

NEW YORK  
CITY BAR

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May 14, 2008

Roy L. Reardon, Esq.  
Simpson, Thacher & Bartlett LLP  
425 Lexington Avenue  
New York, New York 10017

Re: Reinstitution of First Department Rule  
Permitting Issuance of Letters of Caution

Dear Mr. Reardon:

On behalf of the Committee on Professional Discipline of the New York City Bar, we write to express the Committee's views regarding an amendment to the Rules of the Appellate Division, First Department that would allow for issuance of a Letter of Caution in attorney disciplinary matters. The Committee understands that the Departmental Disciplinary Committee ("DDC") favors adoption of (and will urge the Court to adopt) such an amendment, which the Committee fully supports.

As the DDC is aware, until approximately fifteen years ago, it was authorized under a now-rescinded version of 22 NYCRR § 605.8 to issue Letters of Caution to attorneys in disciplinary cases. (A copy of the former rule is enclosed.) Specifically, § 605.8(a)-(b) formerly permitted the DDC to "transmit to the Respondent a Letter of Caution ... [which] does not constitute discipline." The rule did not allow an attorney to appeal or reject a Letter of Caution or otherwise demand an evidentiary hearing, but the attorney could seek reconsideration from a member of the DDC who had not previously reviewed the attorney's matter. Alternatively, the attorney could file a "written response, which shall be maintained with the file relating to the complaint." However, in contrast to Letters of Admonition, it does not appear that the old rule allowed the DDC to cite a Letter of Caution against an attorney in consideration of an

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appropriate sanction in the event the attorney was found guilty of other professional misconduct during a subsequent disciplinary proceeding. *See* § 605.8(b)(3)(ii).

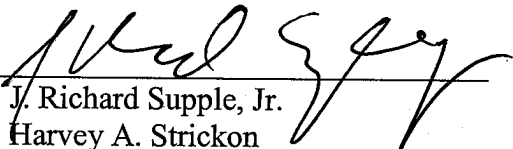
If authority to issue Letters of Caution is to be reinstated, the Committee believes re-adoption of the former version of 22 NYCRR § 605.8 would be appropriate, at least in substance. In addition, the former rule could be improved by explicitly setting forth the type of conduct that would qualify for a Letter of Caution. Specifically, the Committee believes the text of the rule should indicate that Letters of Caution are reserved for conduct that does not constitute "clear professional misconduct." This is the standard announced in the analogous rule currently in force in the Second Department [22 NYCRR § 691.6(a)], and, in our view, appropriately distinguishes Letters of Caution from more severe Letters of Admonition, which constitute discipline and therefore require strict proof that all elements of a claimed disciplinary rule violation have been met. Letters of Caution could then reassume their prior purpose and function by permitting the DDC to comment unfavorably about (and retain a confidential internal record regarding) inappropriate conduct that might not literally violate a disciplinary rule or otherwise justify a permanent record of discipline, but nonetheless warrants comment to caution the subject attorney that his or her conduct is not appropriate and may lead to formal discipline if repeated. Letters of Caution used in the manner would, in effect, fill a lacuna in the current structure of disciplinary dispositions, which currently do not recognize anything in the "gray area" between a dismissal (which signals that an attorney's complained-about conduct should not be criticized) and an Admonition (which, as noted, requires proof that a disciplinary rule was violated).

Please do not hesitate to contact the Committee if you have any questions regarding our views or if you believe we can be of any further assistance.

Very truly yours,

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL DISCIPLINE

By: \_\_\_\_\_

  
J. Richard Supple, Jr.  
Harvey A. Strickon  
Sarah J. North  
M. David Tell

cc: Hon. Jonathan Lippman  
Alan W. Friedberg, Esq.