RECOMMENDATION OF THE CII WORKGROUP AS TO CHANGES TO COURT RULES 6.302 AND 6.610

PROPOSAL:
The Court should accept Alternative B of ADM 2010-16 for amendment to Court Rules 6.302 and 6.610, with the following changes:

Changes as to the proposal for Rule 6.302:

(1) We recommend that the suggested advice to the defendant concerning deportation consequences occur before the plea colloquy with the defendant. In a guilty plea, the colloquy between the court and the defendant results in admissions of the defendant as to the facts which form the basis of the defendant's guilt. In a nolo contendere plea, the colloquy consists of stipulated facts or factual findings of the judge that there is a basis for the defendant's guilt.
The immigration attorneys in the CII workgroup have confirmed that the admission of a defendant alone, or factual findings of the court, even without any adjudication of guilt, may result in deportation. We make the recommendation to move the advice of deportation consequences to the beginning of the plea because *before* a non-citizen defendant makes an admission of guilt that could subject him or her to deportation consequences, the court should inquire into the defendant's awareness of deportation consequences.
If the suggested advice to a defendant about the deportation consequences of the plea is moved to a new subsection (3) of 6.302(B), then the advice about the consequences comes before any admission that may result in deportation consequences. A new subsection (3) would require renumbering existing subsections (3), (4) and (5) that follow in 6.302(B).

(2) We propose that the language suggested by the Court in Alternative B be added to subsection (B) as (B)(3) and be modified so it reads as follows:
"(3) a plea of guilty or nolo contendere by someone who is not a citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States."
We recommend that the last sentence of Alternative B be omitted, because (1) in felony pleas defendants are usually represented by counsel and (2) because of our suggestion below for an addition to subsection (E).

(3) We also propose that the language at the end of subsection (B), be changed in two ways, first, so it conforms to renumbering, and second, to add the advice of deportation consequences to the plea form:
"The requirements of subrule <u>(B)(3), (B)(4)</u> and <u>(B)(6)</u> may be satisfied by a writing on a form . . . ."
This change will not require new separate forms from SCAO, but it will require a change to the existing form. Adding the advice of deportation consequences to the form means that forms that are now prepared in different languages will contain the advice about deportation consequences.

(4) We also recommend that, at the end of the plea, the court inquire of counsel whether he or she has discussed deportation consequences with the defendant. *Padilla v Kentucky* places the

burden on defense counsel to know the deportation consequences of any conviction of his or her client and to advise the client correctly. The court should inquire of defense counsel at the end of the plea to ascertain that defense counsel has fulfilled his or her duty under *Padilla*. This can be accomplished by a revision to Subsection (E) similar to that proposed in ADM 2010-16. Subsection (E) should be broken into two subsections, (1) and (2), with (1) as proposed in ADM 2010-16, but subsection (2) to read as follows:
"(2) ask whether the defendant's lawyer and the defendant have discussed the possible risk of deportation that may be caused by the conviction if the defendant is not a citizen.

Changes as to the proposal for Rule 6.610

(1) We recommend that Alternative B of amendments to Rule 6.610 contained in ADM 2010-16 be accepted by the court. Because many defendants in district court are not represented, we recommend that the second sentence of Alternative B remain in 6.610, although we do not believe it is necessary as part of 6.302. Subsection (b) as proposed by the court should be added to subsection (E)(3) of 6.610.

(2) We also recommend, as with the amendment to 6.302, that the advice to the defendant of deportation consequences should occur *before* the colloquy with the defendant establishing the factual basis for the plea, or else the defendant may admit to an offense that requires deportation before he has been advised that those consequences exist. If the subsections of (E) are rearranged—Subsections (2) and (3) of (E) become subsections (1) and (2) and existing subsection (1) then becomes subsection (3), the advice of deportation consequences will precede any admissions of the defendant. The subsection (b) proposed would then be part of (E)(2) and the colloquy with the defendant would be in subsection (E)(3), following the advice of deportation consequences.

(3) If the sections are rearranged as we suggest, the first paragraph of (E)(4) must be changed in two ways, first, so we add the advice of deportation consequences, and second, to conform to renumbering, so (E)(4) will read:
"A defendant or defendants may be informed of the trial rights in subrule <u>(2)(b) and (2)(c)</u> . . . ."
This will not require a new separate form from SCAO, but will require the addition of the deportation advice to the existing form. As with 6.610, this will also permit forms in different languages to be available that will clearly advise a pleading defendant of the deportation consequences.

(4) We recommend that subsection (E)(7), which permits a plea in writing without a personal appearance of the defendant, be amended to ensure that any defendant who presents a plea in writing will do so with knowledge that the plea could have deportation consequences. Subsection (E)(7) should be amended so a new subsection (c) is added, with the existing subsection (c) becoming subsection (d). Subsection (c) would read as follows:
"(c) the defendant acknowledges in writing that he is aware that a noncitizen defendant who offers a plea of guilty or nolo contendere to the court risks deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States."

(5) Because of the addition of subsection (c) to (E)(7), subsection (E)(9) should be amended so it reads:

"The State Court Administrator shall develop and approve forms to be used under subrules (E)(4)(b) and (c) and (E)(7)(b) <u>and (c).</u>

We are not proposing a new separate form be developed, but that the current form used for written pleas, where the defendant is absent, be amended to add the advice of deportation consequences.