

**Association of the Bar of the City of New York
Committee on Professional Discipline
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April 12, 2011

Jorge Dopico, Esq.
Chief Counsel
Departmental Disciplinary Committee
First Judicial Department
61 Broadway
New York, New York 10006

Re: *Letters of Caution/Amendment to 22 NYCRR § 605.8*

Dear Mr. Dopico:

We write jointly on behalf of the Committee on Professional Discipline of the Association of the Bar of the City of New York and the Professional Discipline Committee of the New York State Bar Association (together, the "Bar Committees"). Deputy Chief Counsel Naomi Goldstein suggested that we address this letter to you.

The Bar Committees have each approved resolutions urging the Appellate Division, First Department (the "Court") to re-adopt Letters of Caution as a non-disciplinary measure for resolving disciplinary complaints. Until approximately eighteen years ago, the First Department had a rule permitting the Departmental Disciplinary Committee to issue a Letter of Caution. As we understand it, Letters of Caution were abolished as a result of due process concerns. Respectfully enclosed for the Court's consideration is a proposed amended 22 NYCRR § 605.8, which both Bar Committees have expressly approved.

The Bar Committees feel strongly that Letters of Caution should be re-adopted because, at present, the Departmental Disciplinary Committee has no option for resolving lower level complaints not involving serious allegations of misconduct aside from issuing a form dismissal letter or, alternatively, a Letter of Admonition, which constitutes formal discipline and carries serious consequences for the affected attorney. The Committees believe there are many instances where the facts discovered upon investigating a complaint reveal conduct that warrants comment but does not rise to a level justifying the imposition of discipline.

For example, an attorney may have arguably, but inadvertently, violated a Rule of Professional Conduct relating to permissible advertising in a manner that did not threaten the public interest. In such instance, the Departmental Disciplinary Committee would not likely impose a Letter of

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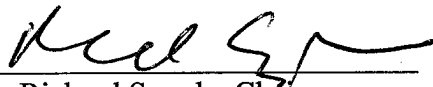
Admonition. However, were Letters of Caution available, instead of issuing a form dismissal letter, the Disciplinary Committee could productively comment on the attorney's actions and establish a clear record that the attorney was cautioned from engaging in conduct that might properly be viewed as improper under the Rules. As opposed to a form dismissal letter containing no discussion of the attorney's actions, a Letter of Caution issued under these circumstances would have the benefit of serving an educational purpose while possibly preventing misconduct in the future. And if the attorney ignored the Letter of Caution and persisted in questionable advertising conduct, the Disciplinary Committee would be able to efficiently determine whether a Letter of Admonition is an appropriate response to the attorney's continued conduct.

In short, the Bar Committees believe that re-adopting Letters of Caution would fill a lacuna in the Rules and cover the "grey area" between straight dismissal letters (which imply no conduct worthy of comment or criticism) and Letters of Admonition (that create a permanent disciplinary record which accompanies an attorney throughout his or her career). All of the other Departments use Letters of Caution. Furthermore, the substance of the Bar Committees' proposed amended rule, which would not permit the Departmental Disciplinary Committee to cite a Letter of Caution as evidence in aggravation of a subsequent finding of misconduct or allow an attorney to appeal a Letter of Caution, should not cause substantive concern in respect to the attorney's due process rights.

Please do not hesitate to contact either of us if we can be of further assistance.

Very truly yours,

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

By: 
Richard Supple, Chair

THE NEW YORK STATE BAR ASSOCIATION
PROFESSIONAL DISCIPLINE COMMITTEE

By: 
Sarah Jo Hamilton, Chair

Enc.

PROPOSED LETTER OF CAUTION RULE
IN THE FIRST DEPARTMENT/REVISED 22 NYCRR § 605.8

§ 605.8 Final Disposition Without Formal Proceedings

(a) **Notification to Respondent of Disposition of Complaint.** Upon the approval of the recommendation of the Office of Chief Counsel by the Reviewing Member, the acceptance of the Reviewing Member's modification by the Office of Chief Counsel, or the determination of the appropriate disposition by the Committee Chairperson, then, unless the disposition involves the institution of Formal Proceedings, as appropriate:

(1) the Office of Chief Counsel by means of written notice shall notify the Respondent of the dismissal of the Complaint; or

(2) the Committee Chairperson shall transmit to the Respondent a Letter of Caution (which shall bear the designation "LETTER OF CAUTION"); or

(3) the Committee Chairperson shall transmit to the Respondent an Admonition (which shall bear the designation "ADMONITION").

(b) **Letters of Caution and Admonitions.**

(1) *General Rule.* A written record shall be made of the fact of and basis for Letters of Caution and Admonitions.

(2) *Notice of Right to Submit Response.* In the Letter of Caution, the Respondent shall be advised of:

(i) the Respondent's right under section 605.8(c) of this Part; and

(ii) the fact that the issuance of the Letter of Caution does not constitute discipline by the Committee.

(3) *Notice of Right to Formal Proceedings.* In the Admonition, the Respondent shall be advised of:

(i) the Respondent's right under section 605.8(c) of this Part; and

(ii) the availability of such records for consideration in determining whether to impose discipline, and the extent of discipline to

be imposed, in the event other charges of misconduct are brought against the Respondent subsequently.

(c) Action Available to Respondent.

(1) *General Rule.* A Respondent shall not be entitled to appeal either a Letter of Caution or an Admonition, but (i) in the case of a Letter of Caution (other than one issued after a hearing under these Rules), the Respondent may submit a written response, which shall be maintained with the file relating to the complaint; or, in the alternative, Respondent may submit a written application for reconsideration which shall be disposed of in accordance with subsection (3) of this subdivision; (ii) in the case of an Admonition, the Respondent may submit a written application for reconsideration which shall be disposed of in accordance with paragraph (3) of this subdivision; or, in the alternative, Respondent may demand as of right that Formal Proceedings be instituted before a Hearing Panel, in accordance with subsection (2) of this subdivision.

(2) *Formal Proceedings.* A demand under paragraph (1) (ii) of this subdivision that Formal Proceedings be instituted shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the Admonition is sent to the Respondent. In the event of such demand, the Admonition shall be vacated and the Hearing Panel shall not be bound by its terms, but may take any appropriate action authorized by the Rules of the Committee or the Rules of the Appellate Division, First Department, including a Reprimand or referral to the Court.

(3) *Application for Reconsideration.* An application under subsections (1)(i) and (ii) of this subdivision for reconsideration shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the Letter of Caution, or the Admonition, as the case may be, is sent to the Respondent. As soon as practicable after the receipt of an application, the Office of Chief Counsel shall transmit the application and the file relating to the matter to a member of the Departmental Disciplinary Committee (who shall not be a Reviewing Member designated with respect to such matter under section 605.6(f)(2) of this Part) designated to review the matter by the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, by the Chief Counsel). The member so designated shall either confirm or vacate the Letter of Caution, or the Admonition, as the case may be, or otherwise determine to modify the Letter of Caution, or the Admonition, as the case may be, under section 605.7(b)(2) of this Part.

(d) Notification to Complainant of Disposition of Complaint. The Office of Chief Counsel, by means of written notice shall notify the

Complainant of the dismissal of a Complaint, or of the issuance of either a Letter of Caution or an Admonition; notice of any such issuance shall inform the Complainant of the requirement of confidentiality.