THE BAR ASSOCIATION OF
SAN FRANCISCO

January 26, 2007

06 - CR - 014

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

RE: Comments on Proposed Amendments to Rule 29 of the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I am writing on behalf of the Bar Association of San Francisco (BASF) to provide comments to your committee regarding the proposed amendments to Rule 29 of the Federal Rules of Criminal Procedure, which were published in August 2006. BASF is a legal professional membership organization comprised of nearly 8,000 members. It champions equal access to justice and works to elevate the standards of integrity, honor, and respect in the practice of law. We provide a collective voice for public advocacy, and pioneer constructive change in society.

BASF opposes the proposed amendments for the reasons stated here.

Although the proposed amendments may have limited practical consequences, they constitute an unwarranted and unwise incursion on judicial independence. Rule 29 of the currently provides that a court may enter a judgment of acquittal where the evidence in a criminal trial is insufficient to sustain a conviction. Under the Rule, the court may take this action either before submitting the case to a jury for verdict or after. If the judgment of acquittal is rendered after the jury reaches a guilty verdict, the acquittal may be appealed because, as in the case of any post-conviction appeal, double jeopardy is not a consideration. If, however, the judgment of acquittal is rendered before a verdict, the judgment may not be appealed because it is considered the equivalent of a jury acquittal, and a prosecution appeal would implicate double jeopardy concerns.

The Merchants Exchange Building • 465 California Street, Suite 1100 • San Francisco, CA 94104
Tel (415) 982-1600 Fax (415) 477-2388 www.sfbar.org

The proposed amendment would allow the prosecution to appeal pre-verdict judicial acquittals and would require a judge, before entering a judgment of acquittal, to obtain a waiver from the defendant allowing the prosecution's appeal. This is an inappropriate solution to a problem that does not really exist.

In actuality, the legal standard for judicial acquittals is extremely high, and as a result the entry of such acquittals, particularly those rendered before a jury verdict, is extremely rare, and generally occurs in only the clearest cases of prosecutorial overreaching. BASF is not aware of any abuse or misuse to which this proposed amendment is a response.

Indeed, the existing federal rule is also the current rule in California (Penal Code Secs. 1118.1 and 1118.2), as has been the case since 1967 without opposition. We believe that the current rule is salutary in allowing the trial court to terminate criminal prosecutions when it is clear that the charges cannot be sustained, without requiring the defendant to undergo the burden and expense of continuing the defense through jury verdict and face the possibility of a wrongful conviction. Of course, the court can set aside a wrongful conviction under Rule 29, but it seems clear that even where the insufficiency of the evidence is clear a court is less likely to set aside a verdict after it has been rendered than to enter its own acquittal before verdict.

In effect, the amendment would deter pre-verdict acquittals and would transfer some of the authority of trial courts to federal appellate courts. While BASF recognizes the importance of regular review of the Federal Rules of Criminal Procedure to ensure the continued fair application of justice in our trial courts, we do not believe that the proposed amendments achieve those ends. We recommend that those proposed amendments be rejected.

Sincerely,

Nanci Clarence