

**The Function
And
Professional Responsibilities
Of
Bond Counsel**

2011
THIRD EDITION

NATIONAL ASSOCIATION OF BOND LAWYERS

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PREFACE AND ACKNOWLEDGEMENTS

In November 1983, the Board of Directors (the “Board”) of the National Association of Bond Lawyers (“NABL”) authorized distribution to the membership of *The Function and Professional Responsibilities of Bond Counsel* (the “First Edition”). The First Edition evolved from a project that began in 1979 (soon after NABL was organized). The then-newly formed Committee on Professional Responsibility determined that NABL should adopt a code of professional responsibility because the unique role of bond counsel was not addressed in the Model Code of Professional Responsibility (the “Model Code”) promulgated by the American Bar Association (the “ABA”) in 1969 and then in force, as modified and adopted, in most jurisdictions. The Committee developed several drafts.

During the course of the original NABL project, the Kutak Commission established by the ABA drafted the Model Rules of Professional Conduct (the “1983 Model Rules” and, as amended, the “Model Rules”), which were adopted by the ABA in August 1983. Unlike the Model Code, the Model Rules addressed situations where lawyers serve in non-advocacy roles. As the Model Rules advanced, the focus of the original NABL project shifted. Rather than promulgating additional rules, its objectives became the “development of a description of the unique function of bond counsel and provision of guidance with respect to matters of professional responsibility associated therewith.”

After publication of the First Edition, the Model Rules displaced the Model Code as the primary articulation of professional responsibility for lawyers in most jurisdictions of the United States. In April 1992, the Board directed the Committee on Professional Responsibility to assemble a subcommittee to study updating the First Edition to respond to the Model Rules and the changes in the practice of bond counsel since the publication of the First Edition. Actual revision began in the fall of 1992.

The Second Edition of *The Function and Professional Responsibilities of Bond Counsel* (the “Second Edition”) was approved by the Board in July 1995 and distributed to the membership in September 1995. The Second Edition was intended to expand on the work of the First Edition by commenting more extensively on: (1) the interplay between the Model Rules and the usual function and responsibilities of bond counsel (particularly the tension between the historic view that bond counsel does not act as an advocate for any party to the transaction and the premise underlying the Model Code and the Model Rules that every lawyer in a transaction must have a client), (2) developments in the literature and case law regarding the Model Rules and (3) developments in the role of bond counsel and the nature of public finance.

In 1997, the ABA established the Commission on Evaluation of the Rules of Professional Conduct, which quickly became known as the Ethics 2000 or E2K Commission, to review and update the Model Rules. The Ethics 2000 Commission submitted its final report for consideration in August 2001, and the ABA adopted amendments to the Model Rules in February 2002. In August 2002, the ABA further amended the Model Rules to reflect the work of its Commission on Multijurisdictional Practice of Law and in 2003 the ABA further amended Model Rules 1.6 and 1.13 based on proposals made by its Task Force on Corporate Responsibility. All of these amendments to the Model Rules are referred to herein collectively as the “2002 Model Rules.” The 2002 Model Rules, like their predecessors, do not specifically address bond counsel practice.

In 2003, NABL published the fourth edition of its *Model Bond Opinion Report*. That report and the model opinions included in it are updates of reports published in 1982/1983, 1987 and 1997. The discussion of the appropriate basis for delivering an “unqualified” opinion articulated in the Second Edition was superseded by the discussion in the 2003 edition of the *Model Bond Opinion Report*.

In light of the significant changes to the Model Rules made by the 2002 Model Rules and their adoption in whole or in part in many jurisdictions, the Board created the Functions and Professional Responsibility

Subcommittee of the Municipal Law Committee to consider revisions to the Second Edition. After reviewing the 2002 Model Rules and the 2003 edition of the *Model Bond Opinion Report* and considering the continued changes in the practice of bond counsel since publication of the Second Edition, the Subcommittee recommended, and the Board approved, preparation of this Third Edition. Work began in earnest in 2008 under the direction of Subcommittee Co-Chairs Thomas Kennedy Downs and Meredith L. Hathorn with the participation of the following Subcommittee members: Jason Akers, Tyler Kalachnik, Andrew Kintzinger and William McBride. In 2010, Allen K. Robertson joined the Subcommittee as an additional Co-Chair.

Professor Geoffrey C. Hazard, Jr., the principal reporter for the 1983 Model Rules and one of the leading experts on the Model Rules since their initial adoption, was engaged to review the First Edition and the Second Edition, and he graciously agreed to review this Third Edition. Three key members of the Working Group on Legal Opinions, Arthur Norman Field, Donald W. Glazer and Stanley Keller, also volunteered their time to review the discussion under the heading “THE BOND OPINION,” particularly the subheading “– Unique Aspects of the Bond Opinion.” The Subcommittee appreciates the time and comments of these reviewers.

Thomas Kennedy Downs

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Subcommittee

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INTRODUCTION

This Third Edition of *The Function and Professional Responsibilities of Bond Counsel* (this “Third Edition”) was prepared by the Functions and Professional Responsibility Subcommittee (the “Subcommittee”) of the National Association of Bond Lawyers (“NABL”) and approved by the NABL Board of Directors (the “Board”) on October 1, 2011.

This Third Edition is a continuation of a project that began in 1979 and is intended to expand upon the work of prior editions published in 1983 (the “First Edition”) and 1995 (the “Second Edition”). Like the First Edition, objectives of this Third Edition include describing the unique aspects of the function of bond counsel and providing guidance with respect to matters of professional responsibility associated with that function. Like the Second Edition, this Third Edition provides extensive commentary on the interplay between the Model Rules of Professional Conduct (the “Model Rules”) adopted by the American Bar Association (the “ABA”) and the usual function and responsibilities of bond counsel. In this Third Edition, unless otherwise noted, references to the “Model Rules” mean the original Model Rules adopted by the ABA in 1983 (the “1983 Model Rules”), as amended in 2002 and 2003 (the “2002 Model Rules”).

This Third Edition begins by reviewing the historical evolution and modern function of bond counsel. The origin of the role of bond counsel in the late 19th century is important because it still affects how bond counsel approach their responsibilities today. The history of bond opinions also reflects, in part, the history of third-party closing opinions generally. Because delivery of the bond opinion always has been, and continues to be, the primary function of bond counsel, the next section examines the scope and nature of the bond opinion. The third section identifies and briefly discusses a number of professional responsibilities of bond counsel. The final section contains a more lengthy discussion and analysis of certain Model Rules and their relevance to bond practice.

This Third Edition is intended to provide bond counsel with a starting point in analyzing how the rules of professional conduct for lawyers generally might apply to their practice. Understanding and complying with applicable rules of professional conduct is an important responsibility of bond counsel. All bond counsel are licensed to practice law in at least one state, and all states have adopted rules governing the professional conduct of lawyers. Failure to comply with these rules can subject a lawyer to discipline, including suspension or loss of license. Each state’s rules also may be considered by courts as evidence of standards of care in civil actions based on allegations of malpractice, misrepresentation, and other common law or statutory concepts. Because the historic custom and practice in a particular industry or practice area, or a course of dealing with a client, or a course of conduct in a particular transaction or series of transactions, also may evidence standards of care, this Third Edition describes some of the custom and practice in the public finance area to assist bond lawyers in understanding the standards applicable to them in determining their responsibilities under applicable rules of professional conduct and general state law.

This Third Edition focuses on the application of the Model Rules to bond counsel practice because they come closest to being a national code of professional conduct for lawyers. As of the date of this Third Edition, 49 states and the District of Columbia have adopted professional conduct rules that follow the format of the Model Rules (with all but four, Georgia, Hawaii, Texas and West Virginia, having amended their state codes in light of the 2002 Model Rules), and the lone holdout, California, has proposed amendments to its rules that would bring them more closely in line with the Model Rules.¹ **Because the Model Rules have not been adopted uniformly**

¹ See American Bar Association, Status of State Review of Professional Conduct Rules (As of November 3, 2010), reported at http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf. This status chart had not been updated further as of the date of this Third Edition. The ABA’s Center for Professional Responsibility promotes and tracks the adoption of the Model Rules.

in all jurisdictions, readers of this Third Edition should consider whether and how deviations from the Model Rules in a particular jurisdiction’s rules of professional conduct may affect their professional responsibilities.

In preparing this Third Edition, the Subcommittee was mindful that, although the Model Rules are more nearly applicable to bond counsel practice than the ABA’s Model Code of Professional Responsibility (the “Model Code”) and the original 1983 Model Rules, some aspects of the Model Rules still do not clearly contemplate the role of bond counsel. The focus on the Model Rules in the later sections of this publication is intended to highlight the special role and function of bond counsel and to examine some of the ways in which the accepted practices of bond lawyers may differ from or be likened to those contemplated by the Model Rules. Finally, this Third Edition also is intended to identify for bond practitioners some of the advantages that might be gained by adopting certain of the procedures strongly suggested or required by the Model Rules, such as the use of written engagement letters and written waivers of possible conflicts of interest.

This Third Edition does not address all of the ethical or non-ethical considerations of professional responsibility and liability facing bond lawyers today. For example, since 2008, as a result of the global credit crisis and legislation and regulation adopted in response, there have been substantial changes in the municipal bond market and public finance. The impact of these changes on the professional responsibility and liability of bond counsel is not entirely clear yet. Moreover, the Subcommittee expects further, and probably substantial, developments in the nature of public finance and the role of bond counsel in the next few years as a result of additional legislation and regulation affecting the municipal bond market that may be proposed or adopted. In addition, further amendments to the Model Rules, and resulting changes in state rules of professional conduct, are likely to result from work of the ABA Commission on Ethics 20/20, which was formed in August 2009 and is engaged in what is expected to be a three-year study of the Model Rules.

The discussion in this Third Edition under the heading “THE BOND OPINION,” *infra*, should be read in conjunction with the fourth edition of the *Model Bond Opinion Report* published by NABL in 2003. References in this Third Edition (including footnotes) to the *Model Bond Opinion Report* mean the 2003 edition of that report, unless otherwise noted. Counsel rendering bond opinions should read the *Model Bond Opinion Report* in its entirety.

Additional discussion of the historical evolution and modern function of bond counsel may be found in the following NABL publications: *Statement Concerning Standard Applied in Rendering the Federal Income Tax Portion of Bond Opinions*, adopted by the NABL Board on November 29, 1993 (cited throughout this Third Edition, including footnotes, as “*Tax Standard*”) ²; *The Selection and Evaluation of Bond Counsel* (1998); *Model Engagement Letters* (1998); and *Standards of Practice* (1989). *Standards of Practice* includes three reports titled: “The Question of Lawyer Competence and Professionalism”; “Lawyer Proliferation in Public Finance Transactions”; and “Alternative Approaches for Improvement of Standards of Practice.” Also very informative in this context is *Disclosure Roles of Counsel in State and Local Government Securities Offerings* (3d ed. 2009), a joint publication of NABL and the ABA (cited throughout this Third Edition, including footnotes, as “*Disclosure Roles of Counsel*”), especially Chapter 5 therein, entitled “Disclosure Roles of Bond Counsel.”

The Subcommittee and the Board are aware that they are without power to, and in publishing this Third Edition do not intend to, promulgate any authoritative rules or any binding interpretation of rules. The discussion and analysis contained herein are presented only for the thoughtful consideration of bond lawyers and other readers. **This Third Edition of *The Function and Professional Responsibilities of Bond Counsel* does not reflect the views of any particular member or members of the Subcommittee, the Board, or NABL; is not intended to establish standards of conduct or care; and does not necessarily reflect common or accepted**

² As with the Second Edition of this publication, *Tax Standard* includes a discussion of the “unqualified” opinion that was superseded by the 2003 edition of the *Model Bond Opinion Report*.

practice in any particular jurisdiction. Rather, it is intended only to assist bond lawyers in analyzing, applying, and adhering to applicable rules of professional conduct in their respective jurisdictions. Readers of this publication should bear these limitations in mind.

SECTION I. HISTORICAL EVOLUTION AND MODERN FUNCTION OF BOND COUNSEL

Historical Evolution

The function of bond counsel originated in the late 19th century in response to widespread defaults and extensive litigation in the state and federal courts regarding validity of “railroad-aid bonds.”³ Initially, debt instruments of states, territories, and their political subdivisions (“bonds”) were purchased on the strength of an issuer’s representations and/or the opinion of local counsel to the issuer with respect to their validity. These representations and opinions sometimes proved to be unreliable, and litigation over enforceability of bonds in that era sometimes resulted in judicial determinations that bonds had been issued without having met all the requirements of applicable law and therefore were invalid.⁴ Defects peculiar to municipal finance, such as lack of public purpose, violation of debt limitations, or absence of proper approval by the electorate, were usually the basis for such determinations, resulting in substantial losses to investors. Investors discovered that limitations on the incurring of governmental debt were substantial and significantly different from those governing private corporations. A governmental issuer’s ability to avoid debt that was issued *ultra vires* (i.e., outside the scope of its powers) created uncertainty among investors that made it difficult for public bodies, especially small communities and those that borrowed infrequently, to raise necessary funds on reasonable terms.

In response to investor concerns, it became the practice for underwriters or purchasers to obtain an opinion regarding bond validity from lawyers whose expertise, objectivity, professional standing and

³ See Charles Fairman, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. VI, Reconstruction and Reunion, 1864-88, Part One* (1971) (“*Supreme Court History*”), Chs. XVII-XVIII, 918-1116; Donald W. Glazer, Scott T. FitzGibbon and Steven O. Weise, *Glazer and FitzGibbon on Legal Opinions* (3d ed. 2010) (“*Glazer and FitzGibbon*”), 2 & n.5; David M. Wood, “The Municipal Bond Attorney,” from *Fundamentals of Investment Banking* (Prentice-Hall, Inc., 1946, 1947), included as Chapter 4 of *Fundamentals of Municipal Bonds* (Investment Bankers Association of America, 1959), 55.

Professor Fairman devotes two chapters, spanning almost 200 pages, in his history of the United States Supreme Court from 1864 to 1888, to municipal bond cases, which “[f]or a season, . . . bulked larger than any other category of the Court’s business.” Professor Fairman summarized these cases as follows:

Chiefly these were bonds issued to purchase stock in order to encourage the building of a railroad. In [this] period the Court decided some two hundred cases on these railroad aid bonds. When as often happened the railroad never came, or fraud and bribery in the bond issues came to light, or statutory prerequisites had been ignored, or people simply became disenchanted, communities would refuse to pay taxes, interest would be stopped, and then bondholders would sue to compel payment. Normally the plaintiff resided out-of-State and thus could resort to the federal court, where a more sympathetic hearing was to be expected than in State courts held by judges popularly elected for brief terms.

Supreme Court History at 918. These out-of-state plaintiffs included large-scale Eastern investors and European investors, who were prepared to sue for payment. See L.A. Powe, Jr., “Rehearsal for Substantive Due Process: The Municipal Bond Cases,” 53 *Tex. L. Rev.* 738, 740 (1975); *Supreme Court History* at 924, 943.

⁴ See C. Richard Johnson and Robert H. Wheeler, “Securities Law Duties of Bond Counsel,” 1976 *Duke L.J.* 1205, 1207 (1976); “The Municipal Bond Attorney,” *supra* at footnote 3, at 55.

As Professor Fairman explains, however, attempts by municipalities or state courts to repudiate or invalidate railroad aid bonds were met with zealous efforts by the United States Supreme Court to enforce them. See *Supreme Court History*, Chs. XVII-XVIII. The Supreme Court’s decisions on the validity and enforcement of railroad aid bonds led to lively resistance in Iowa in the late 1860s and in Missouri in the late 1870s. *Supreme Court History* at 919. See also Powe, “Rehearsal for Substantive Due Process: The Municipal Bond Cases,” *supra* at footnote 3, 53 *Tex. L. Rev.* at 746 (“Throughout the entire series of decisions, with few – and therefore notable – exceptions, the [Supreme] Court upheld any municipal bonds aiding railroads regardless of defects in their issuance.”).

independence from the issuer made their opinions acceptable to the bond underwriters through whom bond issues were sold to investors. The premise underlying this arrangement was that bond counsel would not act as an advocate for the issuer or investors, but would have the expertise required to provide assurance of the validity of the bonds and exercise objectivity in applying that expertise. A bond issue accompanied by an approving opinion of recognized⁵ bond counsel could be sold more readily. Thus, the practice of having a bond opinion arose out of a marketing need – notwithstanding the fact that the validity of bonds could be confirmed in court in some jurisdictions.⁶ Use of bond counsel opinions became well established by 1900 and remains standard practice in the municipal bond industry.

From the late 1800s until the late 1960s, bond counsel were able to focus almost exclusively on issues of validity under applicable state law.⁷ Since 1968, however, bond counsel have been required to spend more and

⁵ The definition of “recognized” is essentially circular. If bond counsel’s opinion is accepted by the market (e.g., by an underwriter), that counsel is “recognized.” If bond counsel is “recognized,” their opinion is accepted by underwriters. If bond counsel is not “recognized,” then a “cover” opinion from “recognized” bond counsel may be required to successfully market bonds until such bond counsel becomes “recognized.”

There is no set standard or generally accepted listing or registry of “recognized” bond counsel. Municipal market participants sometimes refer to *The Bond Buyer’s Municipal Marketplace*[®], a periodic directory known as the “Red Book,” which includes a list of public finance lawyers. The Spring 2011 edition of the Red Book states its criteria as follows:

To be eligible for inclusion, a law firm must have accomplished at least one of the following during the two-year period preceding publication of this directory:

- rendered a sole legal opinion in connection with the sale of state and/or municipal bonds; or
- served as underwriter’s counsel, co-counsel, or issuer’s counsel for a municipal bond offering.

(Firms that have served as underwriter’s counsel, co-counsel, issuer’s counsel or on short-term issues only will be designated as such.) The legal opinion rendered may be on either publicly or privately placed bond issues.

No other representation is expressed or implied by *The Bond Buyer’s Municipal Marketplace*.[®]

The Red Book does not distinguish between publicly or privately sold issues, taxable or tax-exempt issues, general obligation or revenue bonds, private activity or governmental purpose bonds, etc.

NABL also publishes an annual Directory (not intended for public distribution or circulation) of its members, which states:

Membership in the National Association of Bond Lawyers is not based upon and does not directly or indirectly imply competence, experience, or acceptance as an attorney rendering opinions in connection with the delivery of obligations issued by or on behalf of a state, territory or possession of the United States or a political subdivision thereof or the District of Columbia.

⁶ A judicial determination known as a “validation” procedure is sometimes used as an alternative or supplement to a bond counsel opinion. Validation is a special legal proceeding to obtain court approval of the validity of a bond issue. Some states have special legislation requiring or permitting validation procedures upon *ex parte* motion of the issuer without the normal judicial requirement that there be a “case or controversy.” Bond counsel sometimes require such proceedings to resolve novel or difficult legal questions. Validation proceedings can address only validity and other state law questions. They cannot confirm the status of an issue for purposes of federal income taxation (e.g., the exemption of interest on bonds from federal income tax). For novel or difficult questions in that area, bond counsel may require a ruling from the Internal Revenue Service (“IRS”) before delivering an opinion with respect to a particular issue. However, the vast majority of bond issues are sold on the basis of a bond counsel opinion not supplemented by or based on either a validation or a federal tax ruling.

⁷ The origin of the function of bond counsel predated the enactment of the federal income tax. Federal income tax law has provided an exclusion for interest on bonds issued by or on behalf of State and local government since the income tax was enacted in 1913. For most of the 20th century, many bond counsel believed, based on the Supreme Court decision in *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, *modified*, 158 U.S. 601 (1895) (holding earlier income tax

more of their time analyzing issues arising under increasingly extensive and complex federal tax and securities legislation and regulation of municipal bonds. As a result, bond counsel today are seen as federal tax and securities practitioners, in addition to (or sometimes overshadowing) their expertise in state law. Moreover, as a result of Internal Revenue Service (“IRS”) and Securities and Exchange Commission (“SEC”) enforcement programs that began in the 1990s, bond counsel who do not fulfill their professional responsibilities under federal tax and securities law may be subject to sanctions. See “PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL – Responsibilities under Federal Tax Law” and “– Responsibilities under Federal Securities Law,” *infra*.

Modern Function

Today, the primary function of bond counsel continues to be rendering the bond opinion. Bond counsel are lawyers engaged to provide an objective legal opinion with respect to the validity of bonds and other subjects, particularly the tax treatment of interest on the bonds.⁸ The opinion is an objective judgment rather than the partisan position of an advocate. It ordinarily is required by both issuers and investors. As practice has evolved, bond counsel frequently perform other functions, as described in this section under the heading “Additional Functions of Bond Counsel,” *infra*. Some of those functions (e.g., preparation and supervision of bond proceedings) may be incidental to giving the bond opinion. Other functions (e.g., assisting in structuring or evaluating the structure of a bond issue to ensure compliance with applicable law) go beyond what is required to render the bond opinion. Whether bond counsel performs these additional functions for one of the parties to the transaction depends on the terms of the engagement between bond counsel and the client.

The identity of bond counsel’s client and the terms of the engagement may differ depending on the nature of the financing. Bond counsel are engaged in connection with (1) bond issues the proceeds of which are used to finance facilities owned and operated by, and other governmental activities of, the issuer or another governmental body, and (2) “conduit financings,” in which proceeds are used to finance facilities that are owned by private

unconstitutional for various reasons, including the taxation of municipal bond interest), that the tax-exempt status of interest on municipal bonds was constitutionally protected under the doctrine of intergovernmental immunities. As a result, until the late 1960s, many bond opinions did not address tax questions. Beginning with the Revenue Adjustment Act of 1968, Pub. L. No. 90-364, which was enacted in response to the rapid increase during the 1960s of tax-exempt bonds issued to provide financing for private business activities (referred to as “industrial development bonds” or “IDBs”), the legislation and regulation of the taxation of interest on State and local government bonds has become increasingly complex. Moreover, in *South Carolina v. Baker*, 485 U.S. 505 (1988), the Supreme Court rejected the argument that the tax exemption for State and local government bonds is constitutionally protected. For a brief history of the federal taxation of State and local government bonds to 2006, see Joint Committee on Taxation, *Present Law and Background Relating to State and Local Government Bonds* (JCX-14-06), March 14, 2006, at 12-20.

The origin of the function of bond counsel also predated the enactment of the federal securities laws. From the late 19th century until the passage of the Securities Act of 1933 (the “1933 Act”), there were no federal securities laws. Even with the passage of the 1933 Act, municipal securities were exempted from registration pursuant to Section 3(a)(2) of the 1933 Act. In 1968, also in response to concerns about IDBs, the Securities and Exchange Commission (the “SEC”) adopted Rule 131 under the 1933 Act, which deems any part of an obligation evidenced by a bond issued by a governmental unit specified in Section 3(a)(2) which is payable from payments made by a conduit or industrial or commercial enterprise to be a separate security issued by the conduit lessee or obligor subject to registration under the 1933 Act. Although Congress overruled much of Rule 131 in 1970 by amending Section 3(a)(2) to exempt most tax-exempt IDBs from registration, federal securities regulation of municipal bonds has become increasingly complex over the last forty years.

⁸ In some transactions, special tax counsel is retained, and bond counsel addresses only the issue of validity.

entities or to finance other activities of such private entities (the “conduit borrowers”) and the financing of which is found by the issuer to serve a public purpose.⁹

The first type of issue is usually a two-party transaction between the issuer and the purchaser. In some transactions, however, there may be an intermediate state agency which issues bonds, the proceeds of which are used to purchase, and which are secured by, the obligation of a local government. The second type is a three-party transaction involving the issuer, the purchaser, and the conduit borrower, which generally is liable for payment of the bonds. Either type of transaction may also involve an underwriter and a trustee for bondholders and may include other participants such as credit or liquidity enhancers (e.g., banks and bond insurers). Such additional participants in a municipal bond transaction will usually be represented by their own counsel, who may be paid either directly by the party retaining such counsel or from proceeds of the bond issue if and when it is delivered. In various circumstances and in various jurisdictions, it may not be unusual for a lawyer who serves as bond counsel to serve as issuer’s counsel, conduit borrower’s counsel, underwriter’s counsel, disclosure counsel, special tax counsel or trustee’s counsel in the same or other transactions involving some or all of the same parties.¹⁰ While this Third Edition discusses the roles of those other counsel in passing (and many of the principles it deals with are applicable to those roles), it is addressed specifically only to the role of bond counsel.

As discussed in more detail throughout this Third Edition, the complexity of today’s public finance practice suggests that the modern function of bond counsel should usually be defined by the identity of bond counsel’s client in a particular transaction and the duties bond counsel undertakes in an engagement, whether identified by letter or otherwise.

Additional Functions of Bond Counsel

Bond counsel frequently are engaged to perform services in addition to rendering the bond opinion. Some of those additional functions, such as preparation of documents and supervision of the transactional process, are incidental to the giving of the bond opinion and typically are not undertaken for any purpose of advocacy on behalf of a party to the transaction. Other functions are sometimes undertaken for the purpose of advancing the interests of one or more parties to the transaction beyond what is required to give the bond opinion.

Examples of additional services that bond counsel may perform include the following:

- (1) supervising the bond proceedings, including preparation of documents necessary or appropriate for the authorization, issuance, sale, and delivery of the bonds, coordination of the enactment and execution of such documents, and, where appropriate, drafting or reviewing enabling legislation or constitutional amendments;

⁹ This category of facilities includes the facilities described in Sections 142, 144(a) and 145 of the Internal Revenue Code of 1986, as amended (the “Code”), along with other more specific sections, such as Sections 54A and 1400N of the Code.

¹⁰ Even if bond counsel serves in more than one role in a particular transaction, e.g., bond counsel and issuer’s counsel, bond counsel and conduit borrower’s counsel, bond counsel and disclosure counsel, bond counsel may have only one client. In many cases, however, bond counsel will have different clients when serving in more than one role, e.g., bond counsel and underwriter’s counsel. The applicable rules regarding conflicts of interest must be reviewed when representing multiple clients in the same transaction or different transactions. *See* the discussion of Model Rule 1.7 (“Conflict of Interest: Current Clients”), *infra*.

- (2) assisting in evaluating the structure of the bond issue based on the economic and business decisions of their client (which may have been made in reliance on the advice of other participants in the transaction such as financial advisors)¹¹;
- (3) assisting the issuer or others in various aspects of preparing or reviewing the official statement, private placement memorandum, or other form of offering, disclosure, or continuing disclosure document¹² to be disseminated in connection with the sale of, or over the life of, the bonds;
- (4) assisting the issuer or others in obtaining from governmental authorities such approvals, rulings, permissions, and exemptions as bond counsel determines are necessary or appropriate in connection with the bonds;
- (5) assisting the issuer or others in structuring or evaluating the legal structure for investments of bond proceeds pending their expenditure that comply with state limitations on the investment of public funds and federal requirements for maintaining the exclusion of bond interest from federal income tax;
- (6) assisting the issuer or others in structuring or evaluating the legal structure of derivative agreements (e.g., interest rate swap agreements) to hedge interest rate risk or other risks relating to the bonds, including, if requested, drafting documents necessary to treat such agreements as “qualified hedges” for federal income tax purposes;
- (7) advising the issuer or others with regard to ongoing obligations with respect to the bonds;
- (8) pursuing validation proceedings or test cases where appropriate, or participating in relevant dispute resolution proceedings, including litigation;
- (9) preparing a mortgage, security agreement, or other document related to the bonds and their security;
- (10) rendering opinions on related matters such as:
 - (a) the applicability of particular provisions of federal and state securities laws;
 - (b) the eligibility of the bonds for investment by various fiduciaries and other regulated investors;
 - (c) the status of the bonds and related obligations under laws relating to creditors’ rights;

¹¹ As a result of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (“Dodd-Frank”), bond counsel should take care not to be considered a “municipal advisor,” which would require, among other things, registration by bond counsel as a municipal advisor with the SEC. Dodd-Frank defines a “municipal advisor” as any person that provides advice to a municipal entity on municipal finance products or the issuance of municipal securities, including advice with respect to structuring, timing, terms and other similar matters; however, an exception is provided for attorneys offering legal advice or providing services that are of a traditional legal nature. The SEC has proposed rules to implement permanent requirements for the registration of municipal advisors with the SEC and to exempt certain persons and activities from registration requirements. *See* SEC Release No. 34-63587, dated December 20, 2010. At the time of the publication of this Third Edition, the final rules have not been adopted.

¹² For many bond issues, the issuer or another “obligated person” (e.g., the conduit borrower) is required to file certain information with the Municipal Securities Rulemaking Board over the life of the bonds pursuant to Rule 15c2-12 under the Securities Exchange Act of 1934.

- (d) the validity and enforceability of security agreements, indentures and other documents related to the bonds and their security; and
- (11) assisting in presenting information to bond rating organizations or market participants.

Ideally, an engagement letter or other written communication from the client or the engaging party (or consented to or accepted by the client) specifies the full scope and nature of the roles undertaken by bond counsel in a specific engagement. *See Model Engagement Letters*. Although the scope and nature of the role of bond counsel can be delineated by a course of dealing with the client, a course of conduct in the transaction or the custom and practice in the industry, all parties to the transaction, including bond counsel, benefit by specifying clearly in writing: (i) the nature of bond counsel’s role in the transaction (e.g., whether it is representing the interests of the client for the sole purpose of giving the bond opinion, and thus as a non-advocate, or for additional purposes as the client’s advocate); (ii) the services to be provided to the client; (iii) that any services not specifically agreed to in the engagement letter are excluded from the scope and nature of the representation; and (iv) that the duration of the representation is limited.¹³ Additional services may be added later as needed by specific agreement, and compensation for such additional services may be considered at such later time. *See the discussion of Model Rule 1.2 (“Scope of Representation and Allocation of Authority Between Client and Lawyer”), infra.*

¹³ Historically, bond counsel’s engagement has been understood to end when the bond opinion is rendered upon the issuance of the bonds (even if certain tasks, such as filing IRS Form 8038 and preparing the transcripts, will be completed after closing). As a result of the continuing disclosure requirements of Rule 15c2-12, the emphasis in recent years by the IRS on post-issuance compliance and the growing frequency of IRS examinations, bond counsel may now be more likely to work on matters relating to the bonds after closing. If bond counsel expects to continue rendering services relating to a bond issue post-closing, bond counsel should consider addressing such services in the engagement letter for the issuance of the bonds or in a separate engagement letter.

SECTION II. THE BOND OPINION

Model Bond Opinion Report

The fourth edition of the *Model Bond Opinion Report*, distributed in 2003, is the most recent comprehensive opinion report published by NABL.¹⁴ The *Model Bond Opinion Report* includes model opinions for three basic categories of bonds: (1) general obligation bonds (i.e., bonds to which the full faith and credit of the issuer is pledged), (2) revenue bonds (i.e., bonds secured by specified revenues of the issuer), and (3) private activity bonds (i.e., conduit financing bonds).

In June 2009, NABL published a *Report on Bond Opinions for Direct Payment Build America Bonds* (the “*BABs Opinion Report*”), which supplements the *Model Bond Opinion Report* by analyzing certain special considerations relating to opinions on taxable Build America Bonds.¹⁵

Subjects Addressed

Bond counsel’s opinion usually addresses the following subjects:

- (1) that the bonds have been duly authorized and executed by and are valid and binding obligations of the issuer;
- (2) the source of payment or security for the bonds; and
- (3) whether and to what extent interest on the bonds is exempt from federal income taxes and from other taxes, if any, imposed by the state of issue.¹⁶

The opinion should be based upon an examination of material legal and factual sources (including certifications regarding relevant facts provided by persons in a position to have knowledge) regarding the subjects

¹⁴ As with prior editions of the *Model Bond Opinion Report*, in addition to significant other research, the NABL Committee on Opinions and Documents gave substantial attention to the forms of opinion used in non-municipal finance transactions and to numerous articles and publications on opinions by individuals and bar groups. The *Model Bond Opinion Report* cites the following as useful general legal opinion references: *Glazer and FitzGibbon, supra* at footnote 3, which includes an extensive annotated bibliography and copies of reports of various state bar groups; John M. Sterba, *Drafting Legal Opinion Letters* (2d ed. 1992); and Committee on Legal Opinions of Section of Business Law of the American Bar Association, “Guidelines for the Preparation of Closing Opinion,” 57 *Bus. Law.* 875 (2002) (“*Legal Opinion Guidelines*”), including “Legal Opinion Principles” (originally published at 53 *Bus. Law.* 831 (1998)) attached as *Appendix A* thereto. The Committee on Opinions and Documents cautioned, however, that care should be taken in using such references, as substantial differences between general commercial transactions and municipal financings can require substantially different opinions.

The *Model Bond Opinion Report* presumes that bond counsel either is or will become knowledgeable of the relevant considerations in rendering the bond opinion in a particular transaction. In addition to the general legal opinion literature cited in the *Model Bond Opinion Report* and referred to in the preceding paragraph, bond counsel should refer to NABL’s *Model Engagement Letters* (1998), *Tax Standard* (except as superseded by the *Model Bond Opinion Report*), and *Disclosure Roles of Counsel*.

¹⁵ The American Recovery and Reinvestment Act of 2009 (“ARRA”) added Section 54AA to the Code. Section 54AA authorized state and local governments to issue, before January 1, 2011, “direct payment” Build America Bonds (“BABs”) and receive a subsidy from the IRS in an amount equal to 35% of the interest payable on the bonds. Because the interest on direct payment BABs is includible in gross income of the holder, the *BABs Opinion Report* considers, for example, whether tax opinions should be requested and, if given, to whom they should be directed and their content.

¹⁶ See, e.g., the Model Opinion for General Obligation Bonds in the *Model Bond Opinion Report* at 3-4.

addressed therein.¹⁷ Instead of listing specifically the materials that bond counsel has examined, it is preferable to state that bond counsel has made a sufficient examination.¹⁸ As to material questions of fact, the opinion usually generally recites that bond counsel is relying on certifications.¹⁹ If opinions of other counsel are relied on, the bond opinion should state that fact explicitly unless, in rendering their opinion, bond counsel is rendering a concurring opinion.²⁰

Bond opinions traditionally are “unqualified.”²¹ Bond counsel may render an “unqualified” opinion regarding the validity and tax exemption of bonds if they are “firmly convinced” (also characterized as having “a high degree of confidence”)²² that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion.²³

In the area of federal income tax matters addressed in the opinion, certain special circumstances are recognized. Accordingly, bond counsel may give an “unqualified” opinion with respect to federal income tax matters if they are firmly convinced that, upon due consideration of the material facts and all relevant sources of applicable law on federal income tax matters, the U.S. Supreme Court would reach the federal income tax

¹⁷ In *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006), the United States Court of Appeals for the District of Columbia Circuit upheld the SEC’s finding that bond counsel violated Sections 17(a)(2) and 17(a)(3) of the 1933 Act because his opinions to prospective bond investors misrepresented the risk that interest on the bonds would be taxable. The parties in *Weiss* agreed that *Tax Standard* was the standard applicable to bond counsel’s unqualified opinion, which was dated June 28, 2000, prior to the publication of the 2003 edition of the *Model Bond Opinion Report*. The *Weiss* court cited *Tax Standard* (which had in turn cited the First Edition of this publication) in concluding that the examination made by bond counsel must be “reasonably sufficient” and that a bond opinion must be based on “reasonable” certainty. 468 F.3d at 855.

¹⁸ *Model Bond Opinion Report* at 7.

¹⁹ See, e.g., the Model Opinions in the *Model Bond Opinion Report* at 3-4, 20-21, 25-27.

²⁰ *Model Bond Opinion Report* at 7. Bond counsel generally does not rely on opinions of other counsel in rendering the opinions in paragraphs (1) and (2) in the body above. Exceptions to this practice usually involve special situations. See *Model Bond Opinion Report*, at 29 and 34, for additional discussion regarding reliance on opinions of other counsel.

²¹ As used in the *Model Bond Opinion Report*, the word “unqualified” describes an opinion that is subject only to customary assumptions, limitations and qualifications, and that is not otherwise “explained.” Consistent with this terminology, a bond opinion is not “unqualified” if it includes (1) a non-customary assumption, limitation or qualification, (2) a phrase such as “while the matter is not free from doubt” (generally referred to as a “qualified” opinion), or (3) a legal analysis for the opinion (generally referred to as a “reasoned” or “explained” opinion). *Model Bond Opinion Report* at 7. In contrast, “unqualified” opinions in business transactions generally may contain reasoning. See *Legal Opinion Guidelines*, *supra* at footnote 14, 57 *Bus. Law.* at 879 (a reasoned opinion may be unqualified or qualified).

²² In attempting to describe the degree of confidence that bond counsel, in their professional judgment, should reach before delivering an “unqualified” bond opinion, the 2003 edition of the *Model Bond Opinion Report* uses two phrases, “firmly convinced” and “high degree of confidence,” that are referenced in the Second Edition of *Glazer and FitzGibbon* at 71-74 as being applicable to “unqualified” opinions generally. These phrases are not used in the discussion of “unqualified” opinions in the Third Edition of *Glazer and FitzGibbon* because the authors concluded that the standard of care to which a lawyer is held in rendering opinions is usually a matter of state law and the articulation of the standard varies from state to state. See *Glazer and FitzGibbon*, *supra* at footnote 3, at 103-07.

²³ For issues of state law, the relevant court is the highest court of that state; for issues of federal law (e.g., matters relating to the federal income tax treatment of interest on the bonds), such court is the U.S. Supreme Court. The recitation that the court has been “properly briefed” presupposes that it has been duly briefed on the material facts and all relevant law. *Model Bond Opinion Report* at 7.

conclusions stated in the opinion or the IRS would concur or acquiesce in the federal income tax conclusions stated in the opinion.²⁴

Objectivity of the Bond Opinion

As previously described, a primary purpose of the bond opinion is to facilitate the sale of the bonds and thereby assist the issuer in carrying out the public purpose for which the bonds are issued. This result can be achieved only if bond counsel's opinion is accepted in the bond market. Since an advocate's opinion, arguing for debatable validity, would provide less assurance to investors, it is in the interest of all parties that bond counsel give an objective opinion. Objectivity is required even though bond counsel represents one or more of the parties in the transaction and may be, or may have been, engaged in other related or unrelated representation of some other party to the transaction.²⁵

The objectivity required of bond counsel is often misunderstood. It is sometimes assumed that in being objective bond counsel fails to exhibit proper loyalty to their client. This confusion stems from the supposition that a client is always best served by advocacy on the part of counsel. Advocacy, which may involve advancing a position based on a plausible but still debatable premise, is necessary in litigation and ordinarily appropriate in many other situations. Since a primary purpose of the opinion is to provide assurance to prospective investors, however, bond counsel's principal function is to render an objective opinion rather than plausible argument.

Limited Nature of the Bond Opinion

While the bond opinion is intended to provide assurance to investors, there are several limits to the scope and nature of that assurance.

First, the opinion of bond counsel does not constitute or imply a recommendation concerning the marketability or financial value of the bonds, or an assessment of the strength or appropriateness of the covenants made by any of the parties, or the possibility of default (other than on account of invalidity), or the eligibility or suitability of the bonds as an investment, or other legal or financial aspects of the bonds not expressly addressed in the opinion.

Second, a bond opinion is ordinarily dated as of the date of original issuance of the bonds, which is the date of original payment and delivery for the bonds. The opinion speaks only as of its date, and reflects the law and facts on such date. Unless expressly engaged to do so, bond counsel does not undertake to inform any person regarding any subsequent development that may affect the opinion.²⁶

Finally, unqualified bond opinions and other opinions delivered in bond transactions do not guarantee that the conclusions expressed in the opinions will be realized. Opinions convey merely the professional judgment of the lawyers who render the opinions.²⁷ Accordingly, even with an "unqualified" opinion, some residual risk

²⁴ *Model Bond Opinion Report* at 7-8.

²⁵ The objectivity that always has been a hallmark of bond counsel and the bond opinion also is required in rendering a closing opinion in a business transaction generally. See TriBar Opinion Committee, "Third-Party 'Closing' Opinions: A Report of the TriBar Opinion Committee," 53 *Bus. Law.* 591, 595-96 n.8 (1998) ("*1998 TriBar Closing Opinions Report*") (in rendering opinions the lawyer does not function as an advocate and his duty is to provide a fair and objective opinion); The American Law Institute, *Restatement (Third) of the Law Governing Lawyers* (2000) ("*Restatement*"), § 95 cmt. c (same).

²⁶ *Model Bond Opinion Report* at 5; see *Legal Opinion Principles*, 57 *Bus. Law.* at 884 ("An opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments").

²⁷ *Model Bond Opinion Report* at 8; see *1998 TriBar Closing Opinions Report*, 53 *Bus. Law.* at 596 ("An opinion is not a guaranty of an outcome, but rather an expression of professional judgment."); *Legal Opinion Principles*, 57 *Bus. Law.* at

exists that the court may disagree. This risk is assumed by investors, but is generally considered so small as to require no special or additional disclosure in the disclosure document.²⁸

Bond counsel should not, however, be lulled into the view that courts will necessarily decline to attach liability for opinions that prove to be in error. See “PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL - Responsibilities under General State Law,” *infra*.

Unique Aspects of the Bond Opinion

Bond opinions differ from third-party closing opinions in business transactions generally in several ways.

First, bond opinions are used in the marketing of the bonds. In the past, when bondholders received physical certificates evidencing the bonds, the bond opinion was delivered with or printed on the bond. Today, bondholders rarely receive physical certificates evidencing the bonds (because publicly offered municipal and corporate securities are now issued in book-entry form), but the form of the bond opinion is almost always included in the offering document for the bonds. In contrast, legal opinions given in corporate securities offerings (e.g., regarding the enforceability of the securities against the issuer) often are referred to only in passing in the offering document.²⁹

Second, bond opinions are more streamlined (e.g., contain fewer assumptions, limitations and exceptions) than many other closing opinions. This may be due in part to the fact that, historically, the bond opinion needed to fit in the space available on the printed bond certificate. This is also due to resistance on the part of transaction participants and investors in municipal bonds to the inclusion of any exceptions that are not clearly customary.

Third, with respect to tax matters, bond opinions are unqualified, in contrast to tax opinions rendered in many other contexts, which often include reasoning and are expressed with a lesser degree of certainty.

Fourth, a bond opinion is normally intended to be relied upon by the issuer, the conduit borrower, the underwriters, bondholders (both the initial and subsequent owners of the bonds) and any trustee for the bondholders, notwithstanding by whom bond counsel is engaged or to whom a bond opinion is addressed.³⁰ For third-party closing opinions generally, only the addressees of the opinion are entitled to rely upon the opinion (absent specific language authorizing others to rely upon the opinion); therefore, considerable attention is paid to

832 (“The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.”); *Glazer and FitzGibbon* at 103-05.

²⁸ *Model Bond Opinion Report* at 8-9. As explained in footnote 17, *supra*, the parties in *Weiss* agreed, for purposes of that case, that *Tax Standard* was the standard applicable to bond counsel’s unqualified opinion. The *Weiss* court, citing *Tax Standard* (which was citing the 1987 edition of the *Model Bond Opinion Report*), concluded that: “According to the National Association of Bond Lawyers, the purpose of an unqualified bond opinion is to ‘assure [] investors that . . . there is no reasonable risk of . . . taxability that the investors should take into account in making an investment decision, except for risks disclosed in the opinion.’” 468 F.3d at 851 (emphasis added). This statement is not included in the 2003 edition of the *Model Bond Opinion Report* and, therefore, has been superseded to the extent it is cited in *Tax Standard*. See footnote 2, *supra*. Given the historical purpose (i.e., marketing of the bonds) and standard (i.e., a “high degree of confidence”) for bond opinions, bond counsel should be aware that some investors may conclude that they can rely on an unqualified bond opinion, absent any special or additional disclosure in the disclosure document, in determining not to factor the risk of invalidity or taxability into the price they are willing to pay. This perception does not change the examination process involved in, or level of certainty that bond counsel should reach before, delivering an “unqualified” opinion.

²⁹ When corporate debt securities are publicly offered, an opinion of counsel is required to be filed with the SEC as Exhibit 5 to the registration statement. Exhibit 5 opinions are publicly available and may be relied upon by purchasers of the securities.

³⁰ See *Model Bond Opinion Report* at 5.

identifying (and limiting) the addressees. Practice varies regarding the addressees of a bond opinion. Frequently, the bond opinion is addressed to the issuer, the underwriters (or other original purchasers), or both. Occasionally, the bond opinion is addressed to an appropriate officer of the issuer or to another party (such as the paying agent). Sometimes the bond opinion is not addressed to anyone.³¹

Fifth, parties to transactions in which legal opinions are rendered normally are advised by counsel as to the scope and acceptability of those opinions; however, bondholders generally do not engage counsel to assist them in reviewing and understanding the bond opinion.³²

Finally, although a bond opinion speaks only as of its date, the fact that a bond opinion will be relied upon by new bondholders through purchases in the secondary market for the life of the bonds makes the continuing nature of bond counsel's relationship to the opinion different from the normal third-party closing opinion. For example, in recent years there have been several instances when bond counsel felt compelled to "withdraw" a bond opinion after issuance of the bonds. *See* the discussion of Model Rule 4.1 ("Truthfulness in Statements to Others"), *infra*, regarding circumstances under which bond counsel may be required to withdraw their opinion. The intent of bond counsel's action in these situations was to prevent existing and new bondholders from relying on the continuing correctness of the opinion's conclusion. Withdrawing a bond opinion implicates a number of rules of professional conduct in varying degrees because, among other circumstances, the client of bond counsel for the issue may no longer be an active client, the information and conclusions which resulted in the withdrawal may not be permitted to be disclosed under the applicable rules of professional conduct and bond counsel may be in conflict with their client (whether current or former) as to either the necessity for the withdrawal or the responsibility for the problem leading to the withdrawal. In addition, the antifraud provisions of the securities laws should be considered in connection with such an action when the bonds in question are still available to be purchased in the market.³³

³¹ *See Model Bond Opinion Report* at 5. If bond counsel's client is the issuer, and the bond opinion is addressed to the issuer, the bond opinion may initially appear not to be a "third-party" closing opinion (which could implicate policies that many firms may have regarding delivery of opinions to clients); however, given the historical and modern marketing purposes of the bond opinion (e.g., it is normally intended to be relied upon by third parties such as initial and subsequent owners of the bonds), it should be considered a third-party closing opinion regardless of the addressee (if it is addressed to anyone).

³² Bond counsel should consider whether unrepresented bondholders are familiar with "customary practice" applicable to opinion letters. *See 1998 TriBar Closing Opinions Report*, 53 *Bus. Law.* at 600-601 & n. 24; *see also* "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions," 63 *Bus. Law.* 1277 (2008).

³³ One irony of this situation is that a withdrawal usually will not be undertaken due to an adverse IRS audit. Most of those audits result in a settlement agreement which, usually at a cost to some party to the transaction, ensures that the tax portion of the bond opinion continues to be correct. Withdrawal, logically then, is a consideration only if some alternative action will not "cure" the problem identified.

SECTION III. PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL

In performing their functions, bond counsel should understand and carry out the professional responsibilities that arise from various sources, including applicable rules regarding the professional conduct of lawyers generally, federal tax law, federal securities law and general state law. Because bond counsel's professional responsibilities to participants in a bond transaction may differ based on whether such participants are deemed to be clients or non-clients and what functions they perform, a threshold issue for bond counsel in each financing is identifying their client (or clients) and the functions they will perform.

Client Relationship

As in most multiparty commercial transactions, the documentation for bond financings includes allocations of benefits, responsibilities and risks among the parties thereto — the issuer, the bondholders, other parties such as an underwriter, a trustee, or a credit or liquidity provider, and, in conduit financings, the conduit borrower. Provisions relating to matters such as control and disbursement of borrowed proceeds, investment of funds, choice and supervision of contractors, financial statement and covenant compliance reporting, insurance and liquidity requirements, remedies upon default, and indemnification have numerous different possible structures, with varying degrees of effect on one or more parties. Even where conventional or standard terms for such provisions are used, different modes for the expression of particular matters may significantly shift risks or have distinctly different consequences for each party. Given the possible variations, there are areas in which negotiation is possible, and each party is entitled to be advised of advantageous alternatives and assisted by counsel in pursuing them. In some situations, bond counsel may undertake additional advocacy functions, even though doing so goes beyond the original historical function of bond counsel. Indeed, in modern bond transactions it is not unusual to see bond counsel both structuring the documentation and helping one or more parties advocate positions on the key aspects thereof.

The Model Rules assume that if a lawyer renders professional services in a transaction, whether or not the engagement specifically calls for additional advocacy-type services, at least one party to the transaction is a client of that lawyer and as such is entitled not to have the lawyer render such services for the benefit of an adverse party in the transaction without the client's consent. Historically, many practitioners thought the objectivity required of bond counsel resulted in bond counsel being "counsel to the transaction" or counsel to the ultimate bondholders. This view reflected the original role of bond counsel as an independent counsel hired (typically by the underwriter or initial purchaser of the bonds) to review the transcript of bond proceedings and to provide an objective opinion as to the validity of the bonds. This view also continued to fit as bond counsel began to take on additional functions such as being the preparer of the documentation and supervisor of the bond proceedings. Under this view, bond counsel was not confronted with a problem when suggesting terms that might be more favorable to one party than another if, in bond counsel's best judgment, such terms improved the acceptability of the bonds in the market, because all parties are thought to desire such a result.

Even though this historic concept of independent expertise underlying the role of bond counsel runs counter to notions of client advocacy and inhibits delineation of bond counsel's duties to particular parties, bond counsel must identify a client in order to analyze and deal appropriately under the Model Rules with a number of relatively common situations involving the duties of loyalty and confidentiality, the client's rights under the attorney-client privilege rules regarding communications to non-clients, and the necessity to obtain informed client consent in many situations. Due to the relationship of attorney and client and the methods of handling problems within that relationship as envisioned by the Model Rules, it is important that the client be an entity capable of receiving communications and, if necessary, giving consent and instructions. These inherently

practical considerations require that the client of bond counsel not be simply “the transaction” or “all future bondholders.”³⁴ Bond counsel should instead identify a client from among the various parties to the transaction.

There are several obvious possibilities for client identification — the party who will pay, directly or indirectly, bond counsel’s fee (the issuer or, if there is one, the conduit borrower), the party who first introduces bond counsel to the transaction, or the party most clearly relying on bond counsel’s opinion and judgment (for example, where a conduit issuer is the issuer of similar series of bonds in a program that benefits a number of different borrowers over many years). Other factors also may affect client identification such as whether bond counsel has access to financial or other confidential information of any party, has an ongoing client relationship with a party, whether other parties are separately represented by other attorneys, local custom in similar transactions, and even the mundane consideration of to whom bond counsel speaks most frequently in the course of the transaction.

Depending on the particular facts, an argument could be made for various parties to a transaction being the client of bond counsel. In the absence of other compelling reasons, at least in ordinary governmental purpose transactions, if the issuer has selected and retained bond counsel, bond counsel’s client is likely to be the issuer, and the scope of that representation needs to be defined.³⁵

Given the different possibilities for client identification and the practical and ethical importance of certainty in the identification, bond counsel would benefit from having an engagement letter that identifies their client and the duties and responsibilities of bond counsel in the transaction. This letter should make clear who the client is and whether, in addition to rendering the opinion and drafting the bond proceedings required for the transaction, bond counsel undertakes any other functions, such as advocating, insofar as the structure of the transaction or any other matter is concerned, the particular interests of the client.³⁶ Accomplishing this clarification may require not only delivering an engagement letter to the client, but also advising other parties as to the identity of bond counsel’s client, which should be done in the bond opinion itself³⁷ and earlier in the transaction if circumstances warrant. Otherwise, doubt as to the matter might arise and courts might infer that bond counsel has a client relationship with any party who reasonably supposed itself to be a client.³⁸ Such inference after the fact of the existence of an unintended attorney-client relationship is fraught with danger to the lawyer who may unwittingly have had a potential conflict of interest and who may have expanded the number of persons who would have standing to maintain a malpractice action.³⁹ Similarly, an after-the-fact inference of a

³⁴ See *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 832 (4th Dist. 1997), in which the court specifically rejected the theory that bond counsel was counsel to the transaction as being “unworkable and undermining the very nature of the attorney-client relationship.”

³⁵ See NABL’s *The Selection and Evaluation of Bond Counsel* (1998), especially Sections V(E) and VII, and *Model Engagement Letters*, *supra* at footnote 14, especially Commentary (I).

³⁶ For bond lawyers, the client frequently will be a public body. This fact alone raises a host of intriguing questions referred to throughout this Third Edition, concerning, e.g., privilege, conflicts, and organizational hierarchy. A useful discussion of some of these issues generally, not in the context of public finance law, is found in Smith, “Representing the Government — Who Is My Client, Anyway?,” *Bench and Bar* (Minnesota Bar Association), December 1994.

³⁷ *Model Bond Opinion Report* at 6.

³⁸ See *Matter of Petrie*, 742 P.2d 796, 800-801 (Ariz. 1987) and *Matter of Pyatt*, 312 S.E.2d 553, 554 (S.C. 1984). This is not to imply that any participant in the transaction would automatically be entitled to claim bond counsel as its own advocate in the event of some ambiguity, but a lack of clarity on this point may later be seized on as an opportunity to secure an advantage.

³⁹ Many jurisdictions still require privity, which is provided by the existence of an attorney-client relationship, for the maintenance of an action for malpractice as opposed to an action for, e.g., negligent misrepresentation. See the discussion in “PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL – Responsibilities under General State Law,” *infra*, and the cases cited therein.

broader range of responsibilities than was intended might result in a finding of unperformed duties, breach of confidentiality or loss of the attorney-client privilege, each of which may result in liability for the attorney. See the further discussion of these matters with respect to Model Rule 1.2 (“Scope of Representation and Allocation of Authority Between Client and Lawyer”), Model Rule 1.5 (“Fees”), and Model Rule 1.7 (“Conflict of Interest: Current Clients”), *infra*.

When bond counsel has more than one client in a particular transaction, they should acknowledge this fact in a single engagement letter to all clients or, if necessary, in separate engagement letters to each client setting forth the duties and responsibilities of bond counsel, the limits, if any, on each representation and, most importantly, providing for the informed written consent of each client to the multiple representation. As when there is only one client for bond counsel, efforts should be made to inform all other parties they are not the clients of bond counsel. Indeed, it may be more important in the case of multiple parties since other parties will see counsel advocating or acting on behalf of more than one party — thus making it easier for them to think such counsel is also working on their behalf.

Under the Model Rules, the identity of the client has significant implications for the scope of the duties of counsel. Further, as is true with other securities transactions, bond counsel should not conclude that identification of a client will preclude substantive law obligations to non-clients.⁴⁰ The cases described under “PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL - Responsibilities under General State Law,” *infra*, demonstrate that general state law principles, such as concepts of misrepresentation, reliance, etc., as well as statutory provisions, impose duties on bond counsel that are owed to persons other than the client. These concepts parallel the view of many bond counsel that, even if they are hired by one party, they also owe duties and have responsibilities to the bondholders and perhaps to others in the transaction.⁴¹

Bond counsel should be careful to consider and to explain to their clients the basis for and the implications of such responsibilities owed to non-clients. Those duties are not generally in derogation of or conflict with the duties owed to the client. For example, with respect to rendering the bond opinion, the duty owed to the client requires that same exactitude and objectivity required by the duty owed to other persons. Likewise, with respect to disclosure matters, the duty of bond counsel to their client (almost invariably an organization rather than an individual, concerning which see the discussion of Model Rule 1.13 (“Organization as Client”), *infra*) is to help the officials and agents of the client organization fulfill their own duty; i.e., to make sure that the organization is acting lawfully. On the other hand, if bond counsel is representing a client as its advocate in negotiating terms of the documents, so long as the other parties to the transaction are aware of that role and are, or have an opportunity to be, represented by counsel on such matters, then arguing for a structure or advantage that maximizes the client’s interest does not infringe upon a duty owed to others or create a conflict.

⁴⁰ See discussions in Clayton Gillette, “Judicial Conceptions of the Role of Bond Counsel,” 7 *Mun. Fin. J.* 65 (1986), and Robert Amdursky and Clayton Gillette, *Federal Regulation of Municipal Securities* (1992), Section 6.6.1, “Liability of Bond Counsel.”

⁴¹ This concept is not unlimited. See *DeMartino v. Marion County*, 184 P.3d. 1176 (Or. 2008), to the effect bond counsel's duty is to their client or an intended third-party beneficiary, but not to a member of the public of the jurisdiction for which bonds are issued. The court in *Bank of New York v. Sheff*, 2003 WL 23497315 (Md. Cir. Ct. 2003), held that “. . . to establish a duty owed by the attorney to the nonclient, the latter must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship.”

Responsibilities under Rules of Professional Conduct

In the course of and after identifying their client (or clients) and the functions to be performed, bond counsel should understand and comply with the rules of professional conduct for lawyers generally in the applicable jurisdiction (or jurisdictions).

The Model Rules, while emphasizing the litigation context, do describe to some extent a lawyer's role that approximates bond counsel's function. See the discussion of Model Rule 2.3 ("Evaluation For Use by Third Persons"), *infra*.

Nevertheless, the differences between partisan representation in openly adversarial contexts and providing counsel and advice in the issuance of securities make application of the Model Rules to many situations in securities transactions somewhat difficult. Bond counsel should note, however, that notwithstanding such difficulties of application or the historic practice and general custom in the industry, the Model Rules (as and where adopted) do govern them in disciplinary matters and may be taken as evidence of standards of conduct in malpractice litigation.⁴²

Many jurisdictions substantially modified the Model Rules prior to or subsequent to adopting them. Individual state variations must be reviewed carefully by lawyers practicing in such jurisdictions. This Third Edition focuses on the Model Rules and not the actual rules adopted by the states, because of the variations in the text and interpretations of those rules. Many of the primary and recurrent questions raised by the Model Rules with respect to the professional responsibilities of bond counsel are discussed in the last section in the order of the relevant Model Rules. These discussions of case law and ethics opinions in various states are intended to be illustrative only of some of the issues that bond lawyers should consider in their area of practice.⁴³

⁴² The SEC, in footnote 21 of *In the Matter of William R. Carter and Charles J. Johnson, Jr.*, 22 S.E.C. Docket No. 292, 1981 WL 384414, at 5 (1981), has described its view of the different, and perhaps higher, professional responsibilities of the transactional lawyer:

We have previously noted the peculiarly [*sic*] strategic and especially central place of the private practicing lawyer in the investment process and in the enforcement of the body of federal law aimed at keeping that process fair... [T]he task of enforcing the securities laws rests in overwhelming measure on the bar's shoulders Very little of a securities lawyer's work is adversary in character. He doesn't work in courtrooms where the pressure of diligent adversaries and alert judges check him. He works in his office where he prepares prospectuses, proxy statements, opinions of counsel, and other documents that we, our staff, the financial community and the investing public must take on faith. This is a field where unscrupulous lawyers can inflict irreparable harm to those who rely on the disclosure documents that they produce. Hence we are under a duty to hold our bar to appropriately rigorous standards of professional honor.

⁴³ Among the sources that may be consulted for further guidance in these matters are: Ellen J. Bennett, Elizabeth J. Cohen and Martin Whittaker, *Annotated Model Rules of Professional Conduct* (7th ed. 2011) ("*Annotated Rules*"), published by the ABA Center for Professional Responsibility; Ronald D. Rotunda and John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility 2011-2012* (2011), also published by the ABA Center for Professional Responsibility ("*Ethics Deskbook*"); Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* (3d ed. 2001); *ABA/BNA Lawyers Manual on Professional Conduct*; Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* (2011 ed.); "Part IX: Ethical Considerations" in *Disclosure Roles of Counsel*; and "Securities Law Duties of Bond Counsel," *supra* at footnote 4. The *Restatement, supra* at footnote 25, is a very useful resource, especially with reference to general state law responsibilities.

Responsibilities under Federal Tax Law

The Secretary of the Treasury is authorized to regulate the practice of representatives, including but not limited to attorneys, before the Treasury Department, including the IRS.⁴⁴ The Secretary has published these regulations in Circular 230.⁴⁵

Circular 230 defines practice before the IRS to include rendering written advice with respect to any entity, transaction, plan or arrangement having a potential for tax avoidance or evasion. Because most bond opinions address the tax-exemption of interest on, or other tax-benefitted characteristics of, the bonds under federal tax law, bond counsel are generally considered to be subject to Circular 230.⁴⁶

Circular 230 requires an attorney practicing before the IRS to “exercise due diligence.”⁴⁷ The diligence that bond counsel should undertake to comply with Circular 230 in connection with a particular bond issue will vary depending on the facts and circumstances and is beyond the scope of this Third Edition; however, it seems clear that, at a minimum, bond counsel cannot rely on factual representations or certifications that they know to be false or ignore “red flags” that should prompt further investigation.

A practitioner who provides a “covered opinion” must comply with the standards of practice in § 10.35 of Circular 230, which require the practitioner to, among other things, identify in the opinion all relevant facts and all “significant” federal tax issues unless the practitioner opts out of such requirements by including certain specified disclosures in the opinion. Because a “State or local bond opinion”⁴⁸ addressing the exclusion of interest from gross income is not deemed to be a “covered opinion,” the standards of practice in § 10.35 do not apply to bond opinions for traditional tax-exempt bonds.⁴⁹

A practitioner cannot represent a client before the IRS if the representation involves a conflict of interest, unless the practitioner reasonably believes she can provide competent and diligent representation to each affected

⁴⁴ 31 U.S.C. § 330.

⁴⁵ 31 C.F.R., Part 10.

⁴⁶ *See, e.g.*, IRS Notice 2005-47, 2005 – 1 C.B. 1373 (June 7, 2005); *see also Disclosure Roles of Counsel* at 264.

⁴⁷ Circular 230, § 10.22.

⁴⁸ A “State or local bond opinion” is defined in § 10.35(b)(9) of Circular 230 as “written advice with respect to a Federal tax issue included in any materials delivered to a purchaser of a State or local bond in connection with the issuance of the bond in a public or private offering, including an official statement (if one is prepared), that concerns only the excludability of interest on a State or local bond from gross income under section 103 of the Internal Revenue Code, the application of section 55 of the Internal Revenue Code to a State or local bond, the status of a State or local bond as a qualified tax-exempt obligation under section 265(b)(3) of the Internal Revenue Code, the status of a State or local bond as a qualified zone academy bond under section 1397E of the Internal Revenue Code, or any combination of the above.” IRS Notice 2005-47, *supra* at footnote 46, provides an expanded definition of “State or local bond opinion” that the IRS will apply until § 10.35(b)(9) of Circular 230 is amended.

⁴⁹ On December 20, 2004, when final regulations adopting § 10.35 of Circular 230 were published, § 10.39 of Circular 230, which would set standards for practice before the IRS relating to “State or local bond opinions,” was proposed. Proposed § 10.39 is to be effective 120 days after it is finalized; however, as of the date of this Third Edition, proposed § 10.39 has not been finalized. Federal tax opinions rendered by bond counsel in connection with taxable municipal bonds (including Build America Bonds) or tax credit bonds may not constitute a “State or local bond opinion” within the meaning of § 10.35(b)(9) of Circular 230; therefore, bond counsel should consider whether such an opinion is a “covered opinion” under § 10.35 of Circular 230.

client and each affected client waives the conflict and gives informed consent, confirmed in writing within 30 days.⁵⁰

Circular 230 is enforced by the IRS Office of Professional Responsibility. Sanctions for violations of Circular 230 include censure (i.e., a public reprimand), suspension or disbarment from practice before the IRS and/or a monetary penalty not to exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty.⁵¹

Bond counsel also may be subject to monetary penalties under Section 6700 of the Internal Revenue Code of 1986, as amended (the “Code”) if (1) bond counsel organizes or participates in the sale of bonds and (2) knows or has reason to know that any statement made or furnished by bond counsel (such as the bond opinion) with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the bonds was false or fraudulent as to any material matter.

Responsibilities under Federal Securities Law

Although case law confirms that bond counsel are not generally responsible (absent clear notice of a material disclosure issue) for the disclosure in the offering document accompanying a bond issue,⁵² in 2005 the SEC ordered a bond counsel to cease and desist from violating §§ 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and disgorge his fee, plus prejudgment interest, after concluding that he had negligently rendered his unqualified opinion that interest on certain notes would be exempt from federal income taxation.⁵³ In upholding the SEC’s decision, the United States Court of Appeals for the District of Columbia concluded that: (1) under the federal securities laws, a statement of opinion includes an implied representation that the speaker rendered the opinion in good faith and with a reasonable basis, and (2) there can be no reasonable basis for an opinion without a reasonable investigation into the facts underlying the opinion.⁵⁴

Responsibilities under General State Law

While a bond opinion is not a guarantee of the matters covered by the opinion, erroneous opinions can result in liability for bond counsel under general state law. In *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, 892 P.2d 230 (Colo. 1995), for example, the Colorado Supreme Court refused to dismiss on summary judgment a cause of action against bond counsel by the purchasing bank (which was not bond counsel’s client).

⁵⁰ § 10.29 of Circular 230. In an IRS examination of a bond issue, the IRS takes the position that an inherent conflict exists when the bond counsel on the transaction also represents the issuer of the bonds in the examination. This position appears to be based on the view that, because the IRS may impose penalties directly upon bond counsel under Section 6700 of the Code, bond counsel’s representation of the issuer is limited by counsel’s own personal interest even if there is no evidence or indication that bond counsel’s legal analysis is or ever will be a critical issue in the examination (in contrast, for example, to an issuer’s failure to comply with tax covenants post-issuance). Although there is some variation among IRS agents conducting bond examinations, if bond counsel’s client is the issuer, the IRS generally requires a waiver from the issuer of the bonds to be in writing and delivered to the IRS before bond counsel is allowed to represent the issuer in the examination.

⁵¹ § 10.50 of Circular 230. In 2010, the Office of Professional Responsibility suspended a bond attorney for at least 24 months from practicing before the IRS for writing a false tax opinion. The bond attorney admitted to giving false opinions “knowingly, recklessly, or through gross incompetence” and failing to exercise due diligence in violation of Circular 230. In the proceeding at issue, bonds were issued to finance an office building outside of the jurisdiction of the issuer, which led to a determination that the bonds were not validly issued. *See* IR-2010-57 (May 5, 2010).

⁵² *Disclosure Roles of Counsel* at 117.

⁵³ *In re Weiss*, SEC Rel. Nos. 33-8412, 34-49596 (Dec. 2, 2005).

⁵⁴ *Weiss*, *supra* at footnote 17, 468 F.3d at 855-56.

A prior suit had successfully challenged the valid existence of the issuer. Bond counsel had provided an opinion, at the time of the bond issuance while the prior suit was pending, that the prior lawsuit was without merit. The Colorado Supreme Court, in the later action by the bond purchaser against bond counsel, rejected a claim that lawyers have malpractice liability to non-clients but affirmed the existence of a cause of action for negligent misrepresentation, premised on *Restatement (2d) of Torts*, Section 552, where the legal opinion contained misstatements of or omitted material facts (although there was a disagreement among the litigants and the majority and dissenting opinions whether the alleged misrepresentation was one of fact or law). *See also Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987), affirming an actual judgment against an attorney on a lien-position opinion given to a lender, for failure to exercise that degree of care owed to the non-client lender,⁵⁵ and *Kline v. First Western Government Securities, Inc.*, 24 F.3d 480 (3rd Cir. 1994), in which the Third Circuit Court of Appeals ignored clear statements in a tax opinion that the opinion was for the benefit of the offeror-client only, that it was not to be relied on by anyone else, and that investors should consult their own tax advisors in holding that investors had a fraud cause of action against the author of the opinion letter, who allegedly knew or should have known that the hypothetical facts upon which the opinion letter was based did not adequately represent the actual facts of the transactions and that the opinion letter was being distributed to potential investors.

As noted above, in the context of disqualification and disciplinary proceedings, tribunals generally invoke the Model Rules as the governing standard; however, general legal principles impose duties on bond counsel running to clients and non-clients which are of equal force and which frequently have more severe consequences if breached. These principles arise primarily from common law concepts of agency, representation and reliance, and from statutory rules, both civil and criminal, relating to securities transactions. While this Third Edition does not purport to catalogue such general state law precepts and the available sanctions or remedies for their violation, bond counsel must bear in mind the need to be familiar with and mindful of such concerns.⁵⁶ Moreover, although the Model Rules are promulgated as ethical standards, they may also have serious legal consequences in the general state law context. Some courts have held that the applicable ethical standards contained in the Model Rules or the predecessors thereof constitute evidence of appropriate standards of care in lawsuits alleging malpractice.⁵⁷

Most of these cases recognize that violation of an ethical rule does not constitute negligence *per se* and is, therefore, not alone sufficient to give rise to a cause of action.⁵⁸

Some courts, however, have gone further. In *Shaw v. Everett*, 582 So.2d 195 (La. App. 4 Cir. 1988), breach of a professional standard was held to give rise to a cause of action asserted by a non-client who was

⁵⁵ In *Greycas*, the misrepresentation was clearly factual and was intentional rather than negligent, although the cause of action was premised on negligent misrepresentation.

⁵⁶ See *supra* at footnote 40 for an introduction to some of these concerns.

⁵⁷ See *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980) (discussing the Model Code); *Miami Intern. Realty Co. v. Paynter*, 841 F.2d 348 (10th Cir. 1988) (also discussing the Model Code); and *Pressley v. Farley*, 579 So. 2d 160 (Fla. Dist. Ct. App. 1991) (discussing the Model Rules). This reasoning could even be applied to this Third Edition, although such use of this Third Edition is specifically not intended by NABL.

⁵⁸ See, e.g., *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469 (4th Cir. 1992) and *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991), which specifically hold that ethical rules, such as those concerning a law firm's duty to withdraw from representation or to disclose a client's misrepresentations to third persons, do not create a legal duty of disclosure for the lawyer to a non-client under federal securities law; although the court in *Schatz*, in concluding that there was no duty of disclosure in that particular case (which did not involve a bond transaction), specifically distinguished cases where bond counsel had issued reckless and misleading bond opinion letters.

damaged thereby, even though no duty was owed specifically to the non-client.⁵⁹ Similarly, in *Avianca, Inc. v. Corriea*, 705 F. Supp. 666 (D.D.C. 1989), the court stated:

Although the civil cause of action for disgorgement of attorneys' fees and profits springs from the common law fiduciary and ethical obligations owed a client by an attorney, "[w]hether or not a breach of those obligations has occurred may be determined by resort to the standards set forth in the [Model Code] disciplinary rules." [Citation omitted.] . . . The disciplinary rules . . . , while not strictly providing a basis for a civil action, nonetheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the [disciplinary rules] is conclusive evidence of a breach of the attorney's common law fiduciary obligations. [Citation omitted.]

Plaintiffs correctly note that in order to prevail on their limited cross motion for a summary judgment, it is enough to show, as a matter of law, that defendants' conduct on one or more occasions or in one or more transactions breached a fiduciary obligation owed plaintiffs.

705 F. Supp. at 678-679. However, on appeal, the court found that violation of a disciplinary rule created only a rebuttable presumption of a breach of a fiduciary duty.⁶⁰ The disciplinary rules that the attorney was alleged to have breached involved a failure to disclose fully and affirmatively potential conflicts of interest.⁶¹

Even though the Model Rules do not usually give rise directly to a cause of action, the principles on which they are based may, in certain instances, be considered as common law fiduciary principles predating the Model Rules, and those common law principles may be a sufficient basis for liability or injunctive relief. This was the specific and emphatic ruling of the Pennsylvania Supreme Court with respect to concerns virtually identical to those reflected in the Model Rules in *Maritrans GB Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (1992), where the court enjoined a law firm from representing, in labor negotiations, the competitor of its longstanding client, even though the two law clients were not adverse to one another in any legal context.

Finally, in *Matter of Smith*, 419 S.E.2d 227 (S.C. 1992), an attorney's failure to investigate certain pre-sale documentation prior to executing a certification in connection with the bond issue was held to constitute a violation of Model Rule 8.4 ("Misconduct"), resulting in a public reprimand. That same conduct, it should be noted, was also the basis for a criminal prosecution that resulted in a guilty plea for violation of the Securities Act of 1933.

⁵⁹ The result in *Shaw* may have been modified in Louisiana by the subsequently enacted La. Rev. Stat. Section 6:1352, which provides that failure to comply with professional rules does not constitute malpractice *per se*, at least in the context of representing federally-insured financial institutions.

⁶⁰ *Avianca, Inc. v. Harrison*, 1995 U.S. App. LEXIS 30863 at 5-6 (D.C. Cir 1995) (unpublished opinion).

⁶¹ As a practical matter, it would appear any violation of an ethical rule, even if unrelated to the violation of a perceived duty, may be enough to produce an overall negative result in litigation. See, e.g., *Pontiac School District v. Miller, Canfield, Paddock & Stone* 563 N.W.2d 693 (Mich. App., 1997).

SECTION IV. DISCUSSION AND ANALYSIS OF CERTAIN MODEL RULES

Model Rules Regarding the Client-Lawyer Relationship

Model Rule 1.1 Competence

Model Rule 1.1 requires that an attorney provide competent representation to a client. As stated in the Comment to this Model Rule, factors to be considered in determining competence include, among other things, the relative complexity and specialized nature of the matter and the lawyer's training and experience in the field in question.⁶²

Bond lawyers practice in a field that is particularly specialized and at the same time requires knowledge of the fundamental principles of several legal areas. Bond lawyers must be familiar with (or, in particular transactions, associate other lawyers who are familiar with) those areas for which bond counsel has accepted responsibility in the engagement, including the highly technical fields of municipal/local government law, tax law and securities law. Each attorney acting as bond counsel needs an appreciation of the general nature and requirements of all three of these areas of law in order to seek and obtain the assistance of others with requisite expertise.

In particular bond transactions, issues may arise that require knowledge of other practice areas, such as corporate law, bankruptcy and creditors' rights, real estate and commercial law (e.g., Article 9 of the Uniform Commercial Code). It is not unusual for particular bond transactions to involve some form of dispute resolution, administrative hearing or litigation, including validation proceedings, test cases and direct challenges to the issuer's authority to issue bonds. In these situations, the scope of bond counsel's representation may necessarily involve other practice areas, such as administrative, regulatory, utility, injunctive relief and eminent domain matters. As stated in the Comment to Model Rule 1.1: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge." Depending on the nature and scope of the engagement, bond counsel need not necessarily be able to advise their client on questions that may arise in these other practice areas. If such issues are within the scope of the engagement, adequate representation can be provided through necessary preparation and study or through the association of a lawyer of established competence. Of course, each lawyer in the

⁶² Failure to comply with this Model Rule may amount to malpractice by negligence, for which an attorney may be held liable to his client. *See Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975):

The jury could well have found defendant's refusal to educate himself to the applicable principles of law constituted negligence which prevented him from exercising informed discretion with regard to his client's rights.

As the jury was correctly instructed, an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. [Citations omitted.] If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved. [Citation omitted.] But even with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem. In the instant case, ample evidence was introduced to support a jury finding that defendant failed to perform such adequate research into the question of the community character of retirement benefits and thus was unable to exercise the informed judgment to which his client was entitled.

transaction, including specialists, co-counsel and supervisory or subordinate lawyers, must individually address the issue of his or her competence and that of other lawyers (if any) for whom he or she is responsible.⁶³

In 1989, NABL published *Standards of Practice*, which consists of three reports relevant to the maintenance of professionalism and competence.⁶⁴ Bond lawyers are encouraged to review those reports for a historical discussion of the issues raised in this area.

To maintain competence, the Comment to Model Rule 1.1 states that “a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” Ongoing legal education is required by many jurisdictions.

Model Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

Model Rule 1.2 addresses the scope of representation and the allocation of authority between a client and the lawyer. It provides that the “lawyer shall abide by a client’s decisions concerning the objectives of representation” The Wisconsin Supreme Court highlighted the importance of the wishes of the client in *Olfe v. Gordon*, 286 N.W.2d 573, 577 (Wisc. 1980):

It has generally been recognized that an attorney may be liable for all losses caused by his failure to follow with reasonable promptness and care the explicit instructions of his client. Moreover, an attorney’s honest belief that the instructions were not in the best interests of his client provides no defense to a suit for malpractice. (Quoting Note, *Attorney Malpractice*, 63 *Colum L. Rev.* 1292, 1302 (1963).)

But see “PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL - Client Relationship,” *supra*, concerning the objectivity of the opinion and bond counsel’s duties to non-clients as limits on the client’s ability to direct the activities of bond counsel.

As previously noted, there are considerations that argue strongly in favor of the use of engagement letters regardless of whether such use is required. For example, as noted above regarding the formation of an attorney-client relationship, courts may view the client’s subjective understanding as the basis for determining the scope of representation, so long as that understanding is reasonable in light of all the facts and circumstances. Engagement letters make it possible to delineate clearly the scope of bond counsel’s engagement. While there may be factors that allow the parties to the transaction to have a clear understanding of the role of bond counsel without an engagement letter, an engagement letter will assist bond counsel in clarifying such role both for bond counsel and for the client and (if necessary) in obtaining consents and waivers. NABL’s *Model Engagement Letters* contains helpful forms of agreements that set forth the scope of bond counsel services.

In certain circumstances, a bond lawyer may wish to limit the scope of representation more narrowly than the traditional bond counsel function, such as when that bond lawyer is acting as special tax counsel only or when other tax counsel has been engaged and bond counsel is not giving a tax opinion. This is permitted by Model Rule 1.2(c), provided that the limitation is reasonable under the circumstances and the client gives informed consent after consultation with the attorney; however, bond counsel’s need to render an objective opinion may make a strict limitation of their diligence in rendering the opinion unreasonable. To meet the standard for informed consent set forth in Model Rule 1.0(e), the lawyer must make reasonable efforts to ensure that the client possesses information reasonably adequate to make an informed decision. In determining whether the

⁶³ See “Lawyer Proliferation in Public Finance Transactions” in *Standards of Practice*, *infra* at footnote 64 and the discussion of Model Rules 5.1 and 8.3, *infra*.

⁶⁴ The three reports are titled: “The Question of Lawyer Competence and Professionalism,” “Lawyer Proliferation in Public Finance Transactions,” and “Alternative Approaches for Improvement of Standards of Practice.”

information and explanation provided are reasonably adequate, relevant factors include the level of sophistication of the client and whether the client has separate counsel involved in analyzing the engagement. For example, an engagement by a frequent issuer with experienced issuer's counsel may be assumed to meet the standards for informed consent if an engagement letter is accepted. Bond counsel may wish to include in any consultation in this context a discussion of what customary functions are being omitted from, or what additional functions are being added to, the scope of representation and identification of whom the client should look to for any services not undertaken by bond counsel. An engagement letter should normally be used to record such consultation and limitation of the representation.

Careful delineation of the services to be performed by bond counsel is consistent with the pressure on fees in municipal finance transactions. If the client insists on a more restricted scope of service to keep fees down, or if the client awards the engagement based on a lowest fee bid, both bond counsel and the client benefit from a clear written understanding of what services are to be performed: the client, so that it can determine what additional representation or advice may be needed (either from bond counsel or another professional), and bond counsel, so that they are not later held to have undertaken responsibilities that they could not perform in an economically rational and professionally responsible manner.

In addition to agreeing with the client about the scope of representation, it is also very helpful to let others, who might believe or later claim themselves to be clients, know whom bond counsel represents. Statements often found in offering documents and in opinions recite that a firm has served as bond counsel to the issuer.⁶⁵

One principal aspect of the scope of representation arises in connection with any transaction potentially involving criminal or fraudulent conduct on the part of a client. Model Rule 1.2(d) provides as follows:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

This could, in certain situations, affect bond counsel's ability to participate knowingly in a transaction involving inadequate disclosure to bondholders if that inadequacy amounts to a securities law violation. *See also* Model Rules 2.1, 4.1 and 8.4(b) and (c), and *In the Matter of Blatt*, 324 A.2d 15 (N.J. 1974).

Model Rule 1.3 Diligence

Model Rule 1.3 requires reasonable diligence and promptness in representing a client. The Comment to this Model Rule discusses the situation many bond lawyers may face as a result of ongoing relationships with issuers and conduit borrowers. The Comment notes that a client may assume that the lawyer in such a relationship will continue to serve until the lawyer gives notice of withdrawal and suggests that doubts as to whether an attorney-client relationship still exists should be clarified by the lawyer, preferably in writing. An engagement letter is the obvious and appropriate vehicle for this. The *Model Bond Opinion Report* states that, unless expressly engaged to do so, "bond counsel does not undertake to inform any person as to any subsequent development that may affect the opinion."⁶⁶ As a matter of practice, some bond counsel include a statement in the legal opinion, invoice, transcript transmittal letter or elsewhere that the representation concludes upon the rendering of the opinion and that bond counsel takes no responsibility with respect to events occurring after the date of the opinion.

⁶⁵ See "PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL – Client Relationship," *supra*.

⁶⁶ *Model Bond Opinion Report* at 5.

Model Rule 1.4 Communication

Model Rule 1.4 addresses communication by an attorney to a client. Model Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” This simply reiterates an old common law rule. *See Baker v. Humphrey*, 101 U.S. 494 (1879). The Comment to this Model Rule amplifies the point that bond counsel’s client should make the decisions regarding a particular bond issue (to the extent that they do not affect the objectivity of the bond opinion) and should be provided with sufficient information to enable the client to participate in decisions, to the extent the client is willing and able to do so. The degree to which bond counsel should educate a client as to particular legal positions can vary with the nature of the decision to be made. For example, with respect to compliance with federal tax law, the client may be neither willing nor able to provide substantial direction to bond counsel regarding a particular position to be taken. The client’s other retained professionals may, however, have sufficient expertise to participate significantly in such a decision. In such a case, it may become necessary to consult the client as to whether the client wishes to follow such other professional’s advice.

There are certain circumstances in which bond counsel’s scope of representation may include negotiation of transactions or litigation, which will result in a need for more frequent and extensive communication with the client. For example, if bond counsel is representing an issuer of tax increment obligations in its negotiations with a developer or in the event of a challenge to a bond issue by a plaintiff, bond counsel will need to communicate more frequently and extensively with the client than what historically may have been perceived as customary in a “typical” bond issue.

Because bond counsel’s client is almost always an organization, and frequently a governmental entity, bond counsel must determine with whom they should communicate. The Comment to Model Rule 1.4 states: “When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization.” *See* the discussion of Model Rule 1.13, *infra*, and “Representing the Government — Who Is My Client, Anyway?” cited at footnote 36, *supra*. The question of whether communication was made to the appropriate officials of the public entity client was one of the issues in *Pontiac School District v. Miller, Canfield, Paddock & Stone* 563 N.W.2d 693 (Mich. App. 1997). Bond counsel should consider specifying in the engagement letter who the contact will be for communication and consultation. In addition, bond counsel must consider whether the communication complies with applicable laws regarding public meetings or records and the legal authority of officials of the issuer to act to give bond counsel direction and authority. Of course, those laws vary by jurisdiction.

Model Rule 1.5 Fees

Model Rule 1.5 addresses fees and expenses. It requires that the lawyer, if not representing the client on a regular basis, communicate with the client the basis or rate of the fee to be paid and expenses to be reimbursed by the client, in order to permit the client to make informed decisions concerning the representation. *See* the suggested format for fee arrangements in *Model Engagement Letters*. As discussed above in relation to Model Rule 1.2, this is integrally related to the agreement with the client concerning the scope of representation.

Not only must the fee be explained, it also must be reasonable. *See Randolph v. Schuyler*, 201 S.E.2d 833 (N.C. 1974), for the common law statement. *See also O’Connor v. City of Union City*, 285 A.2d 270 (N.J. Super. Ct. Law Div. 1971) in which the reasonableness of a municipal attorney’s fee in a public finance transaction was examined, and the prevailing local practice of basing the fee on the principal amount of the issue was held insufficient to support an otherwise excessive fee. The court did note that the size of the issue might be an

appropriate (albeit minor) criterion for determining bond counsel fees. A number of factors are also listed in Model Rule 1.5(a) as guides for determining if the fee is reasonable:⁶⁷

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer, if that likelihood is apparent to the client;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Many states also have particular statutes or rules governing attorney's fees.

The expenses that bond counsel passes along to the client are also subject to the standard of reasonableness. Bond counsel may require the client to reimburse them for services performed (e.g., copying) and expenses incurred (e.g., telephone charges) in-house, either by "charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer." See Comment 1 to Model Rule 1.5.

Many bond counsel fees are contingent (or effectively contingent) on closing. A contingent fee is permitted, but under Model Rule 1.5 a contingent fee agreement must be in a writing, signed by the client. In some complex or novel transactions, bond counsel may wish to consider whether a contingent fee arrangement permits a sufficiently objective approach in rendering the necessary opinions. Bond counsel also should consider the limitations on contingent fees contained § 10.27(b) of Circular 230. In addition, bond counsel sometimes disclose their fee arrangements publicly in the offering documents. See SEC Release No. 33-7049, 34-33741 (March 9, 1994), Section III (C)(1), and *Disclosure Guidelines for State and Local Government Securities* (Government Finance Officers Association, January 1991), at 63, 73. Although Model Rule 1.5 does not require non-contingent fee agreements to be in writing, there are, as noted above, advantages to putting any fee agreement in writing. Comment 2 to Model Rule 1.5 suggests that an attorney provide any new client a memorandum setting forth the general nature of the services to be provided, the basis or total amount of the fee and the extent to which the client is expected to reimburse the attorney for out-of-pocket costs.

Sharing fees with another lawyer not in the same firm is permitted under Model Rule 1.5 if (i) the total fee is reasonable for all legal services rendered to the client, (ii) the client is informed of and agrees in writing to the arrangement, including the share each lawyer will receive, and (iii) either (a) the division is in proportion to the services performed by each lawyer, or (b) each lawyer assumes joint responsibility for the representation. Lawyers should only refer matters to other lawyers reasonably believed to be competent. See Comment 7 to

⁶⁷ The reader should also become familiar with American Bar Association Formal Opinion 93-379 (December 1993), criticizing the propriety of a number of billing practices and fee calculation techniques where the arrangement with the client specifies that billing will be solely on an hourly basis.

Model Rule 1.5. Fee sharing, however, should be distinguished from situations for which a client employs co-counsel and negotiates each co-counsel's fee separately.

This permissibility of sharing fees allows for the practice of a number of issuers requiring the engagement of co-counsel in bond transactions. The nature of bond counsel practice and other aspects of the Model Rules, however, create some especially difficult practical and ethical considerations. Dividing ultimate responsibility for particular aspects of the work among the various co-counsel requires thoughtful analysis by all co-counsel, and consultation with the client to ensure that the client knows which attorney is responsible for which aspects of the transaction. It may also require either a series of opinions addressing various points, or an opinion comprehensive in scope but qualified by stated reliance on the opinions and work of co-counsel. The other possibility — that each lawyer or law firm be jointly responsible — also implicates significant questions that should be addressed with co-counsel and the client at the outset, e.g., allocation of fees, resolutions of disagreements, review of work product, and compliance with both co-counsel's opinion review procedures, especially if those are part of bond counsel's professional liability insurance contract. Comment 7 to Model Rule 1.5 suggests that joint responsibility for representation is to be undertaken as if the attorneys involved are associated in a partnership. Such shared responsibility thus incorporates the concepts of Model Rules 5.1 and 8.3. *See* the discussion of Model Rules 5.1 and 8.3, *infra*.

Model Rule 1.6 Confidentiality of Information

Model Rule 1.6 generally provides that a lawyer must not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized by the client to carry out the representation. Under certain additional circumstances a lawyer is permitted to reveal confidential client information including, among others, (i) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services and (ii) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.⁶⁸ Consideration of this Model Rule may be necessary in instances in which bond counsel is aware of information material to investors that should be disclosed to the public. *See* the discussion of Model Rule 4.1, *infra*.

Model Rule 1.7 Conflict of Interest: Current Clients

Model Rule 1.7 provides that a lawyer cannot represent a client if the representation of that client (i) is directly adverse to another client or (ii) involves a significant risk of being materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own personal interests, unless:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

⁶⁸ These provisions, which are sections (b)(2) and (b)(3) of Model Rule 1.6, were added to the Model Rules in August 2003 based on recommendations of the ABA Task Force on Corporate Responsibility after the bankruptcy of Enron Corporation and other scandals. *See Ethics Deskbook, supra* at footnote 43, at 225-26, 296-98. This marked the first time the Model Rules permitted disclosure of client information when the client uses or has used the lawyer's services to commit a crime or fraud resulting in substantial injury to the property or financial interests of another (i.e., financial crimes or frauds). *Annotated Rules, supra* at footnote 43, at 105. These provisions have not been adopted by all states (*see, e.g.*, North Carolina Rule of Professional Conduct 1.6(b)); therefore, bond lawyers should carefully review the version of Model Rule 1.6(b) adopted in the jurisdiction relevant to their analysis. *See* the discussion of Model Rule 1.13, *infra*, which also was amended in 2003 based on the recommendations of the ABA Task Force on Corporate Responsibility.

- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion by one client against another client represented by the lawyer in the same litigation or other proceeding; and
- (4) each affected client confirms its informed consent in writing.

As discussed above, to provide “informed consent,” the lawyer must communicate adequate information and explanation about the material risks of and reasonably available alternatives to the proposed representation. *See* Model Rule 1.0(e).⁶⁹

Like other Model Rules, it is impossible for a bond lawyer to apply Model Rule 1.7 without knowing whom the lawyer represents. Careful analysis of the identity of bond counsel’s client in the transaction and of the scope and nature of the representation is necessary to identify duties.

It is important to note that an impermissible conflict may arise even in the absence of a direct conflict. Model Rule 1.7 provides that any situation that creates a significant risk that the lawyer’s representation of a client will be materially limited may create an impermissible conflict. While the mere possibility of subsequent harm does not itself require disclosure to and consent of the client, the “critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” *See* Comment 8 to Model Rule 1.7. Bond counsel must evaluate such “critical questions” both when representing only one client in a bond issue and when considering representing multiple clients in the same transaction. As discussed in more detail below, the determination of whether representing multiple clients in a transaction imposes material limitations on representation of a particular client will depend on the facts and circumstances of the transaction and the roles of the participants in the transaction.

Where the scope of bond counsel’s engagement is limited to the traditional, non-advocacy role, bond counsel’s analysis of these “critical questions” is more likely to lead to a conclusion that no conflict exists. With regard to representation adverse to bond counsel’s client that is undertaken by bond counsel’s firm in matters wholly unrelated to the transaction, there is considerable support for the proposition that no potential conflict is involved. *See In re Supreme Court Advisory Opinion on Professional Ethics Opinion No. 697*, 911 A.2d 51 (N.J. 2006); *Aerojet Properties, Inc. v. New York*, 530 N.Y.S.2d 624 (N.Y.App. Div. 1988); *Minnesota v. Philip Morris, Inc.*, 2d Dist., Ramsey County, Minn., No. C1-94-8565 (Nov. 29, 1994).⁷⁰ In those cases, however, the size and diversity of the activities and component parts of the clients were important to the finding of no conflict. In *Cleveland vs. Cleveland Electric Illuminating Company*, 440 F. Supp. 193 (N.D. Ohio 1977), decided under the Model Code, the non-advocacy role of bond counsel and the effective waiver of any conflict provided a crucial underpinning for the Court’s finding that a firm’s periodic role as bond counsel to the City of Cleveland did not give rise to a conflict of interest when the bond counsel firm represented another client in a lawsuit against the City. *But see In re Marks & Goergens, Inc.*, 199 B.R. 922 (Bankr. E.D. Mich. 1996), (declining to follow *City of Cleveland* and holding that a conflict may exist without regard to whether the client actually conveys confidential information to its attorney during the course of limited representation).

⁶⁹ For an example of disclosure language that bond counsel may use, *see Model Engagement Letters, supra* at footnote 14.

⁷⁰ The last two cases are cited in “Representing and Opposing State Government at the Same Time on Unrelated Matters,” *Loss Prevention J.* (May 1995).

Some jurisdictions prohibit representation by bond counsel against public entity clients even in unrelated factual situations such as a zoning case.⁷¹

Conflicts of interest in transactional contexts may at times be difficult to assess. Comments 26 and 28 to Model Rule 1.7 provide as follows:

Relevant factors in determining whether there is significant potential for material limitation [of the lawyer's representation of the client] include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree.

...

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis....

See, e.g., Kelly v. Greason, 244 N.E.2d 456 (N.Y. 1968).

The critical focus is assessing whether differences of interests among the various participants will materially limit counsel's ability to represent more than one client or whether any of the interests are fundamentally antagonistic. A frequently occurring issue under this Model Rule concerns service as both bond counsel representing the issuer or conduit obligor and underwriter's counsel.

In competitive sale transactions, it is unusual for separate underwriter's counsel to be engaged, although some underwriters retain counsel to review disclosure matters in connection with competitive bids. The possibility of a difference of interests between the roles of bond counsel (if representing the issuer) and underwriter's counsel after the bidding process has been completed appears remote (especially if services provided to the underwriter are at the request of and explicitly part of the representation of the issuer), while the possibility of such a difference of interests arising while acting as bond counsel to an issuer and providing services to an underwriter prior to the bidding for the issue may be somewhat, though perhaps not significantly, greater.

In negotiated transactions, the propriety of dual representation as bond counsel representing the obligor and underwriter's counsel, i.e., on whether the interests of those two parties would be "fundamentally antagonistic," is less clear. There may be significant differences of interest in structuring the transaction, negotiating the provisions of the bond purchase agreement and the obligor's continuing disclosure undertaking, assisting the underwriter in its due diligence and its review of the disclosure documents and the obligor's

⁷¹ *See* N.Y. State Bar Ass'n Comm'n On Prof'l Ethics, Op. 580 (1987), holding that counsel could not simultaneously represent private clients in administrative or judicial proceedings against a municipality and act as the municipality's bond counsel. This rule was found to be not applicable to the municipality's industrial development authority. *See also* N.J. Supreme Court Advisory Comm. On Prof'l Ethics, Op. 571 (1985) holding that a law firm may not act as bond counsel to a municipality, even on an irregular basis, and represent developers before the local governing body seeking zoning changes; *In re Opinion No. 415*, 407 A.2d 1197 (N.J. 1979) (holding that firm and partner or associate could not be counsel both to a municipality and to the county in which the municipality is located); *In re Application of County of Bergen*, 633 A.2d 1017 (N.J. Super Ct. 1994) (holding that a law firm that previously served as bond counsel to a utilities authority could not represent the county in proceedings for dissolution of the authority).

continuing disclosure undertakings, and assisting the underwriter in its review of bond counsel's opinion. Depending on the nature of the transaction, there may also be significant confidentiality concerns, as the prevailing rule is that the confidentiality privilege does not attach as between commonly represented clients. Comment 27 to this Model Rule, however, recognizes that attorneys should also consider the risk of increased costs associated with the transaction and the possibility of developing the parties' mutual interests when analyzing the propriety of dual representation.⁷²

Some of the other potential dual representations in bond transactions are:

- (i) representation of a credit enhancer when otherwise acting as bond counsel or underwriter's counsel;
- (ii) bond counsel (if the issuer is the client) and counsel to the conduit borrower in a conduit financing (including simultaneous service as bond counsel to a governmental agency operating as a bond bank and to another political subdivision or governmental agency issuing its bond to that bond bank);
- (iii) bond counsel (if the issuer is not the client) and issuer's counsel;
- (iv) bond counsel and trustee's counsel; and
- (v) bond counsel (or other counsel to a participant in the transaction) and litigation counsel to the issuer (or such other participant), especially if such bond counsel or other counsel will provide a no-merit opinion with respect to the litigation.

Whether the foregoing multiple representations are appropriate will depend on the lawyer's evaluation of the relevant factors set forth in Model Rule 1.7(b) quoted above in items (1) - (4). In addition, the lawyer must consider the potential prejudice to a client in the event a conflict does arise. Although the Model Rules do not offer any *per se* rule, it is obvious that multiple representation of parties at opposite poles of the negotiating process on terms of central importance merits the most careful scrutiny.⁷³ Additionally, multiple representations should always be fully disclosed in any offering document.

Even if bond counsel is comfortable representing multiple clients in a single transaction, multiple representation is not permitted under Model Rule 1.7 unless all clients give informed consent, confirmed in writing. As noted above, informed consent requires that the lawyer initiate an open and honest dialogue regarding the risks of and alternatives to multiple representation. The lawyer should discuss with each client "the relevant

⁷² The Iowa Supreme Court Board of Professional Ethics and Conduct in Formal Ethics Opinion 95-20 (Feb. 22, 1996) not only prohibited one firm from serving as bond counsel and underwriter's counsel in the same negotiated issue, but also prohibited the bond counsel firm from serving as bond counsel when that firm represented the underwriter in any unrelated, current transaction or the underwriter was a regular client of that firm. The opinion was rendered under the Model Code. Iowa has since adopted the Model Rules, which take a more liberal approach to a client's ability to consent to a possible conflict. In response, the Iowa Supreme Court Board of Professional Ethics and Conduct revoked the substance of Opinion 95-20 in Formal Ethics Opinion 06-03 (Nov. 6, 2006) and instead opined, "Where the parties are sophisticated and experienced users of the legal services involved in representation by a lawyer of an issuer as bond counsel in a negotiated issuer debt financing with an underwriter, when the lawyer and/or other lawyers in the law firm represent or have represented the same underwriter in other unrelated financing or legal matters, is a conflict which may be consented to upon proper disclosure."

⁷³ Also, while the Comment regarding multiple representation in a negotiation is not directly applicable, bond lawyers may wish to consider whether any of the same implications attach when acting as bond counsel (representing the issuer) in one transaction and simultaneously acting as underwriter's counsel (to the same underwriter) in an unrelated transaction with another issuer.

circumstances and . . . the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.” See Comment 18 to Model Rule 1.7. Such consultation should, at a minimum, include an explanation of the implications of the common representation and the advantages and risks involved. In ordinary circumstances, one would expect that the advantages would include efficiencies of time and consequent cost savings, while the disadvantages would include the loss of confidentiality and undivided loyalty, the inability of the lawyer to serve as chief negotiator for either side, and the fact that the one lawyer or law firm intimately familiar with the transaction would be lost to it if matters became adversarial. In certain circumstances, consultation is not possible because it would require disclosure of confidential information about one client that the client will not permit to be disclosed. Counsel should refer to Model Rule 1.6 regarding confidentiality of information when consulting with multiple clients about multiple representation and inform all clients that communications to the lawyer in the course of the shared representation may be neither privileged nor confidential with respect to the other client(s). Consequently, if bond counsel (when the issuer is the client) also acts as underwriter’s counsel in the same transaction, bond counsel should advise both the issuer and the underwriter that communications with one party will not be privileged or confidential with respect to the other party in the event that disagreements or litigation ensues.⁷⁴

In relation to the general state law responsibilities of bond counsel, multiple representation is not, even where in conflict with the Model Rules, *per se* tortious. Multiple representation may, however, permit the inference that counsel preferred one client’s interests over those of another. That inference in turn can undermine the protection against malpractice allegations ordinarily accorded to professionals in matters involving their professional judgment. Such protection hinges on the lawyer’s judgment being within the range of reason (i.e., not negligent) and in the best interest of the client (i.e., in good faith). See, e.g., *Simko v. Blake*, 532 N.W.2d 842 (Mich. 1995).

One further special concern for public finance lawyers in the analysis of conflicts of interest relates to obtaining the consent of a governmental entity client. Some jurisdictions do not permit such consent. See, e.g., New Jersey Rule of Professional Conduct 1.7(b)(1), which amends Model Rule 1.7(b)(4) to add, “except that a public entity cannot consent to any such representation”; *In Re Opinion 452 of the Advisory Committee on Professional Ethics*, 432 A.2d 829 (N.J. 1981); *West Virginia ex rel. Morgan Stanley v. McQueen*, 416 S.E.2d 55 (W.Va. 1992). See also Opinion No. 629 of the New York State Bar Association Committee on Professional Ethics (March 23, 1992), which reversed Opinion No. 580 of the same Committee, for an excellent general discussion of this issue. Like New York, the ABA has also changed its view over the years. In 1929, it issued Formal Ethics Opinion 16 in which it concluded that a public body could not consent, but by 1962 in Informal Ethics Opinion 518 (and now in Model Rule 1.11(a)), it had endorsed the view that public bodies can consent to and waive conflicts. Also recognizing the ability of a public body to consent are *Cleveland v. Cleveland Electric*, *supra*, and *Black v. Missouri*, 492 F. Supp. 848 (W.D. Mo. 1980). Some of the courts upholding governmental ability to consent have, however, noted the particular context or have examined the reasonableness of the consent in making those rulings.

⁷⁴ A related issue concerns serving several issuers in the same locality. Because of different constituencies, different views on appropriate lines of development, overlapping tax or debt limitations and bureaucratic turf wars, representing such different issuers may involve a potential conflict of interest. The State of New Jersey, which specifically prohibits consent by a public body to a potential conflict, has officially frowned on such dual representation where it involves ongoing general representation of the two entities. See *In re Opinion No. 415*, *supra* at footnote 71, which ruled a firm may not be counsel to a municipality and the county in which it is located. This was reiterated and expanded in 1985 in Opinion No. 560 of the New Jersey Supreme Court Advisory Committee on Professional Ethics, which ruled that a lawyer could not serve as counsel to the county and to a municipal housing authority, due to the potential for conflict between the county and the municipality, even though the municipality and the housing authority were separate. Where an attorney is engaged in the limited role of bond counsel, however, the rationale may not apply. Alabama and Missouri have viewed the matter differently even for general representation. Alabama permits a lawyer to represent both a city and the county where it is located if both consent after disclosure (Ethics Opinion 84-130, October 1, 1984). Missouri permits a city attorney to represent an overlapping road district, but only in matters not involving the city (Informal Opinion No. 2, April 14, 1983).

Model Rule 1.9 Duties to Former Clients

Model Rule 1.9 extends the prohibition against representation adverse to a client without consultation and consent beyond the context of simultaneous representations. It provides that a lawyer who has formerly represented a client may not later represent another client in the same or a substantially related matter⁷⁵ in which the second client's interests are materially adverse to the first client's interests, unless the first client gives informed consent, confirmed in writing. Model Rule 1.9 elaborates on this basic provision by tracing its implications for shifting relationships among lawyers and law firms. The rule concludes by providing that a lawyer who has formerly represented a client in a matter shall not later:

- (1) use information relating to the representation to the disadvantage of the former client except as the Model Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as the Model Rules would permit or require with respect to a client.⁷⁶

Consideration of this Model Rule is most likely to occur where one lawyer or law firm sometimes serves as bond counsel in transactions by an issuer where a particular investment bank is the underwriter, and sometimes serves as underwriter's counsel to that investment bank in other transactions for the same issuer. Separate financing transactions are generally not the "same or a substantially related matter." Moreover, Comment 2 to Model Rule 1.9 confirms that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." The more difficult question is whether knowledge of the issuer's or the underwriter's negotiation strategy in the prior transaction is confidential information that cannot be "used" in the later transaction. Comment 3 to Model Rule 1.9 points out that, "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation." In any case, Comment 9 to Model Rule 1.9 notes that "disqualification from subsequent representation is for the protection of clients and can be waived [by them]." Such a waiver requires the client to give informed consent, confirmed in writing. The lawyer may obtain an advance waiver from his or her client, so long as the client reasonably understands the material risks that waiver entails. *See* Comment 22 to Model Rule 1.7. The lawyer's explanation of such risks must be sufficient to rise to the level of "informed consent" and prospective waivers are questionable in many jurisdictions. *See* Model Rule 1.0(e).

Model Rule 1.13 Organization as Client

When a lawyer is employed or retained by an organization, Model Rule 1.13(a) provides that the client is "the organization acting through its duly authorized constituents," rather than the constituents themselves.⁷⁷ Comment 9 to Model Rule 1.13 specifically notes that the duty defined in Model Rule 1.13 applies to governmental organizations and acknowledges that "[d]efining precisely the identity of the client and prescribing

⁷⁵ Comment 3 to Model Rule 1.9 explains that "[m]atters are 'substantially related' . . . if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

⁷⁶ Previously, Model Rule 1.9 specifically referenced Model Rule 1.6 (confidentiality of information) and Model Rule 3.3 (candor towards the tribunal) when discussing a lawyer's using or revealing information relating to the representation of a former client. Model Rule 1.9 now has a general reference that allows a lawyer to use or reveal such information any time it is permitted according to the Model Rules. It therefore invokes not only Model Rules 1.6 and 3.3 but also certain other portions of the Model Rules.

⁷⁷ For the primary case law discussion of an organization as client, *see Upjohn Co. v. United States*, 449 U.S. 383 (1981), discussing attorney-client privilege.

the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of [the Model Rules].” The related commentary is limited but helpful. Also helpful is ABA Formal Opinion 97-405 (April 19, 1997), in analyzing the issue for conflicts of interest purposes of when and under what circumstances a lawyer represents the *entire* government as an entity, or just a certain agency or particular department.

Just as it is important for bond counsel to know who the client is for purposes of determining duties of loyalty, confidentiality, etc., it is likewise important to know who speaks for the client, since bond counsel’s client will almost always be a corporate or governmental entity rather than an individual. This particular Model Rule deals primarily with channels of communication and review when the lawyer for an organization concludes that “substantial injury” to the organization is likely to result from action or inaction by a constituent in a matter relating to the representation that is a violation of that constituent’s legal obligation to the organization or a violation of law that reasonably might be imputed to the organization. Substantially revised in the wake of the issues surrounding the Enron Corporation litigation and similar scandals, and comparable to SEC Rule 205.3(b)(1), Model Rule 1.13(b) requires the lawyer in such circumstances to proceed as is reasonably necessary in the best interest of the organization and, unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, imposes a mandatory up-the-ladder reporting requirement: the lawyer must refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the “highest authority that can act on behalf of the organization as determined by applicable law.” Comment 4 to Model Rule 1.13 confirms that, at least in some circumstances (e.g., a constituent’s innocent misunderstanding of law), the lawyer may ask the constituent to reconsider the matter before going to a higher authority. If despite the lawyer’s efforts in accordance with Model Rule 1.13(b), the highest authority that can act on behalf of the organization insists on acting in a manner that clearly violates the law, bond counsel is required to resign under Model Rule 1.16. Moreover, if the lawyer believes that the violation is reasonably certain to result in substantial injury to the organization, Model Rule 1.13(c) permits the lawyer to reveal confidential information *whether or not Model Rule 1.6 permits such disclosure*, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.⁷⁸ Comment 9 to Model Rule 1.13 points out that when the client is a governmental organization, “a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.”

The greater everyday significance of Model Rule 1.13 for bond counsel, however, lies in the more mundane issue of what level of authorization for action must be obtained by the lawyer. Comment 3 to Model Rule 1.13 states that “[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even though their utility or prudence is doubtful. Decisions concerning policies and operations, including ones entailing serious risks, are not as such in the lawyer’s province.” Clearly, the lawyer is not required to push the normal questions that arise in the course of representation beyond the level of the constituents of the organization with whom the lawyer ordinarily deals.

It may, however, be advisable (though not required by the Model Rules) at the outset of the transaction to have the governing body approve the selection of the lawyer and to designate the constituent officer or officers who will direct the lawyer’s representation and speak on behalf of the client in matters of communication, consultation, and consent.

In the course of critical negotiations or litigation related to a financing it is particularly important that bond counsel, if those matters are included in the scope of their engagement, have guidance and authorization from the client. That action often is governed by public meeting and records laws that vary from jurisdiction to jurisdiction.

⁷⁸ Thus, a legacy of corporate frauds like Enron is that organizational clients have less protection for confidential information than non-organizational clients. See *Ethics Deskbook, supra* at footnote 43, at 610.

Model Rule 1.16 Declining or Terminating Representations

Model Rule 1.16 provides the guidelines for, and duties upon, the termination of the attorney-client relationship either by the attorney or the client. In addition, this Model Rule prohibits the creation of a client-attorney relationship where representation would be improper.

This Model Rule sets forth situations where the attorney must withdraw and other situations in which withdrawal is permissible or discretionary. Withdrawal is mandatory when:

- (1) the representation will result in violation of the [Model Rules] or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

Pursuant to this Model Rule, an attorney is also permitted to withdraw if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

Model Rule 1.16 also imposes limitations upon the time and manner of withdrawal.

Model Rule 1.16 requires the lawyer to take all reasonable steps necessary to protect the interests of the client after termination of the representation, which would include maintaining all client confidences. If, for example, the attorney finds that his or her services are being used to perpetrate a fraud, under Model Rule 1.16(a)(1) he or she must withdraw. Generally, client confidences must be protected except as permitted by Model Rule 1.6. *See* Comment 18 to Model Rule 1.6 (“[t]he duty of confidentiality continues after the client-lawyer relationship has terminated”). *See also* Model Rule 1.2(d) and Model Rule 4.1 and the Comments thereto. However, in the case of organizational clients, confidential information may be disclosed under Model Rule 1.13(c) to prevent “substantial injury” to the organization, whether or not Model Rule 1.6 permits such disclosure, which is referred to as a “noisy” withdrawal. *See* Model Rule 1.13 and the Comments thereto.⁷⁹

⁷⁹ For a discussion of the concept of “noisy” withdrawal prior to the amendment of Model Rule 1.13 in 2003, *see* ABA Formal Opinion 92-366.

While the attorney's right to withdraw from representation is limited, a client has an absolute right to discharge an attorney at any time with or without cause, subject to liability for payment for services.

Model Rule 1.18 Duties to Prospective Client

Model Rule 1.18 provides prospective clients with some but not all of the protection afforded clients.

Model Rule 1.18(a) defines "prospective client" as "a person who discusses with a lawyer the possibility of forming a client-relationship with respect to a matter. . . ." Comment 2 to Model Rule 1.18 explains, however, that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of a lawyer-client relationship" is not a "prospective client" within the meaning of Model Rule 1.18.

Model Rule 1.18(b) prohibits a lawyer who has had discussions with a prospective client from using or revealing information learned in the consultation except as Model Rule 1.9 would permit with respect to information of a former client. Comment 3 to Model Rule 1.18 explains that this duty of confidentiality exists regardless of how brief the initial conference may be.

Subject to Model Rule 1.18(d), Model Rule 1.18(c) creates a duty of loyalty to prospective clients by prohibiting a lawyer (and the other lawyers in such lawyer's firm) from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be "significantly harmful" to the prospective client in the matter. When a lawyer has received disqualifying information as defined in Model Rule 1.18(c), representation is permissible under Model Rule 1.18(d) if (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom. Screening is available only if the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. Written notice of screening also must be promptly given to the prospective client.

Bond lawyers are often contacted about the possibility of representing one or more parties in connection with a proposed bond issue. Comment 4 to Model Rule 1.18 explains that, "[i]n order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose." This is particularly important if a bond lawyer expects, based on prior relationships or work, to be contacted by another party to the proposed bond issue about representing such party (e.g., the bond lawyer is contacted first by an underwriter or bank but has previously represented the conduit borrower). Comment 5 to Model Rule 1.18 confirms that a lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter and that the lawyer may subsequently use the information received from the prospective client.

While a person who simply sends confidential information to a lawyer without any prior contact with the lawyer is not likely to have a reason to believe that the lawyer was willing to consider the employment and, therefore, would not be a prospective client, a website that encourages prospective clients to contact a law firm may change such expectations, particularly if the website gives no cautionary instructions (e.g., warning persons not to send confidential information to the law firm and that no attorney-client relationship arises until both the person and the lawyer sign an agreement).⁸⁰

⁸⁰ See *Ethics Deskbook*, *supra* at footnote 43, at 697.

Model Rule 1.18 does not protect prospective clients who contact lawyers as part of a ruse, for the purpose of disqualifying the lawyer.⁸¹

Model Rules Regarding the Attorney as Counselor

Model Rule 2.1 Advisor

Model Rule 2.1 provides that a lawyer should exercise independent professional judgment and render candid advice. It further states that a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Bond counsel are frequently put in a position in which they are asked to render both legal and non-legal advice. In some cases, as pointed out by the Comment to Model Rule 2.1, purely technical legal advice may be inadequate. Consequently, the right to give more extensive advice may become a duty to "indicat[e] that more may be involved than strictly legal considerations." As indicated by Comment 3 to Model Rule 2.1, this would be the case where a client, inexperienced in legal matters, requests purely technical advice. The bond lawyer should consider in this regard whether the inexperience must pertain only to the representative of the issuer seeking advice, or to the issuer as a corporate or governmental entity including all its agents, staff, attorneys, and financial advisors. The answer to that question may vary depending on the context in which the request for advice is made.

In any event, neither the Model Rule nor the Comment thereto suggests any circumstances in which the lawyer would have an affirmative duty to give substantive, non-legal advice. Clearly the extent to which non-legal advice should be offered depends upon the sophistication of the client and the client's past course of dealings with the lawyer and the competence of the lawyer in the non-legal field, as well as the presence in the transaction of other professionals who would be more competent to give such non-legal advice. In addition, the attorney should not hesitate to recommend the services of professionals in non-legal fields.

Comment 5 to Model Rule 2.1 also states that:

[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under [Model] Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. . . . A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Here again the consideration of who is the client is critical, especially where bond counsel may become aware either through public knowledge or in connection with subsequent work with an issuer or trustee of some event or tendency that is, or may lead to, e.g., a breach of a covenant in a prior bond issue. In this instance, bond counsel may wish to contact the client regarding the prior bond issue to provide advice regarding such potential breach, but should consider Model Rule 1.6 if such information is obtained during subsequent work.

Before giving non-legal advice, the bond lawyer should consider whether to alert the client that the lawyer's advice on financial aspects of the transaction may not subsequently be used to establish a defense of reliance on advice of counsel. *See Draney v. Wilson, Morton, Assaf & McElligott* 592 F. Supp. 911 (D. Ariz. 1984), in which defendant's reliance on counsel as a defense against scienter or negligence was stricken where the advice was on financial matters and hence outside of counsel's "respective area of responsibility" and of his "expertise." The bond lawyer also should consider whether giving such non-legal advice would require the

⁸¹ *Ethics Deskbook*, *supra* at footnote 43, at 699.

lawyer to be registered as a “municipal advisor” with the Securities and Exchange Commission. *See* footnote 11, *supra*.

Model Rule 2.3 Evaluation for Use by Third Persons

Because Model Rule 2.3 is one of the rules of direct importance to bond counsel, this Model Rule and the related Comment are quoted here in full.

Rule 2.3: EVALUATION FOR USE BY THIRD PERSONS

- (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.
- (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
- (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by [Model] Rule 1.6.

COMMENT

Definition

[1] An evaluation may be performed at the client’s direction or when impliedly authorized in order to carry out the representation. See [Model] Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor’s title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person’s affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this [Model] Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this [Model] Rule. However,

since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this [Model] Rule. See [Model] Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by [Model] Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See [Model] Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See [Model] Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Bond counsel's approving opinion falls within Model Rule 2.3. This Model Rule puts the lawyer in the unique situation of being hired for the very purpose of revealing information that would otherwise be deemed confidential under Model Rule 1.6.⁸²

⁸² The existence or extent of such confidentiality, however, may depend on state or local "sunshine" or freedom of information laws. For varying state approaches, *see, e.g.*, Ohio Revised Code, Sections 121.22, 149.43; Code of Laws of South Carolina 1976, Section 30-4-40(7); *Hallas v. Freedom of Info. Comm'n*, 557 A.2d 568 (Conn. App. Ct. 1989); and *City of Fayetteville v. Edmark*, 801 S.W.2d 275 (Ark. 1990), with which, *compare Bryant v. Mars*, 830 S.W.2d 869 (Ark. 1992).

As amended in 2002, Model Rule 2.3 now reflects the view that lawyer evaluations of a client may fall into two categories: (1) evaluations that pose no significant risk to the client, and (2) evaluations that are likely to have a material adverse effect on the client.

Because a primary purpose of the bond opinion is to facilitate the sale of the bonds and thereby to assist the issuer in carrying out the public purpose for which the bonds are issued, and the bond opinion is expected to be made available to and relied upon by third parties, bond opinions should be governed by Model Rule 2.3(a) and client authorization for delivery of the bond opinion should normally be implied.

Comment 4 to Model Rule 2.3 confirms that, if there are any material limitations on bond counsel's due diligence or the scope of the opinion, those limitations should be described in the opinion.⁸³

As Comment 3 to Model Rule 2.3 notes, when the evaluation is intended for the information or use of a third person, the question naturally arises as to whether the lawyer owes a professional duty to the third-party recipient (e.g., the bond purchaser or the underwriter), even though that third-party recipient is clearly not the client.⁸⁴ That legal question is beyond the scope of this Model Rule.⁸⁵ Bond counsel should, therefore, explain clearly the limitations of the engagement in the engagement letter and ensure that the language used in the opinion, the disclosure document and the fee statement does not go beyond the opinion's intended scope.

Model Rules Regarding Transactions With Persons Other Than Clients

Model Rule 4.1 Truthfulness in Statements to Others

Model Rule 4.1 provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when a disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Model Rule 1.6.

This Model Rule raises several issues of interest to bond counsel in light of the antifraud provisions of the federal securities laws. Comment 1 to Model Rule 4.1 on "Misrepresentation" states that "generally [a lawyer] has no affirmative duty to inform an *opposing party* of relevant facts." (Emphasis added.) Here, the language of litigation clouds the issue for bond counsel. During a securities transaction, there really are no such "opposing parties." To the contrary, there may be affirmative duties under securities or anti-fraud laws, at least of some participants, to inform other participants or perhaps prospective purchasers of relevant facts.⁸⁶

The more difficult question is what bond counsel may do, or must do, if the client refuses to disclose certain information. In most instances, of course, a client's determination not to follow counsel's advice to disclose some information would not be "criminal or fraudulent," and Model Rule 4.1 would not be implicated by

⁸³ See also *Model Bond Opinion Report*.

⁸⁴ See *Mehaffy, Rider v. Central Bank* and *Kline v. First Western*, discussed *supra*, and cases cited in materials referenced at footnote 40, *supra*.

⁸⁵ For a helpful discussion of some of these considerations and historical background regarding opinions given in securities offerings, see 64 *Bus. Law.* 395 (Feb. 2009).

⁸⁶ See *Ethics Deskbook*, *supra* at footnote 43, at 882 ("Of course, when other law . . . require[s] disclosure, that other law overrides this general view that lawyering takes place within the context of an adversary system.").

such a decision. If, however, bond counsel has concluded that information in the disclosure document is materially inaccurate or misleading and, therefore, the client will violate the antifraud provisions of the federal securities laws if it proceeds with the offering and sale of the bonds, then bond counsel must determine whether they are required to disclose confidential client information under Model Rule 4.1(b), which they can do only if such disclosure is permitted under Model Rule 1.6.

As amended in 2003, Model Rule 1.6(b) permits a lawyer to reveal confidential client information “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” Bond counsel would appear to be permitted to make disclosure under Model Rule 1.6, which means bond counsel would be required under Model Rule 1.2(d) and Model Rule 4.1(b) to make the disclosure if the lawyer can avoid assisting a criminal or fraudulent act by disclosing the information and such act is reasonably certain to result in substantial injury to the financial interests or property of one or more transaction participants (e.g., bondholders).

Comment 3 to Model Rule 4.1 states that “[o]rdinarily, a lawyer can avoid assisting a client crime or fraud by withdrawing from the representation.” Under Model Rule 1.16(a)(1), if the attorney finds that his or her services are being used to perpetrate a fraud, he or she must withdraw. Under Model Rule 1.16(b)(2), a lawyer also is permitted to withdraw if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.” Comment 3 goes on to point out, though, that “[i]n extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.”

Before making disclosure, bond counsel should first inform the client about the requirements under Model Rule 4.1(b). In practice, faced with the prospect that bond counsel will either be required to withdraw, or to withdraw and make disclosure, the client is likely to agree to make the disclosure.⁸⁷

If bond counsel learns after closing that the client has engaged in conduct that is criminal or fraudulent in connection with the bond issue, bond counsel may be required under Model Rule 4.1(b) to withdraw their opinion to avoid assisting the client’s crime or fraud.⁸⁸

Model Rule 4.2 Communication With Person Represented By Counsel

Model Rule 4.2 places important limits on lawyers who seek to contact persons whom the lawyer knows are represented in the matter. This Model Rule provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Model Rule 4.2 is applicable to the obtaining of information by counsel in a securities transaction. Clearly, an attorney participating in a transaction has a substantial duty to investigate the facts and circumstances underlying that transaction. See *In the Matter of William R. Carter*, *supra*, ABA Formal Opinion 335, *supra*, and S.E.C. Exchange Act Release No. 17831 (June 1, 1981, CCH 1981 Transfer Binder ¶ 82,874). Performance of that duty is inhibited by restrictions on contact with other participants. In a municipal finance transaction Model Rule 4.2 is often merely an inconvenience, and perhaps not even that. The almost universally accepted practice in

⁸⁷ See *Disclosure Roles of Counsel* at 255-56 (explaining that withdrawal under these circumstances may effectively terminate the offering).

⁸⁸ Comment 3 to Model Rule 4.1 and Comment 10 to Model Rule 1.2 both confirm that, in some cases, it may be necessary for the lawyer to disaffirm an opinion. See also *Disclosure Roles of Counsel* at 256.

the municipal finance area of attorneys talking directly to other participants, rather than through their attorneys, may well constitute sufficient consent by the attorney for the participant being contacted, absent express direction or knowledge to the contrary; however, to address the issues discussed in the next two paragraphs, or based on the facts of a particular financing, bond counsel may need to reach an express agreement regarding direct communication with the transaction participants and their attorneys.

There are at least two potential issues of which bond counsel should be aware before communicating directly with other participants represented by another lawyer. Where one participant is involved in a controversy (e.g., an environmental investigation that is not the subject of the financing but that affects the enterprise undertaking the financed project), the participant's lawyer in that controversy may wish to handle all communications regarding that controversy on behalf of that participant. If that lawyer is inexperienced in securities transactions, however, or if the facts in the controversy are too sensitive or confidential, the transaction may, in the worst case, have to be delayed until the controversy is resolved, so that direct investigation would be possible.

Another potential issue involves questions of privilege. If an attorney engages freely in communications with a participant who is not his or her client, information that is adverse to that participant may happen to be divulged to the attorney not representing that participant. In that event, whether the adverse information is not sufficiently relevant or material to require disclosure or whether the transaction is cancelled to avoid disclosure, the information is nonetheless in the hands of a lawyer who has no duty of confidentiality to the participant. This could be avoided by scrupulously complying with Model Rule 4.2 and passing all information directly through a participant's own attorney, upon whom it would be incumbent to examine that information for any potentially adverse material, whether or not related to the transaction at hand. This seems an extremely cumbersome and inefficient manner of dealing with a relatively remote potential problem. The less costly, more efficient, and perhaps sufficient solution would be to explain to each participant at the outset of a transaction that it should examine all material it brings to the table for adverse information and should consult its own attorney with regard to the implications of any potentially adverse information before divulging it to other participants. Here, again, one can see the importance of determining at the outset the identity of bond counsel's client, having an engagement letter with the client, and notifying non-clients of that relationship and other matters.

It should be noted that Comment 5 to Model Rule 4.2 provides that communications authorized by law may include communications by a lawyer on behalf of a client exercising a constitutional or other legal right to communicate with the government. In the context of a bond transaction where bond counsel's client is the issuer, either issuer's counsel or bond counsel may be faced with a situation where an attorney for a party negotiating with the issuer feels free to communicate directly with the issuer. This could arise in the context of an attorney for a developer or a company that is involved in an economic development financing of some type with the issuer and is negotiating key agreements (perhaps even including critical provisions as to complying with the tax rules on management contracts or private use and payment; clawbacks of incentives; or similar substantive issues). This potential exception to Model Rule 4.2 might even be utilized in the event of a dispute relating to a bond issue. As another example, if an investor-owned utility has intervened in a regulatory matter involving a public power issuer, the attorney for that utility could argue that he or she has the right to address that public power authority on behalf of his or her client. Obviously, that same rationale could be used even in the case of extremely contentious litigation such as an attempt by an entity objecting to a bond issue to enjoin the issuance.

Model Rule 4.3 Dealing With Unrepresented Person

Model Rule 4.3 governs the lawyer's communications with unrepresented persons. This Model Rule provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the

unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Municipal securities offerings usually require communication with investors and potential investors by means of the disclosure document. Many investors, particularly retail investors, are assumed to be unrepresented and, therefore, Model Rule 4.3 would apply to communications by bond counsel with investors.

Municipal securities offerings typically deal with this Model Rule by including in the offering document specific disclosure regarding the role of counsel in the transaction. To comply with this Model Rule, counsel may also wish to consider disclosing (1) any contingent fee arrangements, (2) whether counsel represents (or has represented) any other parties to the transaction and (3) any personal holdings of securities issued by financing participants.⁸⁹

Model Rules Regarding Law Firms and Associations

Model Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

Model Rule 5.1 establishes standards for one lawyer's responsibility for the work of other lawyers. It provides that:

- (a) a partner in a law firm and any other "lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm"⁹⁰ must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all of the firm's lawyers conform to the Model Rules;
- (b) a lawyer with direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the Model Rules; and
- (c) (1) a lawyer is responsible for another lawyer's violation of the Model Rules if the lawyer orders it or knowingly ratifies it, or (2) a lawyer who is a partner or has comparable managerial authority in the firm or has direct supervisory authority over the other lawyer is responsible for the other lawyer's violation of the Model Rules if the lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

See, e.g., In re Ritger, 556 A.2d 1201 (N.J. 1989) and *In re Yacavino*, 494 A.2d 801 (N.J. 1985), in which the law firms involved were each criticized for inadequate oversight of the work of young or subordinate lawyers who were the subject of disciplinary proceedings.

Partners and other lawyers with managerial authority within a firm must make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Model Rules.⁹¹ Comment 2 to Model Rule 5.1 provides the examples of such policies and procedures: "those designed to detect and resolve conflicts of interest, identify dates by which actions must be

⁸⁹ See *Disclosure Roles of Counsel* at 256.

⁹⁰ The addition of this language by the 2002 Rules was intended to impose the duties under Model Rule 5.1(a) on managing lawyers in corporate and government legal departments and legal services organizations. *Ethics Deskbook*, *supra* at footnote 43, at 957.

⁹¹ Under § 10.36 of Circular 230, any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice of providing advice concerning federal tax issues also must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with §10.35 of Circular 230.

taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are supervised.” To assure compliance with the competence requirement of Model Rule 1.1, supervising lawyers may need to periodically review the work product of others and apportion issues among attorneys according to their areas of experience and expertise.

Some issuers have a policy or practice of asking bond counsel, as a part of their services, to assist in the supervising and training of co-counsel designated by the issuer. Where bond counsel is asked to supervise or train co-counsel or to assume full joint responsibility with co-counsel in a matter, the usual intra-firm mechanisms for ensuring adequate compliance with appropriate ethical standards will not be available. In that context, each co-counsel with supervisory authority over the other counsel will need to assure itself that the other is acting appropriately under the Model Rules. This may well involve duplication of effort which may affect the basis of fees, a matter that in turn should be disclosed to the client under Model Rule 1.5.

Here again, general state law concerns compel the attention of practicing bond counsel as much as the ethical rules. Agency law principles of *respondeat superior* and vicarious liability may be brought into play by the actions both of professional and non-professional colleagues.⁹²

Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

A lawyer’s responsibility for nonlawyer assistants under Model Rule 5.3 is parallel to the responsibility for subordinate lawyers under Model Rule 5.1. With respect to nonlawyers, Model Rule 5.3 provides that:

- (a) a partner in a law firm and any other lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer with direct supervisory authority over the nonlawyer must make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
- (c) (1) a lawyer is responsible for conduct of the nonlawyer that would be a violation of the Model Rules if engaged in by a lawyer if the lawyer orders it or knowingly ratifies it, or (2) a lawyer who is a partner or has comparable managerial authority in the firm or has direct supervisory authority over the nonlawyer is responsible for the nonconduct of the lawyer if the lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

This Model Rule applies to all types of nonlawyer assistants including secretaries, law clerks, paralegals, and others, and generally provides that, because such assistants act for the lawyer in the rendition of the lawyer’s professional services, the lawyer is required to provide adequate training and supervision to ensure that the assistant is familiar with and complies with the rules of conduct applicable to the lawyer.

Bond lawyers should be careful to ensure that their assistants are adequately trained to perform the tasks delegated to them and should pay particular attention to the need to educate their assistants regarding the obligation not to disclose confidential information. For example, premature disclosure of an advance refunding of

⁹² The Massachusetts Supreme Judicial Court has held that all partners in a law firm may be held liable for the fraudulent opinion of another partner in the firm if that partner had apparent authority to render the opinion or acted at least in part to benefit the partnership. *Kansallis Finance Ltd. v. Fern*, 659 N.E.2d 731 (Mass. 1996).

bonds or of an impending default could provide illegal trading opportunities for those who obtained knowledge of the refunding or the default prior to its public announcement.

Model Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

Model Rule 5.5 governs the unauthorized practice of law and multijurisdictional practice of law. Model Rule 5.5(a) provides that a lawyer shall not practice law in a jurisdiction in violation of the regulations of that jurisdiction, nor shall a lawyer assist any person who is not a member of the bar, such as a paralegal, in the performance of any activity which constitutes the unauthorized practice of law. Model Rule 5.5(b) prohibits a lawyer who is not admitted to practice in a jurisdiction from establishing an office or other systematic and continuous presence in such jurisdiction for the practice of law (unless authorized by the Model Rules or other law) and from holding out to the public or representing that the lawyer is authorized to practice law in such jurisdiction.

Comment 2 to Model Rule 5.5 explains the lack of a definition of “practice of law” and the purpose of this Model Rule as follows: “The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”

What constitutes the “practice of law” may depend upon various factors, including the relationship of the transaction to the lawyer’s home jurisdiction and to the “foreign” jurisdiction, the repetitiveness of the lawyer’s contacts with the “foreign” jurisdiction, the location of the recipient of the lawyer’s opinion, the location of the lawyer’s client, and the substantiality of each instance. *See The Law of Lawyering, supra* at footnote 43, § 46.7. Some states, such as Louisiana, expand the Model Rule to provide a definition of “practice of law.”⁹³

Bond lawyers are frequently hired to work on transactions with issuers in states in which they are not admitted to practice.⁹⁴ In such instances, the bond lawyer is often called upon to analyze, give advice with respect to, and render opinions concerning matters of state or local law of a jurisdiction in which he or she is not admitted to practice. As a result, bond lawyers should carefully consider Model Rule 5.5(c), which permits a lawyer admitted in at least one United States jurisdiction and not disbarred or suspended from practice in any jurisdiction to provide legal services on a temporary basis in another jurisdiction.⁹⁵

Model Rule 5.5(c)(1) permits temporary practice if it is undertaken in association with local counsel who actively participates in the matter. Comment 8 to Model Rule 5.5 explains that “the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction,” but emphasizes that the local counsel “must actively participate in and share responsibility for

⁹³ For information regarding the ABA Task Force on the Model Definition of the Practice of Law and a state-by-state canvass of the definitions of the practice of law, see <http://www.abanet.org/cpr/model-def/home.html>.

⁹⁴ Indeed, early practice with respect to bond counsel was exactly that. The issuer or purchaser would provide a completed transcript of proceedings to (frequently) out-of-state bond counsel who then rendered an approving opinion, if warranted.

⁹⁵ Since 2002, the vast majority of jurisdictions have adopted multijurisdictional practice rules that are the same or similar to those adopted by the ABA. *Annotated Rules, supra* at footnote 43, at 479. *See* http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf. Two of the four exceptions in Model Rule 5.5(c) relate to litigation or alternative dispute resolution and, therefore, are not likely to be relevant to bond lawyers. For an excellent discussion of the role of bond counsel in a transaction and one court’s analysis of the reasons to permit multijurisdictional practice of bond counsel prior to the revisions to Model Rule 5.5 in 2002, including the addition of Model Rule 5.5(c), *see In the Matter of Opinion 33 of the Committee on the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999). *See also* Carol A. Needham, “Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law,” 12 *St. L. U. Pub. L. Rev.* 113 (1993).

the representation of the client.”⁹⁶ Thus, Model Rule 5.5 recognizes that multijurisdictional practice serves the public interest in many instances by promoting the client’s ability to choose its counsel in situations in which the client has reason to engage both a local and out-of-state lawyer.

Model Rule 5.5(c)(4) permits temporary practice if it “arise[s] out of or [is] reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” Comment 14 to Model Rule 5.5 notes that a “variety of factors evidence such a relationship,” such as when “the services draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.” Given the recognized expertise of bond counsel in municipal/local government law, tax law and securities law, this exception may be applicable in many circumstances.

The exceptions in Model Rule 5.5(c) permitting multijurisdictional practice apply only to the offering of legal services on a temporary basis. Model Rule 5.5(c) does not specify the number of visits a lawyer may make to another jurisdiction, or offer any other bright-line test to determine when a lawyer’s presence is “temporary” rather than permanent.⁹⁷ Comment 6 to Model Rule 5.5 concludes that “[s]ervices may be ‘temporary’ even though the lawyer provides services in [the] jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.” It remains impermissible, however, for the attorney to establish an office or systematic and continuous presence for the practice of law in a state in which he or she is not licensed.

Failure to comply with the Model Rules restricting practice in states where an attorney is not licensed may subject that attorney to disciplinary proceedings, criminal proceedings and to the loss of fees earned in the matter. *See, e.g.*, Code of Laws of South Carolina 1976, as amended, Section 40-5-310; *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986); *Birbower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). In considering questions of unauthorized practice, bond counsel must be mindful of the rules and laws not only in those jurisdictions where they are licensed but also of those in which they might be held to be practicing without a license. *See* Comment 19 to Model Rule 5.5.

This Model Rule further permits the employment of legal assistants and the delegation of responsibilities to them so long as the requirement of Model Rule 5.3 concerning training and supervision are satisfied. *See* Comment 2 to Model Rule 5.5. Similarly, it permits a lawyer to provide legal advice to nonlawyers whose particular jobs require a working knowledge of the law. *See* Comment 3 to Model Rule 5.5. For example, a bond lawyer may advise the treasurer or finance director of an issuer about the arbitrage rebate requirements so the issuer will be able to comply with federal arbitrage laws and regulations.

Model Rule 5.7 Responsibilities Regarding Law-Related Services

Model Rule 5.7 defines “law-related services” as “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” Some of the examples of law-related services cited in Comment 9 to Model Rule 5.7 are tax preparation, financial planning and legislative lobbying. As a result, law-related services may include arbitrage rebate calculation services provided by a law firm, a bond counsel that also serves as financial advisor in a transaction and lobbying efforts undertaken by bond counsel on behalf of a client.

⁹⁶ If bond counsel will share fees with local counsel, then Model Rule 1.5 should be considered. *See* the discussion of Model Rule 1.5, *supra*.

⁹⁷ *Annotated Rules, supra* at footnote 43, at 481; *see* Comment 6 to Model Rule 5.5 (“There is no single test to determine whether a lawyer’s services are provided on a ‘temporary basis’”).

To avoid confusing the client over which activities are afforded the protections normally afforded as part of the client-lawyer relationship, Model Rule 5.7 subjects lawyers to the Model Rules even in the provision of law-related services if:

- (1) the lawyer provides such services in circumstances that are not distinct from the lawyer's provision of legal services to the client; or
- (2) an entity controlled by the lawyer, whether individually or with others, provides such services and the lawyer fails to take reasonable measures to assure that the client knows that the services are not legal services and the protections of the client-lawyer relationship do not exist.

A lawyer's "control" of an entity extends to the ability to direct its operation. For purposes of Model Rule 5.7 "control" depends upon the facts and circumstances of each case. *See* Comment 4 to Model Rule 5.7.

The significance of Model Rule 5.7 lies in the other Model Rules made applicable to relevant situations. For example, a lawyer referring clients for law-related services to an entity controlled by the lawyer must comply with Model Rule 1.8(a) (relating to requirements a lawyer must satisfy in order to enter into a business relationship with a client). If the lawyer is subject to the Model Rules with respect to the provision of law-related services, the lawyer must examine potential conflicts of interest and disclosure of confidential information closely, especially in the context of the separate entity, and any promotional activities regarding the law-related services will be subject to Model Rules 7.1 through 7.3 relating to advertising and solicitation.

Model Rules Regarding Information About Legal Services

Model Rule 7.3 Direct Contact with Prospective Clients

Model Rule 7.3 governs direct contact by lawyers with prospective clients. Model Rule 7.3(a) prohibits solicitation of professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, by in-person, live telephone or real-time electronic contact, unless the person contacted is a lawyer or has a family, close person, or prior professional relationship with the lawyer ("Excluded Persons"). Model Rule 7.3(b) prohibits any form of solicitation which involves duress, coercion or harassment or where the prospective client has indicated his desire not to be solicited by the lawyer. Model Rule 7.3(c) requires all written, recorded or electronic solicitations directed to prospective clients known to be in need of legal services in a particular matter (except Excluded Persons) to include the words "Advertising Material" in appropriate places.

The original version of Model Rule 7.3 adopted in 1983 distinguished between mass mailings (which were allowed as advertising) and targeted mailings (which were not allowed). In 1989 the ABA amended Model Rule 7.3(a) to permit targeted mailings in light of the First Amendment concerns in *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988).⁹⁸ Thus, a general mailing by bond counsel to issuers, underwriters, etc., is permissible. If the letter relates to a specific upcoming bond issue, however, it may need to be marked "Advertising Material." Because of significant state-to-state variations, it is important to examine the rules of the jurisdiction in question when such contacts are contemplated.

⁹⁸ In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Supreme Court upheld a state's restriction on lawyer advertising under the First Amendment's commercial speech doctrine. In that case, the Supreme Court concluded that it was constitutional for a state to prohibit plaintiff-attorneys from sending direct mail solicitations to victims and their relatives for 30 days following an accident or disaster. Although other states have adopted short-term bans on targeted advertising similar to one upheld in *Went for It*, the ABA has not amended Model Rule 7.3 to reflect this possible limitation.

This Model Rule is aimed primarily at the potential for abuse in cases in which an individual finds himself or herself in personal circumstances requiring legal representation and is approached in person, by telephone or by real-time electronic contact by lawyers utilizing intimidating, overreaching, or other unprofessional methods. Because bond lawyers are typically hired by organizations (e.g., public issuers, conduit borrowers such as hospitals, universities and for-profit companies, etc.), not individuals, the underlying basis for this Model Rule may not appear directly applicable. The Maryland State Bar Association recognized this difference in Ethics Opinion 88-48, in which an attorney who approached the board of directors of a fraternal organization concerning the provision of services to the organization in a manner that would otherwise have been improper was held not to be in violation of this Model Rule. The Maryland Committee on Ethics stated:

Rule 7.3 only applies to in-person contact directly with a prospective client. If an attorney contacts a representative of an organization for the purpose of informing the organization of the services the lawyer's firm is willing to offer, such communication is generally directed to a fiduciary for the organization, not directly to a specific person in need of legal services. Therefore, it would fall outside the restrictions of Rule 7.3.

This is in accord with American Bar Association Committee on Ethics and Professional Responsibility Informal Opinion No. 84-1504 (January 10, 1984) which held that neither the Model Rules nor the Model Code prohibits a lawyer from mailing letters to a company's in-house counsel offering his services and providing information about his prior positions and activities in a specific area of law. With respect to the analysis under Model Rule 7.3, the Committee noted first that the proposed contact was a general mailing that was clearly permissible. The Committee went on, however, to note an additional reason:

The second reason is that [Model] Rule 7.3 does not by its specific terms prohibit solicitation of professional employment from lawyers in their capacities as representatives of prospective clients as distinguished from their capacities as individuals in need of personal legal services.

The Committee further noted that, since the recipients were themselves lawyers, the potential for harm was minimal. This final conclusion is now reflected in the Model Rule itself, as a result of the 2002 amendment that expressly excluded lawyers from Model Rule 7.3(a). The emphasis in the Maryland and ABA opinions on permitting contact with representatives of prospective clients is consistent with Comment 6 to Model Rule 7.3, which notes that a lawyer may contact a representative of a group that may be interested in establishing a group or prepaid legal plan for their members.

Nonetheless, if strictly construed, the prohibitions against in-person, live telephone or real-time electronic or telephone solicitation of prospective clients contained in Model Rule 7.3(a) could apply to bond lawyers.

"Real-time electronic contact" is not defined in Model Rule 7.3, but it must necessarily only refer to lawyer participation in chat rooms and instant messaging, not postings on list serves or blogs or e-mail (which do not occur in "real time").⁹⁹

State Bar Associations may require advance approval of general advertising or offer a comprehensive review of such advertising prior to its publication.

Of near-perpetual interest regarding business development practices is the issue of political contributions. Municipal Securities Rulemaking Board Rule G-37 effectively restricts the contributions and fundraising activities of underwriters, brokers and dealers who wish to engage in public finance business with the candidate's

⁹⁹ *Ethics Deskbook, supra* at footnote 43, at 1190.

governmental unit.¹⁰⁰ NABL, in February 1994, adopted a “Statement of Professional Principles with Respect to Political Contributions.” That Statement declares that no lawyer should make any political contribution to obtain or retain public finance clients and that each firm should review its mandatory and voluntary disclosure mechanisms with respect to campaign contributions in order to assure itself of their adequacy.

***Model Rules Regarding Maintaining the Integrity of
the Profession***

Model Rule 8.3 Reporting Professional Misconduct

This Model Rule requires a lawyer who knows that another lawyer has violated the Model Rules in a way that raises a substantial question as to the violating lawyer’s “honesty, trustworthiness or fitness as a lawyer in other respects” to inform the appropriate professional authority. Comment 3 to Model Rule 8.3 states that “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” Unanswered is the question of how certain a lawyer must be that a violation has, in fact, occurred. A simple disagreement between lawyers in a transaction as to whether some piece of information requires disclosure should not rise to that level. If, however, one lawyer views the undisclosed item as being so substantial that he feels compelled to withdraw from the transaction to avoid participation in what he considers to be a fraud, this Model Rule may well be implicated. On the other hand, the lawyer’s withdrawal may be a precautionary step and may not amount to a determination that there is a violation. In any case, here, again, the question of the “noisy” withdrawal comes up in slightly different form, since the required reporting, if any, would be to the professional peer review group or disciplinary board.

One extremely sensitive issue in this context for lawyers in public finance transactions is when or whether the duty extends to reporting a violation of the competence rule or the reasonable-fee rule by a firm that is in the transaction and may be a competitor or co-counsel with little or no experience or expertise in public finance. For an excellent discussion of such problems, see “Lawyer Proliferation in Public Finance Transactions” in *Standards of Practice*.¹⁰¹

The lawyer is not excused from the duty to report simply because the client asked that a matter not be reported. There is an affirmative duty to report a known violation unless the information is protected by client confidentiality under Model Rule 1.6. Compare *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) in which a lawyer was suspended under the Model Code for failure to report another lawyer’s violation, with *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317 (R.I. 1993), where the court held under Model Rule 8.3 that a lawyer could not, against his client’s wishes, report embezzlement by that client’s former lawyer, stating that “Rule 1.6 does not authorize an attorney to second guess a client’s decision to refuse disclosure of otherwise confidential information.” See also *Weider v. Skala*, 609 N.E.2d 105 (N.Y. 1992). In that case, concerning the firing of a young lawyer who urged his firm to report the misconduct of another lawyer in the firm, the court ruled that compliance with the Model Rules was an implicit term of the contract of employment that the young lawyer had with the law firm. This duty to report ethical breaches extends to co-counsel. See Virginia State Bar Ethical Opinion No. 1093.

¹⁰⁰ The constitutionality of Rule G-37 was upheld against a First Amendment challenge in *Blount v. Securities and Exchange Commission*, 61 F.3d 938 (D.C. Cir.), cert. denied, 517 U.S. 1119 (1996).

¹⁰¹ See also the discussion of Model Rule 1.5, *supra*.

CONCLUSION

The foregoing discussion of the function and professional responsibilities of bond counsel and of certain of the Model Rules is only that: a discussion. It is not an endorsement by NABL of any statement of particular duties or standards of care. It is intended only to point out some of the many ways in which the principles of professional responsibility, as implemented in most jurisdictions, can touch upon the practice of bond counsel.

Modern bond counsel practice is significantly different from its historical “marketing” purpose. As bond transactions and regulation have become more complicated, bond counsel have frequently been asked to take on additional functions, including advocacy functions, that can be in tension with the original marketing purpose of the bond opinion. As noted at the outset, bond counsel must be mindful both of the law governing bonds and of the historical customs and practices in the field, the nature and continuing development of the practice in the context of the rules of professional responsibility, as adopted in the various jurisdictions, and applicable federal tax law, federal securities law and general state law.