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an ongoing investigation in a related case. In the end, the Committee believed that, on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Finally, revised Rule 11(f), which addresses the issue of admissibility or inadmissibility of pleas and statements made during the plea inquiry, cross references Federal Rule of Evidence 410.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act “makes the Guidelines effectively advisory,” and “requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in

light of other statutory concerns as well, see §3553(a) (Supp. 2004).” *Id.* at 245–46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made to the text of the proposed amendment as released for public comment. One change was made to the Committee note. The reference to the Fifth Amendment was deleted from the description of the Supreme Court’s decision in *Booker*.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (f), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENT BY PUBLIC LAW

1988—Subd. (c)(1), Pub. L. 100–690 inserted “or term of supervised release” after “special parole term”.

1975—Pub. L. 94–64 amended subds. (c) and (e)(1)–(4), (6) generally.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment of subd. (e)(6) of this rule by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96–42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, except with respect to the amendment adding subd. (e)(6) of this rule, effective Aug. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

Rule 12. Pleadings and Pretrial Motions

(a) PLEADINGS. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) PRETRIAL MOTIONS.

(1) *In General.* Rule 47 applies to a pretrial motion.

(2) *Motions That May Be Made Before Trial.* A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) *Motions That Must Be Made Before Trial.* The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information—but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court’s jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) *Notice of the Government’s Intent to Use Evidence.*

(A) *At the Government’s Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant’s Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government’s intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) MOTION DEADLINE. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) RULING ON A MOTION. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party’s right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) WAIVER OF A DEFENSE, OBJECTION, OR REQUEST. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) RECORDING THE PROCEEDINGS. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) DEFENDANT’S CONTINUED CUSTODY OR RELEASE STATUS. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. §3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) PRODUCING STATEMENTS AT A SUPPRESSION HEARING. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(11), (12), July 31, 1975, 89 Stat. 372; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). 1. This rule abolishes pleas to the jurisdiction, pleas in abatement, demurrers, special pleas in bar, and motions to quash. A motion to dismiss or for other appropriate relief is substituted for the purpose of raising all defenses and objections heretofore interposed in any of the foregoing modes. “This should result in a reduction of opportunities for dilatory tactics and, at the same time, relieve the defense of embarrassment. Many competent practitioners have been baffled and mystified by the distinctions between pleas in abatement, pleas in bar, demurrers, and motions to quash, and have, at times, found difficulty in determining which of these should be invoked.” Homer Cummings, 29 A.B.A. Jour. 655. See also, Medalie, 4 Lawyers Guild R. (3)1, 4.

2. A similar change was introduced by the Federal Rules of Civil Procedure (Rule 7(a)) which has proven successful. It is also proposed by the A.L.I. Code of Criminal Procedure (Sec. 209).