February 29, 1996

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Evidence,
Federal Rules of Appellate Procedure,
and Federal Rules of Criminal Procedure
Request for Comments, Issued September 1995

Dear Mr. McCabe:

As Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure, we are pleased to submit the following comments on behalf of the 8700 members of our association, and its affiliates in all 50 states, with a total membership of almost 25,000.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 24(a). Attorney Participation in Voir Dire

The amendment would mandate an opportunity for supplemental voir dire of prosepective jurors by counsel. NACDL strongly supports this proposal, and applauds the Committee for circulating it for comment. We offered in-person testimony before the Committee in Oakland (by James Farragher Campbell, of California) and in New Orleans (written by Michael Stout, of New Mexico, chair of our voir dire committee and a member of our Board of Directors, and orally presented by Robert Glass, of Louisiana).

Judge-conducted, group voir dire, as most commonly occurs in federal trials, is not conducive to rooting out bias in potential jurors. In addition, as the Supreme Court has recently noted, "Voir dire permits a party to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial ...." Powers v. Ohio, 499 U.S. 400, 113 L.Ed.2d 411, 427 (1991). That important benefit of the voir dire process is entirely absent from most federal criminal trials under the present regime.

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Rule 1101. Applicability of Rules.

NACDL suggests that the Advisory Committee on Evidence Rules reconsider its tentative decision to make no change in Fed.R.Evid. 1101, insofar as that rule refers to detention hearings, and trials of forfeiture complaints.

Rule 1101 provides, as now drafted, in part:

> (b) Proceedings generally.--These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, [and] to criminal cases and proceedings ....
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> * * * *
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> (d) Rules inapplicable.--The rules (other than with respect to privileges) do not apply in the following situations:
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> * * * *
>
> (3) Miscellaneous proceedings.-- ... sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.
>
> (e) Rules applicable in part.--In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: ... actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); ....

We believe that Rule 1101 should be amended to provide that the evidence rules apply in full to detention hearings, to ancillary proceedings in criminal forfeiture, and to all stages of civil forfeiture trials.

1. Detention Hearings. As presently written, Rule 1101-(d)(3) provides that the rules of evidence (other than privileges) do not apply in "proceedings with respect to release on bail or otherwise." The 1984 Bail Reform Act confirms that "The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at [a detention] hearing." 18 U.S.C. § 3142(f). (This statute does not even reserve the applicability of

privileges.) The Committee should exercise its power under the Rules Enabling Act to supersede this provision of the statute. To protect the Fifth and Eighth Amendment rights of the accused, Rule 1101(b) should be amended to read "... criminal cases and proceedings (including detention hearings [and ancillary proceedings in criminal forfeiture cases[1]]).

Although legislative history indicates that the drafters thought that the detention provisions of the Bail Reform Act would be invoked rarely, and only for the most dangerous criminals, detention before trial is now commonplace in federal court. Under the existing rule, presumptively innocent arrestees, with strong ties to the community and no record of violence or flight, can be detained without bail simply on the basis of the nature of the charges and the most unreliable hearsay about the strength of the evidence in the case -- federal agents testifying about other agents' reports summarizing investigatory witness interviews. Innocent persons have gone to trial and been acquitted after spending a year or more in jail. While requiring that the rules of evidence be followed would not eliminate all forms of unfairness in detention hearings, it would be a significant step back toward respecting the rights of the accused.

2. Forfeiture Hearings. Under the present rule, properly read, the rules of evidence do apply in civil forfeiture trials. This needs to be made more clear, however, since the courts have not agreed. In addition, the Rule should be amended to establish that the rules apply to "ancillary hearings" in criminal forfeiture cases under 21 U.S.C. § 853(n), which governs claims by third parties against property ordered forfeited in a criminal case.

a. With respect to ancillary proceedings, the rules are entirely unclear whether these are "criminal ... proceedings" under Rule 1101(b), or part of the "sentencing" under Rule 1101-(d)(3), or something else. The statute, in 21 U.S.C. § 853(j), generally adopts the procedural provisions of id. § 881(d), a part of the civil drug forfeiture statute which in turn makes the laws governing customs forfeitures under Title 19 applicable. As discussed below, Fed.R.Evid. 1101(e), making the evidence rules generally applicable to customs forfeiture hearings, is arguably such a law. However, although they are more like civil forfeiture cases than anything else, see United States v. Lavin, 942 F.2d 177 (3d Cir. 1991) (§853(n) decision is civil for purposes of determining time to appeal under FRAP), ancillary proceedings are not really held "under the Tariff Act

[1] See discussion below.

of 1930." To protect the property rights of non-criminal third parties, and to clarify this unnecessarily complicated question, Rule 1101(b) should be amended to read "... criminal cases and proceedings (including [detention hearings[2] and] ancillary proceedings in criminal forfeiture cases)."

b. Since 1972, when the rules were drafted, there has been an enormous expansion in the number and use of civil forfeiture remedies. Both the Supreme Court and political leaders have commented -- as have many others -- on the potential for abuse inherent in these remedies and on their potentially devastating impact. E.g., Hon. Henry Hyde, Forfeiting Our Property Rights (Cato 1995). The sections of Title 19 cited in the rule are incorporated by reference in most, if not all, of the contemporary forfeiture statutes which are now commonly used by the government. See, e.g., 21 U.S.C. § 881(d). Rule 1101(e) should be amended to make clear that the Rules of Evidence apply fully to all stages of the trial of forfeiture actions.

Section 1615 of Title 19, the statute which "govern[s] procedure" in forfeiture actions, does contain three special rules of evidence, but nothing in the Tariff Act purports to suspend the hearsay rule generally. In effect, that statute places a burden of going forward on the government, to the extent of establishing probable cause (and then places the ultimate burden on the claimant of persuasion by a preponderance of the evidence). Yet, in disregard of Rule 1101, the cases in the circuits uniformly hold that the government may establish probable cause for forfeiture by hearsay evidence. E.g., United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 621 (3d Cir. 1989); United States v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276, 1283 (9th Cir. 1983). As the Yacht Named Tahuna case puts the point, "The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." 702 F.2d at 1283. Accord, Grubb Road, 886 F.2d at 621. However, the use of the term "probable cause" in the statute, in and of itself, cannot be taken to imply that one kind of evidence or another should be used to satisfy either party's burden to establish a particular level of belief by the pertinent factfinder.[3]

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[2] See discussion above.

[3] It may be true that a person of ordinary caution and prudence, as the Fourth Amendment probable cause cases say, would not be disabled from forming a belief in a proposition simply because it was to be established by hearsay. But that is equally true of any standard of proof. Unless forbidden

That § 1615, in and of itself, does not make all hearsay admissible, is particularly clear since two of the three evidentiary clauses in § 1615 serve to create special exceptions to the hearsay rule in certain limited respects for the purpose of establishing "the place where the act in question occurred," 19 U.S.C. § 1615(1), and "the foreign origin of [certain] merchandise." Id.(2).[4] Had Congress intended the statutory "probable cause" standard to generate an automatic, wholesale suspension of the hearsay rule, it would not have crafted clauses (1) and (2), because these provisions would then be redundant. Instead, the existence of the two specific, unique hearsay exceptions virtually precludes the possibility that the pre-Rules case law holding that hearsay is admissible to prove probable cause at an in rem forfeiture trial, weak as it was, survived the enactment of the Federal Rules of Evidence.

As Judge Beam elaborated, in a discussion of the constitutionality of § 1615:

> [D]ivestiture of title should only be possible with evidence admissible at a trial. Evidence which qualitatively and quantitatively barely meets the threshold for probable cause should never be sufficient to divest title to noncontraband property.

United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 808 (8th Cir. 1992) (dissent). As Judge Beam explains:

> [T]he interest at stake, private property, is one that has always had enormous importance in our society. From its inception, the Constitution recognized the importance of private property as a concomitant to liberty. ... `Indeed, in a free government almost all other rights would become worthless if the government possessed an

(footnote continued)

by the court, a jury might well be persuaded by hearsay to find a proposition to be true on a preponderance of the evidence; indeed, a jury might find such evidence in a particular case to be "clear and convincing" or even to be persuasive "beyond a reasonable doubt." In other words, contrary to the Yacht Tahuna and Grubb Road reasoning, to declare that a given burden or standard of proof applies is never the same as establishing the applicable rules of evidence.

[4] The third special evidence rule does not concern hearsay, but rather creates a rebuttable presumption concerning contact between certain vessels. 19 U.S.C. § 1615(3).

> uncontrollable power over the private fortune of every citizen.' Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. [226,] 236 [(1897)]; see also Charles A. Reich, The New Property, 73 Yale L.J. 733, 771-74 (1964) .... To deprive an individual of property is to deprive him of a measure of his autonomy and limits his ability to interact with and in society. As Justice Kennedy has stated, `any system that wishes to protect freedom has to protect property.' 6 Newsletter of the Comm'n on the Bicentennial of the U.S. Constitution, No. 3, at 1 (1990).

Id. at 810-11.

Judge Beam's analysis directly ties the constitutional problems with § 1615 to the erroneous case law tolerating reliance on hearsay to establish probable cause for forfeiture.

> The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.

Id. at 811. Judge Beam concludes that under a proper construction of the statute, the "government need not establish [its case] by a preponderance of the evidence, but the facts adduced would have to meet the requirements of the federal rules of evidence." Id. at 812. That is the result mandated by the terms of the Rules themselves, as well as by the Due Process Clause.

Nevertheless, the courts seem to have missed this point. The problem could be resolved with a simple revision of the forfeiture clause of Rule 1101(e). We suggest that the phrase "actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711);" be revised to read "all stages of the trial of actions for fines, penalties, or forfeitures;". The committee note to the change should then make clear that the purpose of the revision of this clause is to reject the fallacious and obsolete reasoning of Yacht Named Tahuna and its progeny.

Rule 103(e). Effect of Pretrial Ruling.

NACDL agrees that Fed.R.Evid. 103 should be clarified for the reasons given in the Committee Note. But the proposed solution to the problem is the reverse of what should be the

rule. Just as exceptions are unnecessary in federal procedure after an objection has been overruled, Fed.R.Crim.P. 51, so it should not be necessary to renew an evidentiary objection unless the court states on the record, or the context otherwise clearly demonstrates, that the court's ruling is not final. The proposed rule creates a trap for the unwary lawyer, guarantees increased appellate litigation over whether a point has been waived, lays the groundwork for many a claim of ineffective assistance of counsel, and increases the probability of conflict between the trial court and counsel about whether a prior ruling is being disregarded.

Rule 801(d)(2). Codifying, expanding, and clarifying the Bourjaily opinion.

In Bourjaily v. United States, 483 U.S. 171 (1987), the Supreme Court held that the "plain meaning" of Fed.R.Evid. 104(a) requires the conclusion that adoption of the Evidence Rules had overruled the common law requirement that the content of a co-conspirator statement could not be considered in ruling on the admissibility that hearsay. Justice Blackmun, dissenting on behalf of himself and Justices Brennan and Marshall, disputed the majority's conclusion, finding that the Rules' drafters did not intend to alter the traditional restrictions on the admission of co-conspirator statements by allowing such "bootstrapping," which would undermine the reliability of the proof even further in conspiracy cases. The committee's proposal accepts the majority holding in Bourjaily and codifies it, while adding that the hearsay statement alone can never be sufficient to establish its own admissibility. NACDL suggests that the proper response would be to reject Bourjaily, exempting determinations under Rule 801(d)(2)(E) from the operation of Rule 104(a). Nor can we support extending that holding to agents' statements under Rules 801(d)(2)(C) and (D), as the committee proposes, particularly in criminal cases. If those suggestions are rejected, however, then we certainly support the creation of a specific rule of insufficiency for bootstrapped offers of co-conspirator statements.

Co-conspirator statements have always been recognized as inherently unreliable. Their admissibility -- dubious enough, for this reason, under the Confrontation Clause -- depends on a theory of vicarious admissions. Changes in federal prosecution priorities and sentencing law in the past decade or so have made these concerns all the more urgent. The "war on drugs" has led to more and more large conspiracy indictments. Harsh and inflexible penalties established under the Sentencing Guidelines and mandatory minimum sentencing statutes have turned more and more defendants into "cooperating" informants, seeking to take advantage of USSG § 5K1.1 (p.s.) and 18 U.S.C. § 3553(e) to

escape some of the otherwise applicable punishment. Incentives for co-conspirators to exaggerate and shift blame are thus magnified. In conspiracy cases, the "relevant conduct" provisions of the Guidelines, USSG § 1B1.3, exacerbate these problems. The present system even provides incentives for "cooperating" individuals to lie outright about others' knowledge and participation. Thus, the system needs more than ever to ensure the reliability of co-conspirator statements, and to look skeptically at cases which are heavily dependent on such evidence. The Rules should not facilitate their admissibility without corroboration or strong circumstantial guarantees of trustworthiness.

The advisory committee's idea of expanding the bootstrapping rule to other forms of vicarious admissions only makes matters worse. Such statements could easily be abused to attribute criminality, particularly in "white collar crime" case arising in a business setting. That an underling has been authorized to speak on a subject, or to act on a superior's behalf in a realm related to the statement -- or that the underling says he or she has been so authorized -- does not make any more reliable the underling's statement that the superior has authorized or directed (or was otherwise involved in) particular misconduct in carrying out that activity. The high stakes in criminal cases and weighty pressures on witnesses that exist today to implicate others demand that we make the rules more protective, not less, with respect to the reliability of alleged vicarious admissions of all sorts.

The committee's proposal should therefore be rejected at the threshold. The holding in Bourjaily was based on a "plain meaning" reading of Rule 104(a), which was obviously not drafted with this particular problem in mind. To change the result by changing the rules would reflect a proper policy judgment by the committee, not any disagreement with the Court on how the co-conspirator rule should work. Rather than codify the majority's holding, then, the committee should instead add the following language to Rule 801(d)(2): "Notwithstanding Rule 104(a), the court may not consider the contents of a statement offered under subparagraph (E) in determining under Rule 104(b) whether sufficient evidence has been introduced to support a finding of the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered."

Rule 804(b)(6). Waiver of hearsay rule by misconduct.

NACDL strongly opposes the addition of proposed subparagraph (b)(6). By definition, any statement that would be admissible under this new rule would be outside all of the traditional categories of reliable hearsay (otherwise it would

come in under one of those rules) and would not even be able to meet the materiality, "best evidence," "interests of justice" and "equivalent circumstantial guarantees of trustworthiness" tests of the residual exception. A rule necessarily allowing the admissibility of untrustworthy, immaterial, inferior quality, and unjust evidence as a sanction for supposed misconduct is strong medicine, which should be more carefully formulated.

The terminology ("wrongdoing") of the proposal is far too vague, and the standard of proof (preponderance) is too low; the proposal also lacks necessary procedural safeguards. We can only assume from the wording of the proposed rule that "wrongdoing" must be intended to mean something more than simply conduct which might have the foreseeable consequence of causing a witness's unavailability. Must the conduct violate some specific legal norm to qualify as "wrongdoing"? Must it be criminal, or contrary to a rule of professional responsibility? NACDL is particularly concerned about the treatment under this proposal of advice given to a witness of his or her legal rights, such as a suggestion that the witness obtain counsel, or that the witness may have a privilege not to testify, or that the witness need not speak with government agents unless he or she chooses to, or that the witness need not consent to a warrantless search and seizure, or that the witness need not supply documents or physical evidence except under compulsion of a subpoena, or that a subpoenaed witness need not testify or supply documents except in the proceeding to which he or she has been summoned (and not before).

If such a rule is adopted, it should not apply except after specific notice by the adverse party of its intention to invoke this rule (including the factual basis for the accusation), and a fair hearing conducted by the court. The standard of proof should be "clear and convincing evidence," not a mere preponderance. The seriousness of the issue, contrary to the draft advisory committee note, calls for a higher standard of proof, not a lower standard.

Experience teaches that such a rule would inevitably be applied unfairly against criminal defendants. This likelihood is reinforced by the proposal's perhaps inadvertent use of the personal expression "a party who," rather than the more generic "a party that," which would have been more consistent with the general style of the Rules, and would more clearly be potentially applicable to the government (and other impersonal parties) as well. Moreover, the government, unlike other parties, is not always held to be bound by the acts of its authorized agents. Thus, when law enforcement agents intimidate potential defense witnesses, as they routinely do, to discourage them from

"getting involved," we doubt that most judges will then allow those witnesses' prior statements to a defense investigator to be admitted. On the other hand, we can easily foresee the use of hearsay statements (such as DEA 6 or FBI 302 interview summaries) attributed to witnesses who, for example, have refused to testify after learning from the defense of their Fifth Amendment rights, or from a family member of the defendant about the severity of the penalties that the defendant is facing.

NACDL believes that the more appropriate remedy for the problem of improper attempts to procure the unavailability of a witness, where the witness's prior statement would not be admissible under some other provision of Rule 804(b) or of 803, is to permit evidence of the misconduct to be admitted as tending to show "consciousness of guilt" (by the defendant) or "consciousness of doubt" (by the government), along with an accompanying "adverse inference" charge to the jury. To allow inherently unreliable evidence to be admitted as a sanction is to pervert the overall goal of the Rules: the just, fair and accurate determination of factually contested cases.

Finally, we note that the proposed rule appears to use the term "waiver" where "forfeiture" is intended. See United States v. Broce, 488 U.S. 563 (1989).

Rule 807. Residual hearsay objection.

NACDL recognizes that no substantive change is intended by the proposed recodification of Fed.R.Evid. 803(24) and 804(b)(5) as new Rule 807. Nevertheless, we suggest that the advisory committee conduct a full study of the excessive invocation of these residual exceptions by the courts. Although originally intended by Congress to be rarely invoked, their use has become all too common. Of particular concern to us is the number of cases allowing grand jury testimony and the like to be admitted, despite its egregious failure to satisfy the requirements of the specific rule on prior sworn testimony. After further study, the wording should be narrowed to ensure that this rule will be less easily invoked, and that it will not be allowed to continue as a vehicle for the admissibility of every item of "near miss" (which is to say, traditionally inadmissible) hearsay evidence.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 29. Brief of Amicus Curiae

(d) Length. NACDL is a very active filer of amicus briefs. We participate as amicus in almost 50 circuit court cases per

year, as well as in many Supreme Court cases. We have reason to believe that our briefs are often appreciated by the court; surprisingly often, our briefs are quoted or cited in the opinion. Seldom, if ever, do our briefs reach the existing page limits. Nevertheless, we oppose the proposal to limit amicus briefs to one half the length of a party's principal brief, which in general under the present rules would be 25 pages, although under pending proposals would soon become about 20-22 pages. Fairly often, that would not be enough room to do the job right.

NACDL files amicus briefs for a number of different reasons. Sometimes, but not often, it is merely to "show the flag" on an issue of interest to our members. Such briefs may be quite short, particularly when our amicus committee knows that the lawyer handling the case is highly competent. Sometimes, however, we file an amicus brief because an issue presented by the case has important ramifications beyond the facts of the particular party's situation. Our brief will then try to put the issue in its broader perspective, which may lead the court to discuss the issue in that light, or, on the other hand, may lead to a more cautious and less expansive opinion, drafted with a better awareness of the potential applications to which excessive dictum might be put. In yet other cases, NACDL's amicus committee elects to file because the issue is a good one, but we know (or suspect) that the skills of the lawyer on the case are not really up to the task. In cases of that type, we might be inclined to file, as amicus, an entire "shadow" brief, containing a full statement of the case and parallel argument. (And we would not be inclined to state for the record in those cases the real reason why we feel the need to file.) Experience teaches that amicus briefs of this latter kind can be very helpful to the court, and can serve to correct the defects in our adversary process that occasionally result from a mismatch of ability between counsel, where important rights hinging on the resolution of difficult issues are at stake.

Briefs in the latter two categories, no matter how tightly and effectively drafted, often (though not always) demand more than 25 pages to fulfill their mission. Although cognizant of the burdens already weighing on our appellate judges, we urge the committee not to adopt the strict 50% page length rule. We would prefer no arbitrary restriction at all, but if a maximum less than that applicable to a party's brief is really felt to be necessary, then we would urge a rule in the 70-80% range (such as about 35 pages where the party's limit is 50).

(a)(1) Written consent. The rule, as revised, would maintain the provision that no motion need be filed where written evidence of the parties' consent accompanies an amicus

brief. Some circuits' clerks interpret this requirement quite strictly, requiring that the written evidence be actually signed by counsel for the parties and actually provided to the clerk with the amicus brief. NACDL has found this procedure more burdensome than would really seem necessary to accomplish its purpose. The court of appeals often relies on the representations of the members of its Bar for information it needs. NACDL suggests that a representation by amicus counsel, located and clearly labeled (for the benefit of the Clerk) within the brief itself, that the parties have authorized counsel to state that they consent to the filing should be sufficient.

(e) Time for Filing. NACDL suggests that the presumptive time for filing an amicus brief, subject to court order in the particular case, be within 10 days after the filing of the principal brief of the party supported. This would allow the amicus to adjust the content of its brief to the actual filing of the party (although it would seldom allow the amicus to postpone beginning to work on the brief until the party's brief was filed), and to make all necessary references to the appendix. This adjustment in scheduling would not cause any noticeable delay in the disposition of cases, while it would undoubtedly make amicus briefs both shorter and more helpful, in many cases. The opposing party should then have the normal period of time to respond, measured from the filing of the amicus brief.

Rule 35. En Banc Proceedings

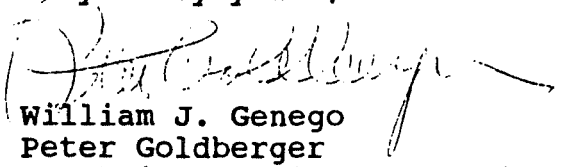
NACDL welcomes the proposed elimination of the confusing distinction between a petition for rehearing and a "suggestion" for rehearing in banc. Expansion of the grounds for rehearing to include inter-circuit conflicts is appropriate. We do not oppose the imposition of a uniform page length, subject to expansion by leave of court. However, we do not see the point of changing the rule's spelling of "in banc," which conforms to the statutory usage in 28 U.S.C. § 46(c). See Missouri v. Jenkins, 495 U.S. 33, 47 n.15 (1990).

Rule 41. Issuance of Mandate, Stay of Mandate

Presumptive period of stay pending certiorari. We thank the committee for its responsiveness to our suggestion of two years ago to conform the presumptive duration of a stay of mandate to the 90 period allowed for filing for a writ of certiorari under the revised rules of the Supreme Court. This will help criminal defense lawyers file better cert. petitions in meritorious cases.

NACDL appreciates the opportunity to offer our comments on the Standing Committee's proposals. We look forward to working with you further on these important matters.

Very truly yours,



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