

AMENDMENTS TO THE FEDERAL RULES OF
CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCE-
DURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT,
PURSUANT TO 28 U.S.C. 2072



MAY 15, 2013.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PRINTING OFFICE

29-011

WASHINGTON : 2013

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 16, 2013.

Hon. JOHN A. BOEHNER,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 16, 2013

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 11 and 16.

[See *infra.*, pp. _____.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2013, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

**AMENDMENTS TO THE FEDERAL RULES OF
CRIMINAL PROCEDURE**

Rule 11. Pleas

* * * * *

**(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:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable

2 FEDERAL RULES OF CRIMINAL PROCEDURE

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);

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

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Rule 16. Discovery and Inspection**(a) Government's Disclosure.**

* * * * *

(2) *Information Not Subject to Disclosure.* Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

January 22, 2013

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: Judge Thomas F. Hogan *Thomas F. Hogan*

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 11 and 16 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September and March 2012 sessions, respectively. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the Reports of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

EXCERPT FROM THE SEPTEMBER 2012
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 11, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2011.

The proposed amendment expands the colloquy under Rule 11 to require advising a defendant of possible immigration consequences when a judge accepts a guilty plea. The amendment was undertaken in light of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. In light of *Padilla*, the advisory committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution.

In the advisory committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. A majority of the advisory committee concluded, however, that deportation is qualitatively different from the other collateral

consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of those consequences also supports requiring a judicial warning. The warning would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The advisory committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the advisory committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, its proposal uses non-technical language designed to be understood by lay persons and will avoid the need to amend the rule further if there are legislative changes.

Six written comments were received. Only one disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy. After publication and receipt of written comments, both the Rule 11 subcommittee and the advisory committee reconsidered the foundational question of whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and the notion that conscientious judges do not need a rule to require them to give warnings in appropriate cases.

After hearing the report of its Rule 11 subcommittee and full discussion, the advisory committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the advisory committee agreed that the immigration consequences covered by the proposed amendment—removal from the U.S. and denial of citizenship and reentry—are qualitatively different from other collateral consequences, and warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” 130 S. Ct. at 1480 (footnote omitted). Although the Court’s decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

The advisory committee accepted the Rule 11 subcommittee’s recommendation to make several small modifications in the proposed Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant’s individual situation. With these changes, the advisory committee recommended approval of the proposed amendment to Rule 11.

The Committee concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Criminal Rule 11, and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mark R. Kravitz", followed by a horizontal line.

Mark R. Kravitz, Chair

James. M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff
Wallace B. Jefferson

David F. Levi
Patrick J. Schiltz
James A. Teilborg
Larry D. Thompson
Richard C. Wesley
Diane P. Wood

EXCERPT FROM THE MARCH 2012
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 16, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment is a technical and conforming amendment to correct what courts have treated as “scrivener’s error” in the 2002 restyling of Criminal Rule 16 concerning the protection afforded to government work product. Because this is a technical and conforming amendment, publication for public comment was unnecessary.

In 2011, a district judge brought the decision in *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), to the advisory committee’s attention. The *Rudolph* court identified what it characterized as a “scrivener’s error” in the restyling of Rule 16. Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy “books, papers, [and] documents” material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs — not including Rule 16(a)(1)(C) — Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that “a defendant may examine documents material to his defense, but,

under Rule 16(a)(2), he may not examine Government work product in connection with his case.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant to this issue, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener’s error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules.

Although the courts have employed the doctrine of the scrivener’s error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the advisory committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes clear that a defendant’s pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

Recommendation: Approve the proposed amendment to Criminal Rule 16, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Kravitz', with a stylized flourish at the end.

Mark R. Kravitz, Chair

James M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff

Wallace B. Jefferson
David F. Levi
Patrick J. Schiltz
James A. Teilborg
Larry D. Thompson
Richard C. Wesley
Diane P. Wood

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Hon. Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

DATE: May 17, 2012

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 22-23, 2012, in San Francisco, California, and took action on a number of proposals.

* * * * *

II. Action Items

A. Rule 11 (advice re immigration consequences of guilty plea)

Following publication, the Advisory Committee decided to maintain the language of the proposed amendment to Rule 11 as drafted, but adopted several changes in the Committee Note that respond to issues raised in the public comments. The Advisory Committee now recommends that the Standing Committee approve the amendment to Rule 11 and transmit it to the Judicial Conference.

1. The purpose of the proposed amendment

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocation. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id.* at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

In the Committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. The list of matters that must be addressed in the plea colloquy is already lengthy, and these members expressed concern that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge and expand litigation challenges to pleas despite the rule's harmless error provision.

A majority of the Committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of such consequences also supports requiring a judicial warning. This would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements. Thus, judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

2. The public comments

Six written comments were received. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy; it recommended that the amendment be withdrawn or at least substantially narrowed.

The remaining comments—which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers—agreed with the concept of amending Rule 11 to add advice concerning immigration consequences. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment, from the National Association of Criminal Defense Lawyers, urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

3. The Advisory Committee's recommendation

After publication, the Rule 11 Subcommittee and the Advisory Committee both reconsidered the foundational question whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and conscientious judges do not need a rule to require them to give warnings in appropriate cases. After hearing the report of the Rule 11 Subcommittee and full discussion, the Advisory Committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the Committee agreed that the immigration consequences covered by the proposed amendment—removal from the U.S. and denial of citizenship and reentry—are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” 130 S.Ct. at 1480 (footnote omitted). Although the Supreme Court’s decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly one half of all criminal cases. In fiscal year 2011, 48% of defendants for whom sentencing data were available were non-citizens.¹ Moreover, as emphasized in several of the public comments, attempts to determine the immigration status of individual defendants could raise self-incrimination issues.

The Advisory Committee accepted the Rule 11 Subcommittee’s recommendation to make several small modifications in the Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant’s individual situation. The National Immigration Project argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. See 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice could raise self-incrimination concerns.

¹U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf.

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

Subdivision (b)(1)(O). The amendment requires the court to include a general statement ~~concerning the potential that there may be~~ immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, ~~and does not require the judge to provide~~ not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship.

By a vote of nine in favor and three opposed, the Advisory Committee agreed to adopt the proposed changes in the Committee Note, and to transmit the proposed amendment to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as amended and transmitted to the Judicial Conference.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Hon. Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

From: Hon. Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Subject: Report of the Advisory Committee on Criminal Rules

Date: December 12, 2011

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on October 31, 2011, in St. Louis, Missouri, and took action on a number of proposals. The Draft Minutes are attached.

This report presents one action item: the Committee's recommendation that a proposed amendment to Rule 16 (discovery and inspection) be approved and transmitted to the Judicial Conference as a technical and conforming amendment.

* * * * *

II. Action Item—Rule 16

Earlier this year, Judge Lee Rosenthal brought the decision in *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), to the Committee’s attention. The *Rudolph* court identified what it characterized as a “scrivener’s error” in the restyling of Rule 16 concerning the protection afforded to government work product. The purpose of the proposed amendment is to clarify that the 2002 restyling of the rule made no change in the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy “books, papers, [and] documents” material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs—not including Rule 16(a)(1)(C)—Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that “a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener’s error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. See, e.g., *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007) (adopting the *Rudolph* court’s analysis).

Although the courts have employed the doctrine of the scrivener’s error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the Advisory Committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant’s pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

The Committee voted unanimously to approve the proposed amendment,¹ and agreed to review and vote on proposed note language by email. Note language proposed by the chair and reporters was subsequently approved by the Committee in an email vote.

The Committee discussed the question whether the proposed amendment could be treated as a technical and conforming change, which would not require publication for public comment. Members generally agreed that the expedited procedure for technical amendments would be appropriate because the change was of a technical nature, merely correcting what courts have correctly treated as a “scrivener’s error.” But one member expressed concern that without the opportunity for a full notice and comment period there might be a mistaken view that the change was depriving defendants of a right to disclosure under the present rule. Finally, members acknowledged that whether a rule change is technical and conforming, or sufficiently substantive to require a full public comment period, would be determined by the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 16 be approved as a technical and conforming amendment and submitted to the Judicial Conference.

* * * * *

¹ Following the meeting, at the suggestion of the Advisory Committee’s style consultant, Professor Kimble, the cross reference to “Rule 16(a)(1)(A), (B), (C), (D), (F), and (G)” was revised to read “Rule 16(a)(1)(A)-(D), (F), and (G).”

* * * * *

(1) *Advising and Questioning the Defendant.* Before

* * * * *

* New material is underlined; matter to be omitted is lined through

2 FEDERAL RULES OF CRIMINAL PROCEDURE

14 obligation to calculate the applicable
15 sentencing-guideline range and to consider
16 that range, possible departures under the
17 Sentencing Guidelines, and other sentencing
18 factors under 18 U.S.C. § 3553(a); ~~and~~
19 (N) the terms of any plea-agreement provision
20 waiving the right to appeal or to collaterally
21 attack the sentence; and:
22 (O) that, if convicted, a defendant who is not a
23 United States citizen may be removed from
24 the United States, denied citizenship, and
25 denied admission to the United States in the
26 future.

27 * * * * *

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

4 FEDERAL RULES OF CRIMINAL PROCEDURE

Changes Made After Publication and Comment

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

1 **Rule 16. Discovery and Inspection**2 **(a) Government's Disclosure.**

3 * * * * *

4 **(2) *Information Not Subject to Disclosure.*** Except as5 permitted by Rule 16(a)(1)(A)-(D), (F), and (G)6 ~~Except as Rule 16(a)(1) provides otherwise~~, this

7 rule does not authorize the discovery or inspection

8 of reports, memoranda, or other internal

9 government documents made by an attorney for the

10 government or other government agent in

11 connection with investigating or prosecuting the
12 case. Nor does this rule authorize the discovery or
13 inspection of statements made by prospective
14 government witnesses except as provided in 18
15 U.S.C. § 3500.

16 * * * * *

Committee Note

Subdivision (a). Paragraph (a)(2) is amended to clarify that the 2002 restyling of Rule 16 did not change the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy “books, papers, [and] documents” material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs—not including Rule 16(a)(1)(C)—Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that “a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

6 FEDERAL RULES OF CRIMINAL PROCEDURE

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g., United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106, 1110 n.2 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

Changes Made After Publication and Comment

No changes were made after publication and comment.

