

Benchbook

for U.S. District Court Judges

SIXTH EDITION

Federal Judicial Center

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2.02 Taking pleas of guilty or nolo contendere (organization¹)

Fed. R. Crim. P. 11

[*Note:* Under the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(2) and (3), any victim of the offense has the right to notice of "any public court proceeding . . . involving the crime . . . of the accused," and to attend that proceeding. It may be advisable to ask the prosecutor if there are any victims and, if so, whether the government has fulfilled its duty to notify them. Also, any victims who are present at the plea hearing have a right "to be reasonably heard." § 3771(a)(4).]²

- A. Before accepting a plea of guilty or nolo contendere from the representative of an organization, the court should be satisfied that
 1. the person appearing before the court is an officer or authorized employee of the organization;
 2. the board of directors is empowered to authorize a person to enter a plea of guilty or nolo contendere to a charge brought against the organization;
 3. the person before the court is authorized by a valid resolution to enter a plea of guilty or nolo contendere to the charge before the court; and
 4. the organization is financially able to pay a substantial fine that could be imposed by the court for the charge involved in the plea of guilty or nolo contendere.
- B. After the court receives the information set out above and ascertains that the plea can be taken from the person before the court, the person should be placed under oath and informed of the following:
 1. the nature of the charge(s) to which the plea is offered;
 2. the mandatory minimum penalty provided by law, if any;
 3. the special assessment for each offense of \$400 (\$125 for a Class A misdemeanor, \$50 for Class B, \$25 for Class C or infraction) required by 18 U.S.C. § 3013;
 4. the maximum possible penalty provided by law;
 5. *if applicable*, that the court may also order the organization to make restitution to any victim of the offense;

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

2. If there are many victims who want to be heard, the court may need to "fashion a reasonable procedure to give effect to [their right to be heard] that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2).

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6. *if applicable*, that the court may require the organization to forfeit certain property to the government;
 7. *if the offense involved fraud or other intentionally deceptive practices*, that the court may order the organization to provide notice of the conviction to victims of the offense (see 18 U.S.C. § 3555);
 8. if appropriate, the right to be represented by an attorney;
 9. that the organization has the right to plead not guilty or to persist in that plea if it has already been made;
 10. that the organization has a right to be tried by a jury and at that trial has the right to
 - (a) the assistance of counsel;
 - (b) confront and cross-examine witnesses against the organization;
 11. that if the organization pleads guilty, there will be no further trial of any kind;
 12. that by pleading guilty for the organization, the representative of the organization waives the organization's right to trial;
 13. that the court will ask the representative of the organization questions about the offense before the court and that if he or she answers these questions, under oath, on the record, and in the presence of counsel, the answers may later be used against the representative in a prosecution for perjury or false statement; and
 14. the essential elements of the offense that are involved, and whether the representative understands what the government must prove.
- C. The court will then inquire
1. whether the plea is voluntarily made on behalf of the organization and not as a result of force, threats, or promises apart from a plea agreement; and
 2. whether there is a plea agreement and, if so, what the agreement is.
- D. If the court is satisfied with the representative's responses, ask how he or she pleads: guilty, not guilty, or nolo contendere.
- E. If the plea is guilty, follow your normal Fed. R. Crim. P. 11 procedure for establishing the factual basis in the case. If the plea is nolo contendere, the court may wish to consider having the government make a representation concerning the facts of the case.
- F. Make the required findings concerning the establishment of the plea, which should include findings concerning items A.1, A.2, A.3, and A.4 above, relating to the propriety of taking the plea from the representative of the organization. Allow any victims of the offense who are present to be "reasonably heard." 18 U.S.C. § 3771(a)(4).
- G. Make a finding on the guilt of the organization after the guilty or nolo contendere plea.

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- H. Inform the representative
 1. that a written presentence report will be prepared by the probation office to assist the court in sentencing;
 2. that the organization, the representative, or both will be required to give information for the report and that the organization's attorney may be present;
 3. that the representative and the organization's counsel shall be afforded the opportunity to speak on behalf of the organization at the sentencing hearing (Fed. R. Crim. P. 32(i)(4)(A));
 4. that if there are any victims of the offense, the victims shall be afforded an opportunity to be heard at the sentencing hearing (18 U.S.C. § 3771(a)(4)); and
 5. that the court shall permit the representative and counsel to read the presentence report before the sentencing hearing (Fed. R. Crim. P. 32(e)(2)).
- I. Advise the representative of the date, time, and place of the sentencing hearing, and order him or her to appear.

