

# MAINE SUPREME JUDICIAL COURT

## ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

### RESPONSE TO PUBLIC COMMENTS TO COMMITTEE'S PROPOSED RULE 11C

Pursuant to the Court's invitation to do so, the Advisory Committee on Rules of Criminal Procedure met on January 18, 2013 to reexamine its proposed new Rule 11C in light of the public comments received by the Court during the comment period. The meeting had a quorum of members. At its meeting the Committee voted to propose a number of substantive changes to its earlier November 2, 2012 submission. Accompanying this report is a proposed promulgation order containing the revised version of Rule 11C accompanied by an updated advisory note. Below the Committee explains its reasons for favoring the adoption of the proposed rule, provides a marked-up version of Rule 11C reflecting the substantive changes being proposed to its earlier submission, and explains the reasons for the proposed revisions.

#### **A. Need for a Rule**

Certain of the commentators contend that a rule addressing the duty of a defense lawyer to communicate a plea offer and consult with the client is unhelpful

and unnecessary, it being an “obvious” duty particularly in the wake of the ethical duty to do so imposed by Rule 1.4 of the Maine Rules of Professional Conduct. The Committee believes instead that a rule provides the best notice of the duty, particularly to inexperienced defense lawyers and other users who are not likely to be as familiar with the Maine Rules of Professional Conduct and their accompanying comments as are the seasoned commentators. Further, a rule serves the independent and critical function of defining the distinction between a “formal offer” for a plea agreement that must be communicated and explained to a defendant by the defense lawyer and an “informal offer” that does not trigger these requirements.

**B. Marked-up Version of Rule 11C**  
**Reflecting Proposed Substantive Changes**  
**and Proposed Advisory Note Changes**

Rule 11C. **DUTY OF DEFENSE COUNSEL TO COMMUNICATE TO THE DEFENDANT A FORMAL OFFER FOR A PLEA AGREEMENT; ~~DUTY OF~~ ACTION BY COURT.**

(a) **Definition of a Formal Offer.** A formal offer for a plea agreement has definite terms in accordance with Rule 11A(a) and is more than an informal exploration. It should contain the date, event or other circumstance upon which the offer will expire or be cancelled. It ~~may~~shall be in writing, ~~but need not be; however, if oral, it must be capable of being stated on the record later in court.~~

b) **Duty of Defense Counsel.** A defense counsel who receives from the attorney for the state a formal offer for a plea agreement must promptly communicate that offer to the defendant, and explain to the defendant the meaning of its terms. Defense counsel must memorialize the date of receipt, the communication and explanation and the date or dates it was communicated and explained to the defendant.

(c) **Duty of Action by Court.** Prior to the acceptance of an open plea of guilty or nolo contendere or prior to jury selection for a jury trial or the start of a bench trial, the court shall may inquire of the attorney for the state whether there was a any formal plea offer, ~~whether formal or informal~~ and, if so, whether more than one such offer was made. ~~If the court determines that a formal plea offer was made it shall inquire of defense counsel whether the formal offer was communicated and explained to the defendant. The court may inquire of defense counsel what steps defense counsel has taken to memorialize the communication and explanation. The court may ask the defendant his or her understanding of the meaning of the formal plea offer.~~

Advisory Note - \_\_\_\_ 2013

In *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012), the United States Supreme Court held that defense counsel has a duty under the federal constitution to communicate to the defendant a prosecutor's "formal offer" for a plea agreement. The Court found no occasion to define the term "formal offer" with precision because the prosecutor's offer was clearly "formal"; it was in writing, its terms were clearly and definitely stated and it contained a fixed expiration date (132 S.Ct. at 1404, 1408).

Defining the distinction between a "formal" offer and an "informal" one is a matter of considerable importance. If "formal offer" is defined too broadly, the state's interest in finality may be unduly impaired. There is a risk of "late, frivolous or fabricated claims" (132 S.Ct. at 1408) based on nothing more than informal conversations ("feelers") between the prosecutor and defense counsel. The potential for wasteful litigation is serious (whether it be a repeat trial or a repeat guilty plea) if a plea offer is not communicated.

On the other hand, if "formal offer" is defined too narrowly, the defendant's interest in fair notice of a possible plea agreement may receive insufficient protection.

Thus, the definition of a "formal offer" must strike the appropriate balance between these competing interests.

Obviously, a state rule of procedure cannot govern this issue of federal constitutional law; but it “can be [an] important guide[.]” (132 S.Ct. at 1408). Moreover, it may provide more protection to defendants than the federal constitutional minimum or provide clearer guidance to defense counsel.

Subdivision (a). “Formal offer” is defined as an offer having definite terms in accordance with Rule 11A(a) and consisting of more than informal discussions or feelers. ~~Because of the variety of current practices, no requirement of a writing is imposed, but the offer must be capable of being stated on the record later in court.~~ It should contain an expiration date or otherwise state the terms on which it will or may expire. The requirement that it be in writing may be broadly satisfied, such as by means of a handwritten notation or e-mail note. Of course, the attorney for the state is under no obligation to make an offer of any kind.

Subdivision (b). A duty is imposed on defense counsel to communicate a formal offer to the defendant and to explain the meaning of its terms. ~~Because a dispute may later arise as to what was communicated and explained, defense counsel must memorialize the date of receipt, the communication and explanation~~Defense counsel must memorialize the date of receipt of the offer and

the date or dates on which it was communicated and explained to the defendant.

Brief notes to the file are sufficient.

Subdivision (c). Prior to the acceptance of an open plea of guilty or nolo contendere or prior to jury selection for a jury trial or the start of a bench trial the attorney for the state must reveal to the court the existence of any plea offer, not simply one viewed by the attorney for the state and defense counsel as formal, since ultimately it is the court that must determine whether an offer is formal or informal. If the court determines the offer is formal the court then has the duty to put on the record the existence, communication and explanation of the formal offer. The fundamental aim of this requirement is to make do-overs unnecessary if a formal plea offer is not accepted the Court may inquire of the attorney for the state whether there was any formal plea offer and, if so, whether more than one such offer was made.

### **C. Reasons For The Revisions**

**Rule 11C(a).** The Committee is now proposing that to be a “formal offer” for a plea agreement the offer must be in writing. The form of that writing need not be formal; it instead can be broadly satisfied, such as by means of a handwritten notation or e-mail note. The impetus behind this proposal is cogently

explained by the Maine Association of Criminal Defense Lawyers in its comments to this Court dated December 10, 2012. In critical part that Association explained:

Having terms of an agreement subject to the rule be reduced to writing obviates later disagreements as to whether there were prior offers (as opposed to statements made in negotiations) and also creates a document that is not only in the prosecutor's file, but also in the defense attorney's file. Having the original [ or any subsequent] offer be in writing and in two separate files decreases the chance that a later ineffective assistance claim may result from an honest misunderstanding as to the nature or availability of an offer. Although MACDL understands the Court's concern in defining a "formal offer" too narrowly, and therefore depriving a defendant of fair notice of a possible plea agreement, the parties retain the same interest in settling cases. Requiring a formal offer to be in writing places a very slight burden on a prosecutor, because *any* form of writing would comply with the rule. The creation of an amorphous standard for offers subject to the rule, however, may create more problems than it solves.

The Association's reasoning is further supported by the United States Supreme Court's observation that an in-writing requirement is a measure that a state might institute by rule to "ensure against later misunderstandings or fabricated charges."

*Missouri v. Frye*, \_\_ U.S. \_\_ 132 S.Ct. 1399, 1409 (2012).

Upon reflection, in crafting its earlier submission of subdivision (a) the Committee was too focused on accommodating the variety of current practices surrounding the communication of plea offers.

**Rule 11C(b).** The Committee is now proposing the elimination of any requirement that defense counsel memorialize the terms of the formal offer made

and the accompanying explanation of that offer to the defendant. In its place the Committee proposes the adoption of a requirement that the date or dates the formal offer was communicated and explained to the defendant be memorialized by defense counsel. The impetus behind these substantive revisions is the proposal in subdivision (a) that all formal offers for a plea agreement be communicated in writing. This in-writing requirement eliminates the need for defense counsel to memorialize its terms and the accompanying explanation since these measures are no longer necessary to help ensure against later misunderstandings or fabricated charges. In their place memorializing the date or dates the formal offer was communicated and explained to the defendant, like memorializing the date of receipt of the written offer by defense counsel, constitutes a light burden and provides important documentation of the processing of the formal offer.

The Committee's proposal addresses the concerns expressed by the Maine Commission on Indigent Legal Services in its comments to the Court dated December 12, 2012 respecting the ambiguity of the language employed in the Committee's earlier submission of subdivision (b) and the potential created therein of a time-consuming burden on defense counsel relative to memorialization.

**Rule 11C(c).** The Committee is now proposing that only the first sentence of its earlier submission of subdivision (c) be adopted. It is further proposing that two substantive changes be made to that first sentence – namely, (1) that the court

inquiry of the attorney for the state be discretionary rather than mandatory; and (2) that the inquiry, if made, no longer be for the purpose of a court determination as to whether a given plea offer disclosed by the attorney for the state is formal or informal, but rather for the purpose of hearing from the attorney for the state whether one or more formal plea offers have in fact been communicated.<sup>1</sup> The impetus behind these subdivision (c) revisions is the proposal in subdivision (a) that all formal offers for a plea agreement be communicated in writing. This proposed change, in conjunction with the other definitional requirements of subdivision (a), draws a clear enough distinction between “formal” and “informal” plea offers to obviate the need to impose upon the trial court a duty to make an in-court “formal plea” determination rather than the parties. The in-writing requirement has also served to change the Committee’s mind as to the wisdom of attempting at this time to write into Rule 11C a formal procedure for ensuring that a defendant knows of and understands any formal plea offer communicated to the defendant’s counsel by the attorney for the state. The Committee is of the view that further consideration of imposing specific in-court procedures by rule should

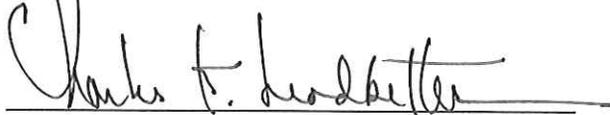
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<sup>1</sup> One of the members present and voting opposed all these proposals on the ground that the Committee should abandon proposing subdivision (c) in any form.

await experimentation by the parties and the trial court in light of the in-writing requirement.<sup>2</sup>

Dated: February 26, 2013

Respectfully submitted,



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<sup>2</sup> The revisions obviates the stated concern of a number of commentators that the attorney-client relationship was endangered by the inquiries to be made of defense counsel by the court in the Committee's earlier submission. Nevertheless, the Committee does not agree with these commentators. The questioned inquiries served only to assure the court that the terms of the formal offer had in fact been communicated and explained, not to disclose the actual advice that followed.