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Because opinions with respect to the interpretation of state and federal laws relating to municipal obligations frequently differ, the National Association of Bond Lawyers ("NABL") has given the authors who contribute to The Bond Lawyer, and its editor, the opportunity to express their individual legal interpretations, opinions, and positions. These interpretations, opinions, and positions, whether explicit or implicit, are not intended to reflect any position of NABL or the law firms, branches of government, or organizations with which the authors and editor are associated, unless they have been specifically adopted by such organizations. For educational purposes, the authors and editor may employ hyperbole or offer suggested interpretations for the purpose of stimulating discussion. Neither the authors, the editor, nor NABL can take responsibility for the completeness and accuracy of the materials contained herein; readers are encouraged to conduct independent research of original sources of authority. The Bond Lawyer is not intended to provide legal advice or counsel as to any particular situation. Errors or omissions should be called to the editor's attention: mail to 1095 Nimitzview Drive, Suite 103, Cincinnati, Ohio 45230, or e-mail to fokiel@fuse.net. Season's greetings.
PRESIDENT NEWTON'S REMARKS

Editor's Note: The following remarks were delivered by incoming President Floyd C. Newton III at the annual meeting of the Association on September 16, 1998.

When I began to consider my remarks for this evening, I considered the several speeches which I had heard by the incoming presidents of NABL. The one which sticks out most in my mind was the acceptance speech of Wally McBride. For those of you who were not present that year, the meeting was substantially delayed because of a contested election, and Wally, with a sense of relief which was only exceeded by the relief expressed by the audience, elected not to give any acceptance speech whatsoever. I have been told by several of my predecessors, however, that I really should make some remarks, but I promise that they will be brief.

First, I would like to express my appreciation to everyone in the Association for having the confidence to let me serve as your President for the upcoming year. I promise that I will faithfully execute my duties to the best of my abilities. I also want to thank everyone who has helped me along the way, either in my practice or in work for the Association, enabling me to spend the time on NABL activities which I have spent. In particular, I would like to express my appreciation to my partners and the associates with whom I work, a number of whom are here tonight, as I am sure they will face a burden in helping me manage my workload during what promises to be a busy year. I am the third partner from my firm to be a NABL President, following behind Pope McIntire and Ted Hester. As a result, my firm is fully aware of the time commitment which the Association imposes upon its President, and I am grateful for my partners' agreeing to let me serve during the coming year.

As we approach the coming year, there are many controversies for our industry, including, in particular, the continuing controversy over "pay to play" and the controversy over yield burning. While I had hoped that both of these issues would be resolved either during Julie's or Bill's terms of office, they have continued into mine, and I suspect they will also be passed on to Howard next year. While these controversies inevitably will occupy a great deal of space in the press, and have implications for our profession, they are not the principal focus of NABL. NABL was formed in 1979 for the purpose of educating its members and others in the law relating to state and municipal bonds and other obligations, providing a forum for the exchange of ideas as to law and practice, improving the state of art in the field, providing advice and comment at the federal, state and local levels with respect to legislation, regulations, rulings and other action or proposals therefor, and providing advice and comment with respect to state and municipal obligations in proceedings before courts and administrative bodies. The Association does not have as one of its stated purposes to control the conduct of its members, and as a voluntary organization, it cannot. While NABL does have a responsibility to its members to promote the highest level of professional conduct, those who expect NABL to attempt to regulate its members will be disappointed. Similarly, as the controversy regarding yield burning continues to bubble, NABL is more than willing to assist in developing rules and procedures to assure issuers, underwriters and investors that appropriate steps have been taken to enable public finance lawyers to make a legal judgment as to the tax status of bonds which are intended to be tax exempt, but public finance lawyers cannot be expected to make financial judgments as to whether the price paid for investments is a fair price. We want, and are willing, to work with the IRS
and Treasury to help develop procedures which can be relied upon by the transaction participants, recognizing the training and experience of the participants.

One of the principal purposes of NABL is education, not only for its members but also for others including congressional staffs, regulatory agencies and others who impact the public finance industry. The expansion of continuing legal education requirements makes the educational function of NABL even more important. Like all of my predecessors, I want to do everything possible to improve the quality of the NABL educational functions and, where appropriate, look for opportunities to participate in educational forums with others where we perceive a benefit to the public finance industry and our members.

Another of the expressed purposes of NABL is to provide a forum for the exchange of ideas. In addition to our seminars and workshops, NABL produces an excellent, and ever-improving publication, *The Bond Lawyer*, which is used extensively by our members. I urge each of you to consider submitting written material to *The Bond Lawyer*. NABL is also in the infancy of developing and understanding how to utilize effectively the Internet and worldwide web. Through the NABL website, we have made our first steps along this way, and we intend to pursue applications of this technology in ways that will provide not only a forum for the exchange of ideas, but also easy access to our members of materials which are relevant to them in their practice. Last year at the Workshop, we previewed the first of the NABL publications to appear in CD-ROM format, *Federal Taxation of Municipal Bonds*. This treatise is a very useful practitioner's tool, and the CD-ROM version of it has made it even more accessible to our members. We will continue to look for other applications of this technology.

NABL has long had a history of providing advice and comment at the federal, state and local levels on legislation, regulations, rulings and other similar proposals. While our effectiveness in this area, particularly at the federal level, has been affected by Amy Dunbar's retirement, NABL, through its various committees, will continue to actively follow developments in the legislative and regulatory arenas at all levels and seek to participate in providing input on matters which are of interest to our members. We are actively searching for a new Director of Governmental Affairs and hope to fill this position in the near future.

Finally, I would like to make a plea similar to the plea which I heard Richard Chirls make at the time he became President several years ago. NABL is an organization of volunteers. The quantity and quality of work produced by NABL are directly dependent upon the voluntary efforts of the members. I would encourage you to become involved in some way, and you should feel free to call me, any of the other officers or directors, or the Committee officers at any time to volunteer for work. My experience has been that it is a rewarding experience, both professionally and otherwise.

Thank you for your patience. I look forward to serving as your President during the upcoming year.

**Visit NABL’s new website: www.nabl.org**
PRESIDENT CONNER'S REMARKS

Editor's Note: The following remarks were delivered by outgoing President William H. Conner at the annual meeting of the Association on September 16, 1998.

It hardly seems possible that one year ago, I was elected as your new President. It has been an eventful and memorable year that has gone quickly. Many of you responded to the perpetual call to lend your time and talents to an Association project during the year. This, despite the fact that all of us were busier than ever doing deals, with no lull at the beginning of the year to catch our breath, thanks to a booming economy and interest rates at levels most of us thought would never be seen in our lifetime. In the proud tradition of NABL, and with the considerable assistance of a number of members, we accomplished a great deal these past 12 months.

First, after what seemed like an endless number of years, the Professional Responsibility Committee finally completed, and the Board approved, a revision of Model Engagement Letters, a copy of which was mailed to members in August. Abundant thanks for staying the course and completing this project go to Chair of the Committee Ray Koegen and to the Committee members who actively assisted in the finalization: Mary Ann Braymer, Meredith Hathorn and former Board members Wally McBride, Jack Gardner and Mae Nan Ellingson. Special thanks go to Board Member Bob Buck who served as liaison to the Committee and, on many crucial occasions, put pen to paper to reconcile differing views and approaches to the treatment of conflicts that more than once threatened to keep the project from ever seeing the light of day. The Model Engagement Letters are not perfect and probably few will agree with all of the choices that were made. But it is an extremely useful product that should be of considerable assistance to all of us and serves as a solid foundation on which to build as this area continues to evolve.

In stark contrast to the Model Engagement Letters project that occupied the time of the last three Boards of Directors, former Board member Susan Weeks chaired a subcommittee that began last September to revise the Selection and Evaluation of Bond Counsel pamphlet. Working at breakneck speed, Susan’s subcommittee, consisting of former president Jane Dickey, former Board member Dave Caprera and members Richard Fox, Edward Sinick and Paul Webber, managed to complete the effort within months — a record for a NABL project of this nature. And a fine project it is, as you undoubtedly realized when you received it this spring. I hope you will make frequent use of it in educating your issuer clients as to what they should be looking for when they select bond counsel. Many thanks to Susan and her subcommittee for their great effort and a great product.

In a housekeeping matter, President-Elect Floyd Newton was asked to finish a project I was charged with last year — and failed to complete: revisions to the Guide to Committee Operations and the Seminar Policy. Both of these documents were out of date and no longer accurately reflected actual practice. Both revisions were approved by the Board in July. My sincere thanks to Floyd for completing that tedious task.

The Education Committee, under the very able and conscientious leadership of Chairman Bill Gehrig and Vice-Chair Lauren Mack, once again produced a banner year of NABL educational seminars. Patti Wu and Linda Schakel, Chair and Vice-Chair, respectively, of the Tax Seminar, Eric Ballou and Mark Mamantov, Chair and Vice-Chair, respectively, of the Fundamentals Seminar, and Mitch Rapaport and John McNally, Chair and Vice-Chair, respectively, of the Washington Seminar, all did superb jobs in organizing their respective seminars and getting the panelists to submit their substantive material in a timely fashion. Thanks to you all for your superlative efforts.

Bill Gehrig deserves special recognition and congratulations for organizing, literally on the fly, NABL’s first ever — and very successful — audio conference on the output regulations. All of you have participated in conference calls where you or another participant cannot be heard because of talking, shuffling papers, pouring drinks, etc. Bill was determined not to let any of that happen on the audio conference. He insisted that the technical
aspects had to work perfectly. His perseverance paid off — the audio conference in March went off without a hitch and with uniformly favorable comments. The substance was great as well, thanks to John Cross’ willingness to take time out from working on the biggest tax-exempt bond deal in history to put together the substantive material for what turned out to be a very comprehensive and useful seminar. Congratulations and many thanks to Bill, John and all of the audio conference panelists.

The Model Indenture Committee, under the guidance of former Board member Morris Knopf, began work in earnest this past year on a truly gigantic project that has been germinating for several years — preparing a model indenture. An initial draft was reviewed by the Board at its July meeting and will be discussed in various panels at this Workshop. I expect the Board to approve a revised version this coming year. This is truly a monumental undertaking. I am particularly grateful to Morrie for chairing this project and for the contributions of former Board member Wally McBride and current Board member Carolyn Truesdell, both of whom have taken an active interest in this matter.

The Opinions Committee, under the able tutelage of Edwin Lucas, began work this past year on a model form of underwriter counsel opinion. A preliminary draft is included in the Workshop materials for discussion, with a view to gaining input from members. I expect it to be submitted to the Board for approval this fall or winter. Thanks to Ed for kicking off this important project.

The Legal Assistants Committee, ably chaired by Ann Atkinson, continued its longrange development of a handbook for legal assistants and duplicated once again its educational success at the Fundamentals Seminar.

A number of ad hoc projects were completed this past year. Last October, an ad hoc subcommittee of the Securities Law and Disclosure Committee responded to the MSRB’s request for comments as part of that Board’s review of the underwriting process, in particular, the practice of issuers selecting underwriter counsel. Board members Mary Jo White, Julie Ebert, Floyd Newton and Howard Zucker, former Board member Jack Gardner, former president Drew Kintzinger, Committee Chair and Vice-Chair Bill Nelson and Walter St. Onge, and member John Overdorff and then Director of Governmental Affairs Amy Dunbar joined forces to craft a very artful and persuasive letter to the MSRB on the issue. Two weeks ago, the MSRB issued a notice that warns issuers that selecting underwriter’s counsel who is unskilled or who has conflicting allegiances that could compromise its work may constitute material information that must be disclosed in the issuer’s official statement. The fact that the MSRB decided not to promulgate a rule mandating underwriter disclosure of the practice of issuer selection — which I believe was its initial inclination — can be attributed in large part to NABL’s efforts. All of us are grateful for the work of the ad hoc subcommittee.

In January, John Cross authored a NABL letter to the IRS suggesting priorities for its 1998 business plan relating to tax-exempt bonds. That letter proved to be highly influential in shaping the business plan that was later released.

John also took time in what was an extraordinarily busy year for him to finalize a letter to the IRS regarding the assisted living quagmire that resulted from two private letter rulings last year, both of which were favorable but which collectively created a great deal of confusion as to where to draw the line between residential rental property for family units and health facilities. Larry Carlile produced a magnum opus on the subject early in the year to start the project. It fell to Amy Dunbar, John Cross and me to boil Larry’s work down to manageable proportions, while crafting a recommended solution with irresistible logic. A very compact and persuasive letter finally honed by John was sent to the IRS in April. On Monday, September 14, the IRS issued Rev. Rul. 98-47, which adopted whole cloth the approach suggested by NABL. We owe an immense debt of gratitude to John, Larry and Amy for their extraordinary efforts on this project.

Former Board member Jack Gardner spearheaded a NABL effort early in the year, in conjunction with the Airports Council International - North America, to obtain SEC clarification of “obligated persons” for purposes of Rule 15c2-12
in the context of airport financings. A draft letter was discussed with SEC representatives in February. Unfortunately, the SEC was unwilling to clarify the matter at this point, preferring instead to allow the evolutionary process to work its magic. Thanks, Jack, for your excellent efforts on this endeavor.

At the beginning of summer, there was inserted in the Senate version of the massive IRS restructuring bill a provision authored by Senator Orin Hatch that would permit issuers to appeal adverse technical advice determinations regarding outstanding tax-exempt bonds to the United States Tax Court. That hastily-drafted provision, while superficially appealing, contained a number of potential problems that had not been fully considered. NABL’s Arbitrage and Rebate Committee Chair, Perry Israel, authored a letter to Senator Hatch, with Amy’s help, spotlighting these concerns and suggesting that all of the ramifications needed to be considered before enacting such a change. The result was passage of interim relief that permits issuers to appeal adverse determinations to a senior appeals officer within the IRS, while careful and thoughtful consideration is given to the consequences of granting issuers the right to appeal to Tax Court. Many thanks to Perry and Amy for their fine work on this matter.

Finally, after several years of patient perseverance, Monty Humble was able to piece together in May the conflicting views of investment bankers, trustees and bond lawyers into a best practices memorandum relating to bondholder notification in the context of defaulted securities. Hopefully, that effort will lead to greatly improved bondholder communications in default situations. Thanks, Monty, for sticking with this project and shepherding this effort to a reasonable and successful conclusion under trying circumstances.

Unquestionably, the greatest kudos during the past year must go to my predecessor as president, Julie Ebert. Last September, as Julie ended her year as President, she was appointed, in effect, as NABL’s representative on the 12-member Task Force on Political Campaign Contributions by Lawyers, created by ABA President Jerome Shestack. I cannot say enough about Julie’s tireless efforts on the Task Force from September, 1997, through the first week of this August to ensure that whatever the Task Force did, it did not make a recommendation that applied only to bond lawyers, as if only they and no one else make political contributions for business-related purposes. Julie’s fierce and unyielding determination in the Task Force deliberations carried the day. The Task Force recommendations that were finally issued in August applied broadly to all government legal engagements. The patently offensive New York City Bar proposal that a number of influential persons urged the Task Force to adopt was not adopted by a majority of the Task Force members. The final resolution adopted by the ABA House of Delegates at its annual meeting in August preserves the broad sweep adopted by the Task Force. Julie received very able assistance from fellow NABL member Jack Williams and fellow public finance professional David Cardwell and several other members of the Task Force. We are all deeply indebted to Julie for her efforts. I have never seen a more tireless, unselfish performance by a volunteer. Julie, you were magnificent!

Early in the year, the Administrative Board of the Courts of the State of New York invited interested parties to comment on the New York City Bar proposal that would effectively prevent bond lawyers from making political contributions to government officials for whom they perform legal work. Former President Ric Weber, chair of the Amicus Committee, volunteered to draft NABL’s comments. Ric drafted a masterpiece. He received a major assist from Secretary Howard Zucker on a key part of the comments that pointed out, with devastating effect, the almost complete absence of any factual support for the pay to play foundation upon which the City Bar proposal rests. The comments were a terrific piece of work of which all NABL members can be justifiably proud. As the pay to play battleground shifts to New York this fall, I expect those comments to continue to play a key and influential role.

We also acknowledged during the year that The Quarterly Newsletter had become much more than that. In recognition of its increasingly scholarly status, our esteemed editor Fred Kiel suggested a name change — and within 30 minutes had compiled a list of nearly 40 possibilities. Thus...
was born *The Bond Lawyer: The Journal of the National Association of Bond Lawyers*. Fred has done an outstanding job once again on this publication, continuing its growth into a truly valuable asset to members. Thank you, Fred.

While it was a productive year, it was also a tough year for yet another President, beginning at last year’s Workshop lunchtime entertainment when I was asked to embarrass myself as part of the closing skit done by the Capital Steps. I hasten to add that my problems during the year were far different than those bedeviling that other President. Last fall, Board member Bob Buck advised me that he was retiring from the practice of law and pursuing a different career path while still young enough to smell the roses and enjoy life. Bob is now studying naval architecture, if you can believe that. Despite his retirement at the end of last year from his law practice at Palmer & Dodge, Bob continued his great service as a member of the Board through today. I mentioned earlier that Bob was truly instrumental in helping the Board finalize the *Model Engagement Letters* project. Bob has been an outstanding asset to NABL during these past 3 years. As Fred Kiel, Editor of *The Bond Lawyer*, aptly said in the September 1 issue, Bob is one of the “nicest, most civil, elegant, and centered bond lawyers you will ever meet.” All of these adjectives assuredly continue to apply to Bob Buck, naval architect. Bob will be sorely missed.

But the shock of Bob’s retirement was mild compared to the shock of Amy Dunbar’s retirement as Director of Governmental Affairs as of June 1. No one has been as much an integral part of NABL’s evolution into the highly respected voice of the public finance legal profession it is as Amy. She is NABL to many. Her wisdom, savvy, thoughtful insights and keen knowledge of the way Washington works have been invaluable assets to me, the Board and to all NABL members. Not surprisingly, the Search Committee formed by the Board and headed by incoming President Floyd Newton has found the task of replacing Amy to be very difficult. NABL’s profound loss is tempered only by the knowledge that daughter Emily has now gained a full-time mother. Thanks, Amy, for your immense contribution to NABL these past 12 years. We miss you greatly.

I would like to express my sincere thanks to Pat Appelhans and her extraordinary staff in the National Office. What a terrific and dedicated crew they are. Their efforts make this job far easier than most jobs of this nature. Thanks, too, to Laura Butera, NABL’s Administrative Assistant in the Washington office. Laura has had a difficult time, what with Amy’s retirement barely a year after she began. She has hung in there and will be a great asset to Amy’s successor once we find him or her.

My thanks to the entire Board for their work these past 12 months. Special thanks to the departing Board members, Treasurer Jeannette Bond, immediate past President Julie Ebert, and members Bob Buck and Pam Robertson. I have enjoyed working with you all.

I hope I have not forgotten anyone. If I did, I apologize.

Thank you all for the honor and the privilege of serving as President this past year. It has been a richly rewarding experience that I shall not forget.

**ACTIONS BY THE BOARD OF DIRECTORS ON NOVEMBER 12 AND 13, 1998**

The Board of Directors of the Association convened at 8:15 a.m., Pacific Standard Time, on Thursday, November 12, 1998, at Helena, Napa Valley, California. President Floyd C. Newton III presided. Also present were: Howard Zucker, President-Elect; J. Hobson Presley, Jr., Treasurer; Carolyn Truesdell, Secretary; Directors Lisa P. Soeder, David A. Walton, Mary Jo White, William L. Gehrig, Linda L. D’Onofrio, William J. Noth, and J. Douglas Rollow; William H. Conner, Immediate Past President; Frederick O. Kiel, Honorary Director; and Patricia F. Appelhans, Executive Director.

**Executive Director’s Report**

Executive Director Appelhans reported that as of October 30, 1998, the Association had 3012 members (2575 regular members, 232 associate members, 198 legal assistant members and seven retired members), and that renewals were coming...
in ahead of last year's pace. She also reported on the meeting held in Washington with Education Chair Lauren Mack and others to plan the 1999 seminars. Executive Director Appelhans reported that requests for proposals were being sent out to prospective auditors for the Association, and Honorary Director Kiel made a motion to delegate to the Executive Committee the ability to select the auditor for the Association's 1998 financial statements. The motion was seconded by President-Elect Zucker and passed by unanimous vote of the Board.

1998/1999 Budgets

Treasurer Presley discussed the current financial information for 1998 as prepared by Executive Director Appelhans. He noted that attendance at the Tax Seminar was down in 1998 over 1997, but that expenses were also reduced, and that the line item for book sales for the Bond Attorneys' Workshop is less than 1997 because fewer books were printed and available to sell. Treasurer Presley also discussed the significant increase in Aspen royalties for the tax book and CD-ROMs. Treasurer Presley then highlighted certain expenses, including the equipment depreciation and capital expenditures, which largely related to a new copier at the national office, and expenses for the consultant and the search committee for the new Director of Governmental Affairs. Overall, a surplus is expected for 1998.

Treasurer Presley then discussed the 1999 Budget, which shows an increase in membership revenues to reflect the dues increase previously put in place for 1999. He also noted that the seminar revenues will be revised to reflect any fee increases that may be approved by the Board. There was general discussion that it was appropriate to keep the dues as low as possible, but to make the seminar fees cover all expenses and, in particular, to increase the non-member seminar fees to a level sufficient to encourage membership. President-Elect Zucker made a motion to increase seminar fees as follows:

<table>
<thead>
<tr>
<th>Seminar</th>
<th>Member</th>
<th>Non-Member</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bond Attorneys' Workshop</td>
<td>$425</td>
<td>$650</td>
</tr>
<tr>
<td>Tax Seminar</td>
<td>425</td>
<td>595</td>
</tr>
</tbody>
</table>

Director Noth seconded the motion, which passed by unanimous vote of the Board. The Board made no change in the fees for the Fundamentals Seminar. Treasurer Presley then made a motion to accept the 1999 Budget and to delegate to the Executive Committee the authority to make any appropriate changes, particularly with respect to salary items for the National Office and the Director of Governmental Affairs. Director Gehrig seconded the motion, which passed by unanimous vote of the Board.

Pay-to-Play

President Newton expressed grateful thanks to former Association Presidents Fredric Weber and Julianna Ebert, who were principally responsible for NABL's supplemental submission to the Administrative Board of the Courts, Office of Court Administration in New York (the "Administrative Board") with respect to the proposed pay-to-play rule of the Association of the Bar of the City of New York (the "City Bar"). President-Elect Zucker then reported that the American Bar Association Ethics Committee is drafting a proposed model rule and anticipates an exposure draft in January, 1999, for discussion at the ABA mid-year meeting. He also reported that the New York State Task Force was expected to report to the State Bar Association in December, 1998. President-Elect Zucker also noted an article in the November 11, 1998, issue of The Bond Buyer to the effect that the City Bar will propose a disclosure rule to the Administrative Board with respect to political contributions by attorneys. Finally, President-Elect Zucker stated that it may be appropriate for the Association to formally comment in the future on the proposed City Bar disclosure rule.

New Jersey Opinion 33

President Newton and President-Elect Zucker led Board discussion about Opinion 33, released in September, 1998, by the Committee on the Unauthorized Practice of Law appointed by the New Jersey Supreme Court, which prohibits lawyers not admitted to practice in New Jersey from advising New Jersey governmental bodies in connection with the issuance of bonds. Board
members noted that the Attorney General and Treasurer of the State of New Jersey have filed a motion for remand and stay of the opinion and are scheduled to file an additional brief in November, 1998. Following extensive discussion by Board members about whether the Association should file a brief relating to Opinion 33 and on what issues, President Newton moved that the Professional Responsibility Committee be asked to prepare and submit a motion seeking permission to file a substantive brief. Director Soeder seconded the motion and, following discussion, the motion was unanimously approved by the Board.

Underwriter's Counsel Opinion

Director Noth discussed the current draft of the Model Letter of Underwriter's Counsel. The Board discussed various issues raised by the draft, particularly identification of the client. President Newton noted that Former President William H. McBride is writing an article for The Bond Lawyer regarding this issue. The Board also discussed whether the letter was intended to be a paradigm or only to reflect the more typical minimum requirements of an opinion, with the latter the consensus of the Board.

Model Indenture Committee

President Newton stated that the Model Indenture is a committee project that has been authorized by the Board, but that since it is not a Board project, there would not be a page-by-page discussion of the Indenture and related Commentaries by the Board. However, President Newton encouraged all Board members to send comments on the current draft and Commentaries to Secretary Truesdell or Committee Chair Morris Knopf. Secretary Truesdell, as liaison to the Committee, led a discussion of certain aspects of the Model Indenture and took comments from the Board. Because several members of the Board had comments on various sections of the Indenture relating to federal tax law, the Board recommended that the draft and Commentaries be provided to Association members Jeffrey M. McHugh and Charles C. Cardall, the Chair and Vice-Chair of the General Tax Matters Committee, for their comments. President Newton indicated that the Model Indenture and Commentaries should be made available to Association members by mid-summer 1999. The Board also discussed extensively the form of distribution, including the possibility of making the Model Indenture and Commentaries available on the Association's website.

ABA Ethics 2000 Commission

President Newton reported on a letter sent to Immediate Past President Conner by Association member John M. Gardner regarding his service on the ABA Ethics 2000 Commission. Member Gardner will keep the Board informed of any activities that would be of interest to the Association and its members.

Bankruptcy Committee

Secretary Truesdell reported on a memorandum received from Association member James E. Spiotto, Chair of the Bankruptcy Committee, with regard to municipal bankruptcy amendments approved by the House and the Senate of the 105th Congress. Because Congress concluded its session without enacting any bill into law, no bankruptcy legislation applicable to municipal bonds was adopted in 1998.

Securities Law and Disclosure Committee

Director White reported on activities on the Securities Law and Disclosure Committee. She noted that former Association President Fredric Weber and other attorneys at his firm are preparing two papers on insider trading. The first will be a scholarly review of the law to be published in The Bond Lawyer, and the second an article or memorandum for more general distribution, particularly to public officials. Members of the Committee will review and comment on the articles as they are developed. Director White also noted that she and others met with representatives of the Municipal Securities Rulemaking Board regarding disclosure and other issues. Committee Chair William L. Nelson and Vice-Chair Walter J. St. Onge III also met with representatives of the Securities and Exchange Commission regarding various matters, including ways to provide information to issuers regarding disclosure matters. Director White commented that she was particularly pleased with the activity of various Association members in continuing the good relationships with governmental agencies and associations.
during the time that the Association is without a Director of Governmental Affairs in Washington. President Newton requested that Director White report at the February Board meeting on recommendations of Association members to attend the spring meeting with the SEC.

NABL Website

Director Gehrig provided the Board with extensive information regarding the revision of the NABL website and indicated that he had been working with Association member David Miller and the Association's Washington Administrative Assistant, Laura Butera, in developing the new website. Director Gehrig indicated that the Tax, Securities, Opinions, Professional Responsibilities, and Legal Assistants committees would have individual pages, as would the Bond Attorneys' Workshop Steering Committee. The Board will consider adding other individual and project pages. The Association is also investigating a threaded message mechanism through which members could communicate. President Newton noted that the usefulness of the NABL website requires everyone's involvement by providing ideas and information, as well as the importance of the committees and the Board members in making sure that the information on the website is kept current. Any Board members or Association members with ideas should e-mail Director Gehrig. Director D'Onofrio suggested that a website committee be established of Association members who are particularly "web-literate." Director Gehrig also noted that issues of The Quarterly Newsletter and The Bond Lawyer since November, 1992, would be available through the website. Secretary Truesdell noted that website is particularly important for providing member services and making available information about bond lawyers and our activities to the broader public. President Newton also led discussion as to whether there should be a password-protected area that would be available only to members to provide security and to limit access to publications that are sold by the Association. These matters will be discussed further at future Board meetings.

General Tax Matters Committee

President Newton, Director Walton, Former President McBride, and members Jeffrey M. McHugh and John J. Cross III met with IRS representatives recently regarding the IRS reorganization with respect to the Commissioner's side of the IRS. The representatives were seeking NABL's ideas with respect to the handling of tax-exempt matters, including audits and examinations. Director Walton and other Board members noted that many of the issues dealt with by Association lawyers are with the Chief Counsel's office, not the Commissioner's office. Director Walton stated that the IRS is expected to announce reorganization plans for exempt organizations, governmental entities and tax-exempt bonds by January, 1999, and implement changes by the summer of 1999. Director Walton also indicated that General Tax Matters Committee Chair McHugh will draft comments on the reorganization to be submitted to the IRS.

Director Walton and other Board members then discussed a recent Minnesota IRS district audit with respect to the financing of cardboard container recycling as solid waste. It was noted that an ABA committee will be submitting comments on the solid waste regulations and the Board discussed whether the Association should also submit comments. President Newton expressed concern that the Association's comments not be interpreted to be a response to a specific audit matter. The issue under consideration is whether transportation and handling costs should be taken into account in determining whether a waste product has value. It was suggested that the Association's General Tax Matters Committee organize a subcommittee to consider this matter and comment on the regulations. Director Walton also noted that Form 8038s are apparently now being stored by the IRS in Utah, but it was the consensus that lawyers should continue to file in Philadelphia until there is an official IRS announcement of a change.

Education Committee

President-Elect Zucker discussed the memorandum from Education Committee Chair Lauren Mack regarding the 1999 Tax, Washington, and Fundamentals Seminars, as well as other Committee activities. Director White suggested that the Association consider an audio ethics conference, similar in structure to the power
The Board discussed the Association's policy regarding attendance of governmental employees at the Bond Attorneys' Workshop, and it was determined that generally the benefits of such attendees participating outweigh any concerns of their inhibiting discussion. Director Rollow discussed the evaluations from the 1998 Bond Attorneys' Workshop and reported that the evaluations were very favorable; he indicated that, in particular, the curriculum changes were well received. Director Appelhans reported that she is meeting with staff of the Palmer House Hilton to address some of the logistical concerns raised about the meeting and hotel rooms. Director Rollow will solicit views on new topics and will be replacing approximately eight or nine Steering Committee members who have served on the Steering Committee for three years. The Board also discussed the major presentations on tax, securities and general law matters and requested that topic suggestions and Steering Committee recommendations be provided to Director Rollow.

**Legal Assistants Committee**

Director Rollow reported that the Legal Assistants Committee is looking at issues such as Blue Sky concerns and making changes to the Fundamentals Seminar program for legal assistants.

**Search Committee**

President Newton reported on a meeting of the Search Committee for a new Director of Governmental Affairs held the previous day and indicated that the Committee was very pleased with the new résumés received from the consultant. President Newton indicated that approximately five candidates will be interviewed by the Search Committee in Washington on December 10, 1998.

Following a motion for adjournment, the Board adjourned at 10:30 a.m.

Respectfully submitted,

Carolyn Truesdell,
Secretary
The Bond Lawyer 11 December 1, 1998

Visit NABL's new website: www.nabl.org

ACTIONS BY THE BOARD OF DIRECTORS ON SEPTEMBER 16, 1998

The Board of Directors met on September 16, 1998, in Chicago. President William H. Conner presided. Also present were: Floyd C. Newton, President-Elect; Howard Zucker, Secretary; Jeannette M. Bond, Treasurer; Directors J. Hobson Presley, Jr., Robert W. Buck, David A. Walton, Carolyn Truesdell, Mary Jo White, Pamela S. Robertson, and Lisa P. Soeder; Immediate Past President Julianna Ebert; Honorary Director Frederick O. Kiel; and Executive Director Patricia F. Appelhans.

Report of the Treasurer

The Treasurer advised the Board of Directors that the Association's operations through August 31, 1998, were consistent with the budget.

Report of the Executive Director

The Executive Director gave her report, briefing the Board of Directors on, among other things, the following matters: membership (current total 2,999), Bond Attorneys' Workshop (1,020 paid registrations, eight exhibitors), The Bond Lawyer, and Model Engagement Letters.

Website

The President updated the Board on the status of the Association's website. The President informed the Board that a tax group wants to link with the website for a fee. After some discussion, it was decided to continue to explore the concept.

Arbitrage and Rebate Committee

Director Soeder updated the Board on the committee's activities.

Bond Attorneys' Workshop

Director Presley gave his report, briefing the Board on, among other things, the following matters: sponsorships, exhibitors, phone bank, and luncheon speaker.

General Tax Matters Committee

Director Walton updated the Board on the activities of the committee. Mary Gassmann
Reichert will head up the Issuers' Right To Appeal Project with assistance from Hank Klaiman, Perry Israel and David Walton. Comments are due by the end of September.

**Opinions**

Director Robertson informed the Board that an exposure draft of the Model Underwriter's Counsel Opinion will be distributed during the Bond Attorneys' Workshop for comments. All Board comments should be forwarded to Edwin Lucas III.

**Section 103 Editorial Board**

The Treasurer updated the Board on the activities of the Editorial Board. A Desk Book is scheduled to come out in September. There was some discussion of the possibility of dovetailing the Desk Book with the Website. The President-Elect will look into the possibility for next year.

**Securities Laws and Disclosure**

Director White gave her report, briefing the Board on the following matters: Blue Sky-Federal Preemption, Year 2000 Disclosure, Informal Meetings with the SEC, MSRB Disclosure Forum, Insider Trading, Underwriter's Counsel Opinion, NMFA, and SEC Enforcement Subcommittee.

**American Bar Association Matters**

The Secretary updated the Board on the activities of the Tax Exempt Financing Committee of the ABA.

**Search Committee Report**

The President-Elect updated the Board on the search Committee's activities to fill the Director of Governmental Affairs position.

**Model Indenture Committee**

Director Truesdell updated the Board on the status of the revised draft of the Model Indenture Project. Director Truesdell requested that all additional comments on the draft come directly to her. Director Truesdell also informed the Board that all Trustee sessions at the Bond Attorneys' Workshop will receive the draft. A revised draft will be presented at the November Board meeting.

**Amicus Review Committee**

The Secretary informed the Board that a brief was filed by the Attorney General of New Jersey in August on New Jersey Opinion 33. The effectiveness of Opinion 33 was stayed. The Secretary led the discussion on NABL's participating in an *amicus* brief. After some discussion the Board decided to defer action.

Respectfully submitted,

Howard Zucker
Secretary

**ACTIONS BY THE BOARD OF DIRECTORS ON SEPTEMBER 17, 1998**

The Board of Directors met on September 17, 1998, in Chicago. President Floyd C. Newton III presided. Also present were: Howard Zucker, President-Elect; J. Hobson Presley, Jr., Treasurer; Directors Lisa P. Soeder, David A. Walton, Mary Jo White, William L. Gehrig, Linda L. D'Onofrio, and William J. Noth; Immediate Past President William H. Conner; Honorary Director Frederick O. Kiel; and Executive Director Patricia F. Appelhans.

 Following a discussion of President Newton's recommendations for Chair and Vice-Chair and Board Advisor for each of the Association's Committees, it was moved by Director Walton and
seconded by Immediate Past President Conner and unanimously approved that those persons named below be appointed to serve as Chair, Vice-Chair, Board Advisor, or members, as the case may be, of the respective Committees, as follows:

**Amicus Review**
- Chair: Fredric A. Weber
- Vice-Chair: Richard M. Jones
- Advisor: William H. Conner

**Bankruptcy**
- Chair: James E. Spiotto
- Vice-Chair: S. Frank D'Ercole
- Advisor: Carolyn Truesdell

**Bond Attorneys’ Workshop**
- Chair: J. Douglas Rollow
- Vice-Chair: Cynthia M. Weed
- Second Vice-Chair: Eric E. Ballou

**Education**
- Chair: Lauren K. Mack
- Vice-Chair: Eric E. Ballou
- Advisor: Howard Zucker

**General Tax Matters**
- Chair: Jeffrey M. McHugh
- Vice-Chair: Charles C. Cardall
- Advisor: David A. Walton

**Legal Assistants**
- Chair: Ann L. Atkinson
- Vice-Chair: Susan M. Parker
- Advisor: J. Douglas Rollow

**Model Indenture**
- Chair: Morris E. Knopf
- Vice-Chair: Charles H. Waters, Jr.
- Advisor: Carolyn Truesdell

**Opinions**
- Chair: Edwin F. Lucas III
- Vice-Chair: Allen K. Robertson
- Advisor: William J. Noth

**Professional Responsibility**
- Chair: Meredith L. Hathorn
- Vice-Chair: Patricia M. Curtner
- Advisor: J. Hobson Presley, Jr.

**Securities Law and Disclosure**
- Chair: William L. Nelson
- Vice-Chair: Walter J. St. Onge III
- Advisor: Mary Jo White

**Section 103 Editorial Board**
- Members: Kristin H.R. Franceschi, Clifford M. Gerber, Valerie Pearsall Roberts
- Advisor: Linda L. D’Onofrio

**The Bond Lawyer Editorial Board**
- Members: Scott R. Lilienthal, John M. McNally, Karen S. Neal, Robert Dean Pope
- Advisor: Lisa P. Soeder

Executive Director Appelhans submitted to the Board for its approval a resolution designating Harris Bank as a depository of Association funds, and authorizing the President, Treasurer, and Executive Director to sign checks and withdraw funds. The Board unanimously approved its adoption.

President Newton then reviewed with the Board the schedule of events and projects for the upcoming year.

President Newton then called upon President-Elect Zucker to update the Board on New Jersey Opinion 33, whereupon the President-Elect informed the Board that a brief was filed by the Attorney General of New Jersey in August, 1998, requesting a remand. The effectiveness of Opinion 33 was stayed. After some discussion the Board decided to await the outcome of the remand and to schedule a conference call of the Board if necessary to consider further action on filing an *amicus* brief.

Respectfully submitted,

Carolyn Truesdell
Secretary
WASHINGTON SAGA

Who would have thought in August, when President Clinton was confessing his infidelity and the Democrats were afraid of a Republican sweep in the mid-term elections, that those elections would instead result in an increase in Democratic representation in the House of Representatives, maintenance of the status quo in the Senate, improvement of the President’s position regarding congressional impeachment, and the resignation of Speaker Gingrich? The Republicans were smacking their lips in anticipation of a veto-proof majority and the Democrats were visibly packing their tents, with some even refusing to be seen with President Clinton. What a difference the voice of the people who vote can make!

It is difficult to pontificate about the future of the next Congress when there is such disarray in Washington. No one really knows what will happen in the 106th Congress, especially the members of Congress themselves. The Republicans have just elected what might be termed divided government in the House, maintaining two of the “losing” team and throwing out two others, reflecting both a desire for change and fear of the unknown. Whether the melding of the old and new will work remains to be seen. Conventional wisdom seems to read into the election results a desire by the electorate to see a less contentious environment in Washington in which the government can focus on the issues that people care about instead of President Clinton’s sex life, and a Congress that will work together. However, the Republican members leading the charge to throw out their leadership seem to want just the opposite, a more confrontational, ideological, and successful effort from their leadership. The six vote margin between Democrats and Republicans would suggest the need for working together, not against each other, if Congress is to achieve anything. Some believe that in order to get things done, both sides will work together, while others think that we are in for two years of confrontation, tongue-wagging, and ideological posturing leading up to the presidential election in 2000.

What, you ask, did the election mean for the bond community? It meant at least the following: if anything is going to be done, it will happen in 1999 because 2000 is a presidential election year. That means that the effort that will be waged to accelerate the volume cap increase from its current phase-in — beginning in 2003 and ending in 2007 — to a more immediate time frame will have to hit the ground running in 1999. That will be somewhat difficult since the primary sponsors of the provision are gone. Congresswoman Kennelly (D-CT) left Congress to run for Governor and lost. Senator D’Amato (R-NY) lost his bid for re-election to the Senate. Immediate attention should be given to replacing their leadership on this issue if such an effort is to succeed.

Of course, what shape a tax bill will take will presage whether accelerating the volume cap increase will work. The budget scenario will be determinative, and on that issue we know that the new Speaker of the House, Congressman Bob Livingston (R-LA), ran on the platform that "the trains would run on time." He promised that the budget would be done according to schedule by April 15th, eliminating the session-ending confrontations and concessions to the President. What surplus or deficit they will be facing remains to be seen, based on the strength of the economy in the next quarter. This schedule also suggests that activity on tax issues related to budget issues will be dealt with quickly in the new year. Much of the Republican members’ dissatisfaction came from
their failure to produce the promised tax relief bill, so I would expect that to be high on the agenda for next year, but I would guess that unless it is in a form that the Democrats agree to, it will not be part of an expedited budget package. It will probably be worked on at the end of next year and if it is ideological — and therefore contentious — will carry over into the election year of 2000.

Other possible bond candidates for a tax bill that have surfaced to date are education measures, either in the form of rebate relief for education bonds or the President's proposal for a tax credit for school construction. Senator Carol Moseley-Braun (D-IL) was the champion of the latter initiative, and she was defeated. Proponents of the tax credit initiative will have to find another member of the Finance Committee to carry it. Another possible candidate is Senator Moynihan's anti-stadium proposal. Senator Moynihan has announced his retirement in 2000, so it is unclear what initiatives he will choose to work on in his final Congress. He has been a strong advocate for non-profit finance, authoring the elimination of the $150 million cap for 501(c)(3) bonds.

Another issue to watch in a possible tax bill is whether there will be any changes to the IRS restructuring bill and specifically the bond appeal process. The IRS has just released its regulations and until there have been a few appeals to see if the process works to the satisfaction of issuers and their congressional representatives, action is unlikely. However, Congressman Rob Portman (R-OH), a member of Ways and Means, offered to work on this issue with issuers if there were problems.

My fundamental expectation is that the Republicans will have a difficult time corralling their own forces in the face of a six vote margin and therefore will incline toward reasonable, obtainable, and thus, moderate initiatives. Otherwise, if they pursue an ideological path, there will be gridlock and polls and the presidential election will begin to affect the process. The Democrats have set their sights on retaking the Congress, and the Republicans will quickly focus on maintaining the majority. For all the whining about the excessive influence of the media and the inside-Washington types, it is nice to see that elections can still be held in which the electorate can and does affect what goes on in Washington. So if you have a newly elected or even old but nervous representative or senator, make your views known, because Congress seems to be listening — at least for now.

Stay tuned for more news from the Nation’s Capitol. . . .

Amy K. Dunbar  
Director of Governmental Affairs (Ret.)  
November 20, 1998

AMY K. DUNBAR RECEIVES FRIEL MEDAL

Amy K. Dunbar, the Association's first Director of Governmental Affairs, was awarded the Association's Bernard P. Friel Medal at the Bond Attorneys' Workshop luncheon on September 17, 1998. The presentation was made by former President James W. Perkins, who brought Ms. Dunbar to the Association from Palmer & Dodge in 1986. Ms. Dunbar was also awarded an honorary lifetime membership in the Association.

Ms. Dunbar, as noted at length in the June 1 issue of The Bond Lawyer, created the Director of Governmental Affairs position, and in it contributed mightily to the Association's credibility with those inside the Beltway and with members. During her tenure, she waged the Association's large and small wars in the nation's capital, presenting the Association's positions with patience and eloquence to the Congress, to the regulators, and to the public interest groups whose members we represent. She retired in May to spend more time with her daughter Emily.

The Friel Medal is awarded for distinguished service in public finance. Amy Dunbar served longer and better than most. We will miss her more than we now know.

Accepting the medal, Ms. Dunbar commented as follows:

Thank you. This is particularly special coming from Jim Perkins because he has been my role
model and inspiration as a lawyer, having the highest intellectual acumen, dedication to the public purpose of public finance, common sense, compassion, and fairness.

I want to thank all the Presidents and Board members with whom I have had the pleasure to work, especially Fred Kiel for his hard work with me during all those years.

Most importantly, I want to thank all the members with whom I have worked through so many issues. Your contribution of time, expertise, and support to NABL's projects and my learning have been invaluable. It's been a privilege to work on legal and public policy issues with so many wonderful and extraordinary people. Thank you so much.

FRIEL MEDAL AWARDED POSTHUMOUSLY TO AUSTIN V. KOENEN

The Association's Bernard P. Friel Medal, for distinguished service in public finance, was awarded posthumously to Austin V. Koenen at the Bond Attorneys' Workshop luncheon on September 17, 1998. Christopher Fink, of Morgan Stanley & Co. Inc., accepted the medal on behalf of the Koenen family.

Mr. Koenen, a former Chairman of the Public Securities Association (now The Bond Market Association) and former President of the Municipal Forum of New York, had worked at Kuhn Loeb & Company and Salomon Brothers, and had been head of municipal finance at Shearson Lehman and, more recently, at Morgan Stanley & Co. Inc. At his death, on May 1, he was chief executive of China International Capital Corporation, a Beijing investment banking firm owned by several Chinese government entities and Morgan Stanley Dean Witter & Company.

During his municipal career, Mr. Koenen championed ethical improvement in the industry, including curbs on pay-to-play practices, as well as improved disclosure. He was critical of efforts by the SEC and MSRB to regulate municipal issuers indirectly through dealers and urged repeal of the Tower Amendment so that the SEC might regulate issuers directly.

In presenting the Friel Medal, Association President-Elect Howard Zucker said that Mr. Koenen "will be remembered by the bond industry as the beacon of the highest ethical standards. . . . Austin was a frequent participant in Association conferences and was the leading champion, both privately and publicly, among investment bankers in promoting respect for the importance of the objectivity of the bond counsel opinion and the integrity of bond counsel."

THE TWENTIETH ANNUAL MEETING

The Twentieth Annual Meeting of the National Association of Bond Lawyers was called to order by President William H. Conner at 5:43 p.m., Central Daylight Time, on September 16, 1998, at the Palmer House Hilton in Chicago. In attendance were all officers and members of the Board of Directors of the Association, Executive Director Patricia F. Appelhans, and approximately ninety-five other members of the Association.

President Conner announced that the first order of business was a report from Treasurer Jeannette Bond. Treasurer Bond stated that the financial condition of the Association is sound and that the Association currently has a fund balance approximately equal to one year's expenses.
President Conner thanked Treasurer Bond for her report and spoke about those members, directors, officers, and other volunteers as well as the staff of the Association who had made great contributions to the Association during the prior year. He gave special thanks to Committee Chairs and Vice-Chairs and praised them for their work. Mr. Conner’s remarks are printed *supra*.

President Conner then introduced Immediate Past President Julianna Ebert, Chair of the 1998 Nominating Committee, who reminded members that, in accordance with Article VII of the By-Laws of the Association, the Committee consisted of five members, a majority of whom were not current directors or officers of NABL. President Ebert then presented the report of the Committee as previously circulated to the membership. She stated that, pursuant to the By-Laws, because no member of the Association had indicated an intention to make any other nominations, no other nominations would be accepted. Accordingly, the nominations of the Nominating Committee were presented for adoption. Upon motion of immediate Past President Ebert, and seconded by member Susan Weeks, the nominees were approved by unanimous vote of the members present at the meeting. Accordingly, Howard Zucker became President-Elect; J. Hobson Presley, Jr., became Treasurer; Carolyn Truesdell became Secretary; David A. Walton was re-elected to the Board of Directors for a term expiring in 1999; William J. Noth became a member of the Board of Directors for a term expiring in 2000; and William L. Gehrig and Linda L. D’Onofrio became members of the Board of Directors for terms expiring in 2001. It was noted that Floyd C. Newton III became President automatically upon election of a new President-Elect and that J. Douglas Rollow would become a member of the Board of Directors by virtue of his being the next Chair of the Bond Attorneys’ Workshop. William H. Conner, as Immediate Past President, will continue as a director pursuant to Section 5.02 of the By-Laws.

President Newton then addressed the membership. His remarks are printed *supra*.

The meeting was adjourned by President Newton at 6:32 p.m., Central Daylight Time.

Respectfully submitted,
Howard Zucker
Secretary

**THE NEW OFFICERS AND DIRECTORS**

At the Association’s Annual Meeting on September 16, *Floyd C. Newton III*, a partner on the Public Finance Team of King & Spalding, based in Atlanta, became President of the Association for a one-year term expiring in September, 1999. Mr. Newton has previously served as President-Elect and as Treasurer. He has also served on the Board of Directors and as Chairman of the Steering Committee of the Bond Attorneys’ Workshop. He has been a speaker at numerous seminars sponsored by the Association on various topics.

Mr. Newton graduated from Princeton University in 1977 with a B.A. degree in economics, magna cum laude. He received his law degree from The University of Georgia School of Law, magna cum laude in 1980, where he was Executive Editor of *The Georgia Law Review* and a member of Order of the Coif and other various honorary organizations. Mr. Newton joined King & Spalding after his graduation in 1980, and has practiced in the public finance area through the present. He became a partner of King & Spalding in 1987. Mr. Newton has served as bond counsel, underwriter's counsel, or special tax counsel on a wide variety of public finance matters, including bond issues for various health care and nonprofit institutions, utility and industrial companies, and other entities eligible for private activity bond financing and revenue bond issues for various governmental entities.

**Howard Zucker,** a partner of Hawkins, Delafield & Wood, resident in its New York office and a member of the firm’s Management Committee, was elected President-Elect. Mr. Zucker served previously as Secretary of the Association, and as a Director.

**Carolyn Truesdell,** a partner in the Public Finance Section of Vinson & Elkins, L.L.P.,
Houston, was elected Secretary. Ms. Truesdell had previously served as a Director of the Association.

**J. Hobson Presley, Jr.**, a partner with Maynard, Cooper & Gale, P.C., Birmingham, was elected Treasurer. Mr. Presley had served as a Director from 1997 to 1998 by virtue of being the Chair of the Bond Attorneys’ Workshop. He had previously been a member of the Steering Committee of the Bond Attorneys’ Workshop and served as First and Second Vice-Chair of that Committee.

**Linda L. D’Onofrio**, a partner with Whitman Breed Abbot & Morgan LLP, New York, was elected to the Board of Directors. Ms. D’Onofrio, a nationally recognized expert in the tax aspects of municipal finance, has worked in the municipal arena since 1981, serving as tax counsel to both issuers and underwriters in hundreds of financings aggregating over $10 billion in principal amount. Ms. D’Onofrio currently serves as Co-Chair of the New York State Bar Association Tax Section Committee on Tax-Exempt Finance, and as Last Retiring Chair of the American Bar Association Section of Taxation Committee on Tax-Exempt Financing, where she also served as Vice-Chair, Secretary, and as Chair of the Subcommittee that drafted model proposed regulations for the two-year construction exception to the rebate requirements. She has also served as Editor-in-Chief of *Federal Taxation of Municipal Bonds*, as a member of the Steering Committee of the Bond Attorneys’ Workshop, as chair of the Association's Education Committee, and as a frequent lecturer at the Association's Arbitrage seminars, Fundamentals of Municipal Bond Law seminars, Bond Attorneys' Workshop, and legislative seminars. Ms. D’Onofrio also lectures for the Practising Law Institute and has lectured on the arbitrage rebate provisions of the 1986 Tax Reform Act at the Annual United States Conference of Mayors.

Ms. D’Onofrio is a graduate of Smith College (A.B. with High Honors), Georgetown University Law Center (J.D. *cum laude*; Final Editor, *American Criminal Law Review*), and New York University School of Law (LL.M. (In Taxation)). She has served on the Board of Law Alumni of Georgetown University Law Center and is currently President of the Board of Directors of Court Appointed Special Advocates (CASA), a nonprofit corporation that assists the Family Court in the adjudication of difficult child abuse cases in the foster care system.

**William L. Gehrig**, a partner and Chair of the Finance Group at Arter & Hadden LLP (Washington, D.C., office), was elected to the Board of Directors. Mr. Gehrig previously served as Chair and Vice-Chair of the Education Committee, Chair and Vice-Chair of the Fundamentals Seminar, and as a member of the Steering Committee of the Bond Attorneys' Workshop. He is the general editor of the Association's *Fundamentals of Municipal Bonds* (published annually) and has served as the principal author of the Federal Tax section of that book since 1989. Mr. Gehrig has practiced in the municipal bond area since 1984. His practice concentrates on the tax and financial aspects of housing bond transactions, and he serves as underwriters' counsel, bond counsel, and special tax counsel for underwriters and issuers across the country.

Mr. Gehrig graduated from the University of Virginia in 1976 as an Echols Scholar (B.A. High Distinction) and received his law degree from the University of Virginia in 1981, where he was a member of the founding Managing Board and Executive Editor of the *Virginia Tax Review*. He passed the Uniform CPA Examination in 1978.

**William J. Noth**, a shareholder in the Public Finance Department of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C.,
Des Moines, was elected to the Board of Directors. He previously has served as a faculty member for the Fundamentals of Municipal Bond Law Seminar, as Vice-Chair and Chair of the Washington Seminar, as a member of the Steering Committee of the Bond Attorneys’ Workshop and as Vice-Chair of the Securities Law and Disclosure Committee.

Mr. Noth graduated from St. John’s University, Collegeville, Minnesota, in 1975 and received his law degree from the University of Iowa College of Law in 1982, where he was a Note and Comment Editor of the Iowa Law Review. He joined Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., after serving as a law clerk to Justice K. David Harris of the Iowa Supreme Court. Mr. Noth practices primarily as bond counsel in governmental bond financings and also represents issuers in other securities and municipal law transactions.

J. Douglas Rollow, with the law firm of Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, was elected Chair of the Steering Committee of the Bond Attorneys’ Workshop, and will serve as a member of the Board of Directors during his term as Workshop Chair.

THE TWENTY-THIRD BOND ATTORNEYS' WORKSHOP

Editor's Note: The report on the General Session was provided by Cynthia M. Weed of Preston Gates & Ellis LLP, Seattle.

This year’s incarnation of the Bond Attorneys’ Workshop, held for the first time at the Palmer House Hilton, was attended by about a thousand of us, almost all of whom, pretermittting a few tax lawyers, now understand the Y2K problem in excruciating detail. At the Thursday luncheon, Workshop Chair J. Hobson Presley, Jr., mystified the crowd by reading off a list of twenty-six attendees, whose distinction was revealed to be attendance at both this Workshop and the very first Workshop, held in 1976.

Two Bernard P. Friel Medals were awarded (see articles supra). The Carlson Prize of the Association, for the best scholarly article submitted to this journal during the previous publication cycle, was awarded to Linda B. Schakel, of Ballard Spahr Andrews & Ingersoll, by an ad hoc committee comprised of Cynthia M. Weed, of Preston Gates & Ellis LLP, Karen S. Neal, of Bass, Berry & Sims PLC, and
your editor, and presented by the unforgettable Rita J. Carlson. Ms. Schakel's article, "Qualified Zone Academy Bonds," was published in the September 1 issue.

Trenchantly introduced by new Bond Attorneys' Workshop Chair J. Douglas Rollow, Robert L. Steed, of King & Spalding, Atlanta, in a reprise of his 1986 Workshop remarks, regaled the crowd with a pastiche of often-fresh observations about (without implied limitation) life, sport, bond law, and his wiry, long-suffering spouse. He recounted having stunned an audience of New Zealanders by observing that the United States harbors more lawyers than sheep, while noting that it is also true that there are so few lawyers in this country that some people have to share one. He concluded by suggesting that "Mistakes are often just stepping-stones to failure."

Thursday morning dawned bright and sunny; shopping and sightseeing opportunities were abundant. However, the "draw" of the General Session was compelling. The Grand Ballroom on the 4th floor of the Palmer House was full, and the speakers faced a standing-room-only group. And the speakers were up to the task. Following a rousing introduction from Hobby Presley, the floor was turned over to the first of our three speakers (Hobby assured us that the order of appearance reflected nothing more than alphabetical order).

Former Association President Neil P. Arkuss, of Palmer & Dodge, graciously ceded several minutes of his time to Edwin Oswald, of the Department of Treasury. Mr. Oswald reported on a late-breaking ruling of substantial magnitude in the multi-family housing and non-profit financing practice areas. Rev. Rul. 98-47, announced on September 15, 1998, provides a brief, pungent analysis of what types of facilities will qualify for treatment as "residential rental property." In sum, if a facility provides substantial or continual "non-housing" services, then the facility would not constitute residential rental property. In the case of mixed use facilities, an allocable portion will not qualify. The ruling appears clear and concise. Neil Arkuss, who followed Mr. Oswald, acknowledged the contribution of this ruling: "The ruling contains (1) a sensible definition of what are complete units for living, and (2) permits significant non-housing services to be delivered without disqualification."

Although Neil then admitted that (apart from the foregoing) there were "absolutely no federal income tax developments of interest," he proceeded to interest, educate, and entertain us. The output regulations, announced by Treasury in January, received special note. As if we needed convincing, he reinforced the notion that output regulations were no place for a dilettante.
to visit. Neil did offer a ray of hope to the 501(c)(3) practitioner. The IRS may (or may not) actually need to receive all the bond documents with the Form 1023 application. Neil quickly concluded with a parable about debt service reserve funds, proceeds, and the universal cap. This actually was a "revelation" for me, perceiving a biblical connection with the regs. Thus, we closed with a smile and a feeling of gratitude, first, that we all do not have to wade through tax rulings on a daily basis, and second, that we have practitioners and interpreters as skilled as Neil in analysis and presentation.

The second of our speakers, former Association President Manly W. Mumford, practitioner emeritus, and well known to us all, speaking on Developments in State Law, announced his topic with no subtlety: "It helps if it's valid." His presentation, a concise outline of the fundamentals, was well-received by all and is reprinted in its entirety in this issue, infra.

The third member of the triumvirate, former Association President Robert Dean Pope, Hunton & Williams, also opened with the view that there had not been any spectacular development to report in the area of securities laws. There were a number of matters of substance to report, however. Dean brought us a new perspective on the analysis of yield burning investigations. The approach most recently receiving attention in the ongoing attacks against yield burning focuses on whether the underwriter or financial advisor providing escrow securities sold them at an improper markup. Dean cited the Dain Rauscher case filed by the SEC last January wherein the alleged impropriety of the markup for escrow securities is the focus of the case.

In other SEC enforcement actions, Dean noted the success of the SEC in obtaining settlements without proceeding to trial. One case cited involved a number of municipalities in Mississippi (SEC Release No. 7554, July 13, 1998) which on the face of the complaint appeared likely to settle without substantial defense. In other instances, e.g., the case involving Nevada County, California, and others (SEC Release Nos. 7535, 7536 and 7537), the local government had announced intentions of disputing the claim, citing reliance upon experts. The point made by the SEC was that "[d]espite its retention of professional advisors and appraisers," each issuer remained legally responsible for misrepresentations and/or omissions. (Perhaps we bond lawyers cannot say this too often to ourselves and our issuer clients.)

Dean also reported on three major enforcement actions in the 1998 Bond Attorneys' Workshop Vice-Chair J. Douglas Rollow Greets Workshop Attendees.
President-Elect Howard Zucker Presents the Friel Medal to Christopher Fink for Austin V. Koenen.

First Boston. The 10(b) and 10b-5 charges were dropped, with the claims resting on Section 17(a) of the '33 Act and MSRB Rule G-17 (fair dealing). In August, the SEC settled with Merrill Lynch in connection with its underwriter role (the notes). This case involved claims that have troubled a number of underwriters, because the claim was that the investment bankers, as part of their reasonable investigation in connection with the underwriting, did not solicit information from other employees at the firm who had business relationships with the issuer. In the third case, the SEC has filed against Rauscher Pierce, now Dain Rauscher (Securities and Exchange Commission v. Dain Rauscher, Inc., Kenneth D. Ough and Virginia O. Horler, SEC Litigation Release No. 15829, August 3, 1998). This matter has not settled and includes specific allegations involving actions that amount to a failure to disclose tax-exemption risk. Dean also pointed out several cases and announcements expressing the SEC's continuing view that "improper" activities in the selection of underwriter should be disclosed to both the issuer and investors, again without a clear indication of why this information should be material.

A recent case cited by Dean should be noted by all attorneys who work with "off-balance sheet" debt, including leases/certificates of participation. Franklin High Yield Tax-Free Income Fund v. County of Martin, U.S. Court of Appeals (8th Cir. No. 979-3727MN, August 13, 1998). The Court of Appeals reversed a summary judgment action, concluding that an agreement by the County to "use its best efforts" could not be disregarded without showing, in the record, that best efforts had been made. The implication may be serious, although this case continues to be developed.

Dean's analysis of the Y2K disclosure dilemma was predictably practical. "What should we suggest on disclosure, either as underwriters' counsel or in giving advice to our municipal clients generally? It probably would be material if an issuer has not even addressed the Y2K problem. The disclosure can be brief if the facts justify it: the issuer has assembled in-house expertise and/or outside consultants; it has inventoried its equipment; it believes it will cost X dollars to fix the problem; it has budgeted that amount; it expects to complete the process by a stated date." (Of course, there is the tough, middle ground where we know there is a problem, but the "experts" are not being especially clear in identifying the extent of the problem/cost/time parameters.)

Two additional points regarding initial disclosure were especially relevant for my practice. Over a number of years, we have seen an erosion in the legal restraint on hospital borrowing.
structures have been established that permit assets to be transferred to related corporations; formal mortgages are not recorded with respect to the assets. In addition, our bond security documents routinely include more flexible provisions regarding amendments, permitting insurers to consent to all amendments (in lieu of bondholders). Are we providing adequate disclosure emphasis on these tools of flexibility?

With respect to continuing disclosure, Dean reported routine compliance. He did indicate that municipal analysts generally and officially are not enthusiastic in their review of the 15c2-12 standards. The National Federation of Municipal Analysts is concerned that initial disclosure has been weakened and ongoing disclosure is more carefully monitored (not always a positive from its point of view). Dean provided a thoughtful counterpoint to this view (which this sympathetic listener thought persuasive).

The final major topic involved disclosure regarding the relationship of parties. The SEC has raised again the propriety of multiple roles in transactions. Although Dean's direct example involved an underwriter cited for breach of "fiduciary duty," the examples are equally applicable to bond counsel in multiple roles. Does anyone have any other undisclosed "stake" in a transaction? If so, disclose. Dean pointed out, without endorsement, that the GFOA's Committee on Debt and Fiscal Policy approved a Recommended Practice on the role of issuers in the selection of underwriters' counsel, and the MSRB also addressed the issue in a recent release.

Dean's prediction for the new year, that fees for bond counsel and underwriter counsel will not rise dramatically in the next year, was not greeted with much surprise. He did convince us, however, that enough happens in the world of government regulation from year to year to make our trips to Chicago well worth the effort!

Next year's Bond Attorneys' Workshop will be held in the same venue, from September 22 to 24.

'TIS THE SEASON . . .

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Former President James W. Perkins Presents the Friel Medal to Former Director of Governmental Affairs Amy K. Dunbar.
Joie de vivre! No new laws, regulations, rulings or judicial decisions to cause concern for this week’s bond opinions — and even a few helpful items! For example, we understand that the spending and budget bill to fund the federal government through September 30, 1999, included an increase in the private activity bond volume limit from $50 per capita to $75 per capita — though not, unfortunately, until 2003, with staged incremental increases stretching to 2007. The Congressional heart may be thawing.

Revenue Ruling

Also helpful (unless you were one of the unlucky ones who rendered an opinion that an assisted living facility with units containing kitchen facilities was not a residential rental facility for Code section 145 purposes) is Revenue Ruling 98-47. This Ruling concisely describes three buildings in a facility, Building X (clearly residential rental housing), Building Y (probably an assisted living facility), and Building Z (pretty much a nursing facility), and holds that Buildings X and Y are residential rental facilities for both Code section 142 and Code section 145, but Building Z is not. The key: “continual or frequent nursing, medical, or psychiatric services.” If the facility provides these, it is likely that the facility is not residential rental property.

Private Letter Rulings

Since the last issue of The Bond Lawyer, the Internal Revenue Service has released several interesting, but unexciting, private letter rulings and technical advice memoranda. Those that concern Section 103 matters are described below.

Small issuer rebate exemption. Technical advice memorandum 9835002 (May 22, 1998) relates to the small issuer exemption from the rebate requirement. Under the facts, after the year of bond issuance, the city discovered that the total amount of bonds issued by the city and its on-behalf-of and subordinate units had not exceeded $5 million during that year. Having conscientiously paid arbitrage rebate to the federal government, an on-behalf-of issuer requested a refund based upon the discovery (having been so “advised by its tax professional after the retirement of the Bonds”) and, lo, the refund was granted.

Should you be inclined to review the status of the exemption as applied to outstanding bonds for the purpose of claiming a refund (or abandoning the rebate computations), be wary. The TAM notes that the rules of Code section 148(f)(4)(D)(iv) (which require a specific allocation of the small issuer limit to subordinate units before bond issuance) also apply to on-behalf-of entities. If the bonds in question, therefore, were issued by an on-behalf-of issuer or a subordinate unit of government and if a timely allocation was
not made, then the exemption is not available. Setting aside this complexity, however, it should be permissible to apply the small issuer limit to previously-issued bonds upon learning that the $5 million limit was not exceeded in the calendar year of issuance.

*Short-term private business use.* Private letter ruling 9835022 (May 31, 1998) holds that a prison designed to house federal and non-federal prisoners was not used for a private business use. The exception for short-term contracts applied to an agreement with the U.S. Marshals Service to house federal prisoners since the term of the agreement was no longer than 90 days, including renewal options, even though the issuer “hopes and reasonably expects that it will renew the IGA [the agreement] indefinitely.” The ruling may provide comfort in those many cases confronting bond counsel where contracts seem to be renewed indefinitely for short-term periods even though neither party to the contract has an enforceable right to renew.

The ruling also finds that the (prison) “property is not used by natural persons not engaged in a trade or business” and, in addition, states, “The federal agency’s use of the facility is not general public use because this type of use is not available for use [*sic*] on the same basis by natural persons not engaged in a trade or business.” (The status of the prisoners as, presumably, natural persons is disregarded.) In other words, the ruling indicates that, for the purpose of the short-term use exception, the type of use under consideration may dictate whether the facility is to be viewed as a publicly-available facility.

*Two-year construction exemption: two TAMs.* Technical advice memorandum 9836001 (March 19, 1998) holds that, under the facts, there was substantial compliance with the procedures for bifurcation of an issue (for the 2-year expenditure exemption from rebate) and for election of the penalty-in-lieu of rebate. Although “the commissioner may disregard an issuer’s election for failure to follow Rev. Proc. 92-22,” since the issuer included appropriate references in its arbitrage certificate and Form 8038-G, the bifurcation and election were acceptable even though there was not full compliance with the requirements of Revenue Procedure 92-22. The memorandum also holds that the spending exception was properly applied, in the case of a pooled financing bond, to each conduit loan.

Technical advice memorandum 9842002 (July 2, 1998) holds that an entity validly elected to apply the 2-year exemption from rebate even though it did not so state, in that it claimed the $300 computation credit in its penalty-in-lieu of rebate computation. The errors made (which were several, in that the issuer did not state the proper amount of proceeds and failed both to account for reasonably expected investment earnings and to apply a reasonable, consistently applied accounting method) were not innocent, but also were not due to willful neglect. The 50% penalty was therefore waived.

*Solid waste facility change of use.* Private letter ruling 9838006 (June 11, 1998) holds that bonds issued to construct a solid waste disposal facility did not lose their tax-exemption notwithstanding demolition of the facility and sale of the remnants for scrap, since the cash proceeds from the sale were used to buy replacement processing equipment. For those of us who may have believed that abandonment was not a change in use, a modification of our logic may be required.

*Hospital reorganization.* Private letter ruling 9839004 (June 19, 1998) upholds another hospital reorganization. In this case, a special tax district that leased its hospital from a nonprofit corporation assigned its leasehold interest to an affiliated nonprofit corporation. The ruling requires specific amendments of the articles and bylaws of the affiliated nonprofits, but holds that the affiliates are instrumentalities.
of the district, a political subdivision. In fact, therefore, a change of use did not occur because the transfer amounted to a transfer between governmental units (i.e., between the district and an instrumentality of the district).

Similarly, private letter rulings 9842005 (June 19, 1998), 9841008 (June 19, 1998) and 9841009 (June 19, 1998) hold that, where a state created an HMO with the power of eminent domain and the HMO issued revenue bonds to finance new assets as well as to refinance certain prior bond issues, and where the HMO planned to lease or transfer substantially all of its assets to several nonprofit subsidiaries, the lease and transfer between the parent HMO and the subsidiaries was not a change in use.

Private letter rulings 9839016 (June 25, 1998) and 9839017 (June 25, 1998) uphold the continued tax-exemption of qualified 501(c)(3) bonds in the case of formation of a limited liability company by two nonprofit health care corporations under a plan for merger of services through the limited liability company. The rulings note that the LLC is treated as a partnership because it did not elect otherwise and that partnerships are considered either the aggregate of the partners or an entity independent of the partners, depending upon the facts under consideration. In these facts, the merged entities are to be treated as an aggregate, rather than as an independent entity, and thus the bonds are not private activity bonds (other than qualified 501(c)(3) bonds). The rulings assume no violation of the restriction against unrelated trade or business use or of the $150 million limitation. Private letter rulings 9844019 (August 3, 1998) and 9844022 (August 3, 1998) hold to the same effect in the case of an agreement for common management of a teaching hospital and a clinic between a university and a 501(c)(3) organization in the context of both governmental and qualified 501(c)(3) bonds.

$40 million limit. Technical advice memorandum 9841004 (May 14, 1998) holds that the $40 million limitation was not violated by the issu-
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ance of refunding bonds. First, the refunded bonds did not count (under the express exception for bonds refunded in a current refunding), and second, the last issue of exempt facility bonds was several months after issuance of the refunding bonds and therefore the issue of refunding bonds did not cause the limit to be exceeded.

Reissuance. Private letter ruling 9844021 (August 3, 1998) finds a reissuance in the case of conversion of multimodal bonds from a weekly variable rate to a rate fixed to maturity. Among others, the following were discretionary alterations under Notice 88-130, 1988-2 C.B. 543 (establishing reissuance rules for qualified tender bonds): (a) setting the interest rate at a long-term fixed rate rather than maintaining the weekly variable rate, (b) providing for municipal bond insurance for a portion of the bonds, (c) establishing optional and mandatory redemption schedules, (d) setting a redemption premium for certain optional redemption dates, and (e) serializing term bonds and thus providing for earlier maturities than existed prior to the conversion.

The ruling also concludes that its holding is consistent with section 1.1001-3 of the reissuance regulations, but contains no discussion regarding the fact that the legal documents authorizing the bonds provided for some or all of the changes. This ruling is likely to upset a few folks.

Transfer of governmental utility. Private letter ruling 9846004 (August 3, 1998) upholds, under the remedial action provisions of regulations section 1.141-12(e) (alternative use of disposition proceeds), a sale by an agency (created to provide power and energy to three cities) of the agency's entire interests in a bond-financed electric facility to a corporation for cash equal to the fair market value of the facility, under circumstances where the agency would concurrently acquire from the corporation, for a specified price, system-wide capacity sufficient to meet the continuing needs of the cities.

The transaction represented a sale “exclusively for cash” followed by an alternative use of disposition proceeds for a purpose that was not a private business use (namely, the acquisition of the system-wide capacity required to serve the electric energy needs of the cities). The ruling adds that the step transaction doctrine does not apply to combine the transactions into a single transaction where each transaction has independent economic significance (as they each did here).

Field Service Advice

“Field service advice” released by the Service is not a formal administrative determination, but provides guidance to field officers in developing facts for examination. As a result of a Freedom of Information Act suit brought by Tax Analysts, field service advice is now being made available to the public. Described below are five FSAs that relate to tax-exempt bonds.

Excessive interest. FSA 1998-191, dated October 1, 1992, advises that there is no basis under the tax-exempt bond rules for the Internal Revenue Service to deny tax-exempt status to bonds solely because the bonds carried an excessive interest rate. The Advice suggests, however, that further facts be developed regarding the nursing home financing in question for the purpose of determining whether there may have been a taxable capital gain to the governmental issuer from the sale of the home following default.

Cash flow borrowings. FSA 1998-176, dated May 4, 1992, advises that the obligations of a school district participant in a pooled tax and revenue anticipation note program did not appear to satisfy the safe harbor to the arbitrage rebate rules because (based upon “the workpapers provided” to the Service) the funds in question did not show a cumulative cash flow deficit. The FSA notes that the arbitrage certification supporting the borrowing may have been insufficient if the cumulative cash flow projections in the certification did not include all funds available to pay current expenditures or if the reasonable
expectations of the issuer regarding the projections were based upon the worst case rather than the most likely case.

**Tender purchase on remarketing.** FSA 1998-254, dated November 17, 1993, advises that bonds issued subject to a repurchase agreement under which investors were provided a tender right to put the bonds to a remarketing agent for par plus accrued interest at the end of each weekly interest rate adjustment period were owned by the investors. The transaction was not a secured loan arrangement.

**Temporary financing arbitrage bonds.** FSA 1998-200, dated February 18, 1993, advises that bonds issued to make a loan to a developer where the proceeds were possibly not spent but were used “to purchase the LOC,” and where permanent financing was not obtained and construction was not commenced, were probably arbitrage bonds and probably also violated the 2% costs of issuance limit, but further facts were required.

**Lien sales.** FSA 1998-245, dated October 13, 1993, advises that interest collected by counties upon redemption of tax liens which is then paid to purchasers of certificates representing the liens is not likely to be tax-exempt. The interest is not paid on an obligation of the counties, as no indebtedness arose on the part of the counties, and as there was no intent to borrow.

**IRS Continuing Education**

The IRS has released its fiscal 1999 Continuing Professional Education text for exempt organizations. This 407 page tome contains Part I relating to “technical topics” and Part II concerning technical developments since 1996. Of interest to bond lawyers are the following:

- Chapter A (whole hospital joint ventures), which describes the nature of such ventures and provides general examination guidelines for field agents (but omits coverage of ancillary joint ventures in which less than whole hospitals participate in joint ventures);

- Chapter G (arbitrage allocation and accounting regulations), which contains a general description of basic arbitrage concepts and a detailed description of allocation and accounting rules;

- Chapter H (abusive transactions involving tax-exempt bonds for section 501(c)(3) organizations), which lists eight factors indicating that an exempt organization’s bond-financed project does not adversely affect the organization’s section 501(c)(3) status and seven factors indicating that such a project may have an adverse effect; and

- Chapter N (unrelated business income tax developments), which includes a summary of proposed regulations on travel tours offered by exempt organizations (such as universities) and a discussion of unrelated business income arising from sales from museum gift shops.
Revenue Procedures

The IRS has issued Revenue Procedure 98-57 setting forth the maximum face amount of qualified zone academy bonds that may be issued for each state during calendar year 1999. The amounts range from $57,589,000 for California to $217,000 for Guam. The September 1, 1998, issue of The Bond Lawyer contained a Carlson Prize-winning article by Linda Schakel describing these bonds in detail.

50% Interest Rate?

Some have concluded that interest is tax-exempt on bonds such as the $7,580,000 50% McCormick Place Expansion Project Bonds Series 1998B identified in the September 10, 1998, issue of Grant’s Municipal Bond Issuer and the Livingston Township 14% and 15% coupons identified in Grant’s Municipal Finance issue of October 8, 1998. And, when you think about it, why not?

The issuer will receive about the same amount of proceeds to build the project, but the proceeds will consist of a lot of premium and a little principal. The annual debt service, too, will be more or less the same as it would be with a typical transaction (though the annual payment will include a lot of interest and a little principal). The par amount of the bonds will be lower (and that may provide debt limit help in some states) and the yield will be about the same as it otherwise would be (for the increase in interest rate will increase yield, but that increase will be offset by the increase in purchase price, which in turn will decrease yield, as you know). Basis to the bondholder will be affected, but will the market be burdened in a manner offensive to the IRS? Any takers?

Sharon Stanton White
Hunton & Williams
November 16, 1998

AN UNFORGETTABLE WEEK

Editor’s Note: Pope B. McIntire, formerly of King & Spalding, Atlanta, served as President of the Association from 1983 to 1984. On August 28, 1987, your editor interviewed him in Cashiers, North Carolina, in aid of the Association’s oral history project (see Bond Lawyers and Bond Law: An Oral History, 1992, at pp. 1–21). On that occasion, he somehow neglected to tell (but has now e-mailed, after considerable importuning) the tale which follows.

It was December, 1943, and I had been in the United States Army Air Force for six months. [Mr. McIntire later piloted B-17s on bombing runs over Germany.] I had just turned nineteen, and was an aviation cadet stationed in Santa Ana, California. Christmas was approaching, and we were told that we would be given a week’s leave. That was not nearly enough time for me to get all the way across the country to my home in Savannah, Georgia, and back, unless I could fly, and that wasn’t easy to arrange in those days, to say nothing of the cost.

I didn’t know what I was going to do. I have forgotten what aviation cadets were paid in those days but it wasn’t much, perhaps something like $75 per month. I didn’t have nearly enough money to spend a week in a Los Angeles hotel, so it looked as though I would spend a very dull Christmas at the air base in Santa Ana.

I called Mother to tell her that I wouldn’t be able to get home for Christmas. She asked me what I planned to do and when I told her that I had no plans, she suggested I call Johnny Mercer in Hollywood to see if I could visit him.

Johnny was a native of Savannah who although only thirty-four years old had already become one of America’s foremost songwriters, in a class with Irving Berlin, Cole Porter and George Gershwin. Among his big hits written prior to 1943 were "Lazy Bones," "Blues in the Night," "That Old Black Magic," "Laura," "On the Atchison, Topeka, and the Santa Fé” and "Skylark." He went on to write many, many more, including "Moon River," "Autumn Leaves" and "In the Cool, Cool, Cool of the Evening," which won Academy Awards.

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I reminded Mother that I had not seen Johnny since he was best man in my sister Cornelia's wedding. At that time I was eleven and wearing my first pair of long pants. I felt that trying to invite myself to spend Christmas and New Year's with him when he would undoubtedly be going to a lot of parties was a little too much. I also told her that he had an unlisted number and I wouldn't know how to call him if I wanted to. But Mother didn't give up easily. She said, "I'll call him."

Mother and Johnny had a very special relationship. In the 1920's, town theatres were a very big thing and in 1927 the Savannah Town Theatre had reached the finals of a national competition. Mother had the lead female part in the play and Johnny was the male lead. Mother and Johnny went to New York together with the rest of the cast for the final performance of the play. At the time, Johnny was nineteen and a senior at the Woodberry Forest School in Virginia. He was already writing songs, and he had a burning ambition to try his luck on Broadway, but his father, a successful real estate developer in Savannah, wanted him to go to college and forget about show business.

While they were in New York, Johnny talked with Mother about his dilemma, and to Johnny's delight, Mother told him he should give show business a try while he was still young enough to do something else if it didn't work out, and that if he didn't give it a try he might never forgive himself.

Johnny took Mother's advice, and after graduating from Woodberry he stowed away on a steamship headed for New York, with his first cousin Walter Rivers, to try his luck on Broadway. The rest, as they say, is history. Johnny always said he would never have tried it had it not been for Mother's encouragement.

Anyway, back in Santa Ana, the day after my telephone conversation with Mother I got a telegram from Johnny telling me to call him and giving me his telephone number. When I called he said he wanted me to come to Hollywood and spend my Christmas leave with him. I tried to beg off, saying that I thought he would be far too busy that week to fool with me, but he wouldn't take "no" for an answer. So I was off to Hollywood. When I rang the bell at Johnny's house, he came to the door and I said, "Hi, I am Pope." He said, "Natch, come in and have a drink," and we were off and running. Johnny's wife Ginger couldn't have been nicer and I was treated like a visiting dignitary rather than the teenager they really didn't know.

That night we went to a restaurant and I met my first two stars, Frank Sinatra and Nat (King) Cole. I remember that Sinatra was sitting at a table with a telephone waiting for news of the birth of his first child. The next night we went to a big party at Bob Hope's house and I had a wonderful time. During the war, people were very nice to men in uniform and I was made to feel right at home. My eyes must have been the size of silver dollars as I tried to take it all in.

The following night we had dinner at Harold Arlen's house and sang some of the songs that he and Johnny were working on together as well as a number of others. I joined in with the singing although I couldn't carry a tune in a bucket. One of the songs Johnny was working on at the time was "Accentuate the Positive" and I was very proud of myself for offering a word which he used in that song.

I quickly learned two things about Hollywood. First, the singers, comedians and songwriters didn't pal around too much with the actors, because (as Johnny put it) the actors got so deeply involved in the parts they were playing from time to time that they found it difficult to return to the real world. Second, they are all hams, and when they get together they try to entertain each other. So there was always a lot going on at their parties. It was rather like being in the middle of a variety show.

The next night we went to the Brown Derby for dinner and I met Lucille Ball. She wasn't a big star then but she was the most beautiful woman I had ever seen, with her red hair, perfect complexion and beautiful blue eyes, to say nothing of a marvelous figure.

The Brown Derby was the first place I had ever been to where they had magazine racks and telephones in the bathrooms, and that impressed me greatly. The next night we went to a party at Jerry Colonna's house and it was a riot. Most of
the first floor consisted of a large room with a big circular bar. Jerry presided as bartender, constantly cracking jokes while mixing drinks.

On New Year's Eve, Howard Hawks, who was then President of Paramount Pictures, had a big dinner party at his house. There were several hundred guests, mostly stars and Hollywood moguls. George Montgomery (who was then married to Dinah Shore) and I were the only enlisted men at the party, but there were plenty of officers, including Clark Gable and Jimmy Stewart. Gary Cooper was there. Hoagie Carmichael came over to me at one point, touched my uniform and said, "Sharp as tweed!" At midnight a quartet sang "Auld Lang Syne." The singers, believe it or not, were Bing Crosby, Dinah Shore, Johnny, and me. It was a terrific ending to a week that I will never forget.

Pope B. McIntire

DON’T FORGET — IT HELPS IF YOUR BONDS ARE VALID

Editor's Note: The following back-to-basics remarks were delivered to the General Session of the Bond Attorneys' Workshop on September 17, 1998, by former Association President Manly W. Mumford.

The Agenda shows that I am to talk about Developments in State Law. I’m thankful that it does not say new developments. Hobby Presley asked me to talk to you, not about anything new, but about the meat and potato bond issues for local public projects — what I lovingly call “legitimate” bond issues. What I say is mostly about general obligation bonds, but much applies to utility revenue bonds, and some to all municipal bonds.

Organization. The very first thing to look at is whether your issuer is legally organized. This seems like a no-brainer if it is a city that has been operating for a hundred years and has delivered scores of bond issues in the past. But if the issuer has been recently created, you should check out that organization and make sure that it is correct. In addition, if the issuer has recently changed its boundaries, such as by annexation of territory, there can be some embarrassing questions if a city allows people who live in questionable territory to vote in a bond election, or if your bonds are secured by special assessments on property in such territory.

The most common problem with an issuer's organization is that the boundaries don't close. This means that there is a gap somewhere in the legal description of those boundaries. You should check it out on a map showing all pertinent landmarks. True, the issuer may not be legally prohibited from operating or from issuing bonds, but what do you do when some property owners deny that their land is in the boundaries of the issuer? And what will you say to the bondholders when the property owners win? If your district comprises a shopping center plus residential housing that enjoys homestead exemptions, telling the bondholders that even though the shopping center may not be in the district, all the rest of the property is subject to taxation without limitation as to rate or amount to pay the bonds will not make them think you're a hero.

Of course, following all the steps specified by the statute under which the issuer is created is essential; sometimes you will find that required notices were not published at the proper times. Remember to check State law about the validity of notices published on Sunday if the publisher's affidavit shows that's when the notices were published. If the organizational meeting of the initial officers was not held at the proper time and place, worry! Make sure that their oaths of office have been filed wherever they should be, and that all are registered voters of the territory unless you are sure that they don't have to be.

If your issuer has been in existence for many years or if it has previously issued bonds that were approved by competent bond counsel, you can generally rely on that fact to cure questions about the initial organization. But you do have to make sure that it is still in existence. Sometimes you'll find that a village stopped functioning for a while; that it didn't elect officers and trustees for several years, and that only recently has it resumed acting like a municipal corporation. Do what you must to make sure that it has not lapsed.
If you find problems with the organization that you can't patch up with baling wire and duct tape, all is not necessarily lost if you act promptly. Often you can get the issuer recreated if the job has been done badly the first time. Traditionally, the way to test the validity of the existence of a political subdivision is by a writ of *quo warranto*. This means "by what warrant or authority" are the officials purporting to exercise governmental power? In some States an individual can petition for such a writ, in others only the Attorney General can, or individuals can if the Attorney General refuses to when asked. This is not the sort of thing you take lightly, but it is a good next-to-last resort. And you certainly don't want the Attorney General or anyone else to bring such a suit after your bonds are out.

The last resort, in most situations, is an act of the State Legislature. You have to make sure that the State Constitution does not prohibit special legislation for this purpose, or that you can draft a bill that follows judicial precedent for general legislation yet that applies only to your issuer. As a general rule, State legislatures pass such bills at the request of the local delegation, so whoever is in power in your issuer must approach the members of that delegation — they will usually blame you for being too technical, but that's one of the prices you have to pay for doing your job right. Remember that those same officials will cheerfully blame you later if a question about the validity of the issuer's organization is decided adversely after the bonds are out.

One final bit of warning: make sure that the issuer, if a special purpose district, is constitutionally created. For example, if a statute permits petitioners to require a local governing body to create a taxing district with the boundaries specified in the petition, doing so probably violates the Due Process Clause of the 14th Amendment. In 1926 the Supreme Court decided *Browning vs. Hooper*, 269 U.S. 396, otherwise known as the Archer County Case, with an opinion that rendered invalid nearly all the road districts in Texas. Justice Butler, writing for the Court, pointed out, "Subject to the vote of a district of their own choice, the petitioners' designation is absolute. The commissioners' court has no power to modify or deny; it is bound to grant the petition. [citations] And when the required vote is given, the court, once for all, must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures." Later in the opinion Justice Butler made a mess of trying to distinguish special assessment bonds from general obligation bonds, and it took several more Supreme Court cases to straighten it out. Yet there was no retreat from the principle of political accountability in the creation of taxing districts.

**Debt and Value.** If you are approving revenue bonds, including conduit financing as well as utility revenue bonds, you don't usually have to worry about debt limits. At first it seems simple enough with tax bonds. Just find out what the assessed valuation of taxable property in the issuer is and multiply by the percentage specified in the pertinent State constitutional or statutory provision. And don't let the total indebtedness exceed that. But there are ramifications, such as what constitutes indebtedness, and what is the assessed valuation.

*Letters to the editor are welcome.*
In most States, money in a sinking fund (and sometimes taxes in the process of collection) to pay the principal of outstanding bonds constitutes an offset against the debt those bonds represent. But not in Georgia, unless that has been changed recently. If you are going to use a sinking fund or taxes in collection as an offset, check the State court decisions. This is particularly true with refunding bonds if the old bonds are not paid and canceled simultaneously with the issuance of the new bonds; if the sinking fund offset doctrine does not apply, the new bonds may be over the debt limit when issued. And all your piety and wit can't lure legality to bonds that were void when issued. Of course, if there are outstanding special assessment bonds or utility revenue bonds that are additionally secured by the full faith and credit of the issuer, they must be counted in determining debt unless you find satisfactory authority to the contrary. In Texas, and possibly other States, amounts due under contracts are sometimes considered debt for this purpose. You’ve got to know whether tax anticipation and other short term obligations are debt. Several years ago there was a lot of fuss over whether unfunded pension liabilities constitute debt; I think that question has been resolved wherever it arose, but don’t assume it away.

The valuation of taxable property in the issuer may not always be what is seems. I previously mentioned the problem of the boundaries that don’t close. No matter what the tax assessor believed about which property was in the issuer, if some of that property escapes, it affects the debt-incurring power. Also, most States provide for the equalization of property assessments, to assure that all property is assessed at the same percentage of market or true value. This equalization process takes some months, and during that time the assessed value of the property inside the issuer may
fall as property owners get their assessments reduced. You don't want to be in the position of letting an issuer sell bonds up to the debt limit, only to find out that after the sale and before delivery the assessed value has dropped and you can't approve them all.

Purpose. Here we get the Dillon’s Rule lecture. A political subdivision has only those powers specifically granted by the State and those powers necessarily implied from specific grants of power. There are many exceptions to this rule, but never assume that the exceptions are the rule. The notion of home rule is popular among city officials, and in several States cities can grant themselves powers not specifically provided by State law by going through various rituals. I recall that many years ago a Utah statute permitted a city to issue water revenue bonds payable only from the improvements to be made with bond proceeds, so to make improvements to an existing system the bonds could be payable only from the revenues of those improvements, not the revenues of the entire system. However, Utah law also provided that through a voters’ initiative procedure, greater legislative power could be conferred on a city. So a petition would be circulated to adopt a home rule ordinance authorizing a specific bond issue, and the vote on the petition would be held at the same time as the vote on the bonds themselves. Usually the voters voted the same way on both propositions.

If a State purports to grant home rule powers to its cities it may be only that the city can decide how many members it wants on its city council, and all other significant powers must be specifically granted by the State. Some supreme courts construe home rule provisions broadly, others narrowly. And if the cities in a State have broad enough home rule powers to decide what they will issue bonds for, don’t assume that counties and utility districts also have such powers. The power to own and operate a waterworks may not include the power to build or buy or improve one; the power to acquire and improve a waterworks may not include the power to issue bonds for it. The power to issue bonds may not include the power to issue revenue bonds. The power to issue revenue bonds may not include the power to make the covenants necessary to sell the bonds. All the powers I just mentioned do not include the power to condemn land. And the power to condemn land does not include the power to tear up streets — if the issuer does not own the streets, it must get a franchise. And most spectacularly, the power to provide utility service does not include the power to enter take-or-pay contracts to supply a large area outside the boundaries of the issuer; several years ago bond counsel’s bad guess on this topic disappointed the holders of billions of dollars of bonds of the Washington Public Power Supply System.

Many cities have charters granted by the State legislature, and derive their powers from both the charter and the general laws. You will find it rewarding to be familiar with both. I fondly remember reading an early version of a charter, perhaps that of the City of Phoenix, that gave the governing body specific power to prohibit dogfights in the streets.

Above all, the purpose of tax bonds must be a public one. The courts have held that whether a specific purpose is public is a question for the legislature, but from time to time they hold that the legislature was wrong about a specific item. These decisions are based largely on the State constitutional provisions prohibiting the loan of credit or gift of a thing of value to a private party (and in some States, even to another public body), and partly on the Due Process Clauses of State and Federal Constitutions. The notion is that to exercise the power of taxation for a private purpose deprives the taxpayers of property without due process of law. During the early days of industrial development bond financing it was necessary to get a State supreme court blessing in every State, even when the bonds were not payable from taxation, because several of them considered that IDBs constituted a loan of credit or a gift. In time those courts caught on to the fact that conduit financing is merely a way of getting the States to grant exemptions from federal income taxation on interest paid to the holders of the debt of private companies, and cheerfully went along with the game. But if the bonds are payable from any sort of taxation, whatever is to be acquired with the proceeds should not be turned over to private enterprise, not even as a lessee, unless the
decisions under these provisions have been thoroughly checked.

One thing to look out for is bonds payable from parking meter revenues. Though I have yet to find constitutional or statutory support for the proposition, the courts insist that because parking meters tax the use of the public streets, the revenues can be used only for traffic control purposes, including off-street parking. I’m not sure where the courts get this idea, except from each other, but it is what they hold. I have no idea whether this notion would supersede a city’s home rule power in a State where home rule means what it says, and I’ve never had a client that wanted to find out.

**Elections.** One thing that is a mess to patch up after it happens is the failure correctly to publish notice of a bond election. Courts vary in their determinations whether publishing one day late is fatal, and if you’re in a State where it is not fatal, you are left not knowing how late it has to be before a court will declare the election void. Usually bond elections are constitutionally required, although sometimes the requirement is only statutory. In case of a statutorily-required election, you may be able to rely on judicial validation to cover late publication of notice and other irregularities in those States where this is an option. I still remember one transaction where I sweated and stewed and consulted my partners and finally agreed to rely on validation for this purpose; the bonds were sold to an underwriter whose counsel decided that he would make a hit with his client by proving me to be a rube. I managed to answer all his supercilious questions as if I were a gentleman, and then silently gloated over his failure to ask anything about the election.

It’s even harder to patch up a problem with the ballot; all you can do is to tell the issuer to issue whatever it was that the ballot described, whether that was what they wanted or not. If the ballot and the notice of election differ, lie down and breathe deeply.

Of course you examine a certified copy of the proceedings of the governing body canvassing the returns and declaring the results of the election. This means checking to see if the addition was done properly, as well as making sure that the canvassing authority actually declares the conclusion that the election carried. Consider an arcane and archaic notion of jurisdiction: that jurisdiction to issue the bonds is conferred on the governing body only by the official declaration that the election carried. While a court should hold that simply declaring the votes for and against is sufficient, it’s best not to have to rely on a court to hold the way it should.

If the issuer decides to issue a smaller amount of bonds than voted, look for possible trouble. Usually the smaller amount will be an initial block of a larger total amount, or the project won’t cost as much as originally contemplated. But the situation could mean that the governing body has decided to proceed with a different and less expensive project than the one the voters were told about. The courts generally hold that the nature of the project cannot be changed after the bonds have been voted, although minor deviations are permitted.

Once in a great while you will find that the bonds voted at an election were not issued promptly, and the issuer wants to go ahead and sell them many years later. The law involved is that if the project has been abandoned, it cannot be revived and the bonds cannot be issued without a new election. As a rule of thumb I would rely on a simple certification that the project had not been abandoned if the period was less than ten years. If longer, I would put the burden on the issuer to explain why the project was delayed, to show that the same project could and should be financed now, and to show that circumstances have not so changed.
during the interim that it would be unjust for a court to allow the bonds to be issued now. This last showing sounds pretty vague, but it is the standard that the courts use, and I recommend that you do the same. A significant danger is that inflation will have raised the cost of the project so much that whatever it was that the voters voted for cannot be accomplished with the proceeds of the voted amount of bonds.

**Sale and Authorization.** If your bonds are to be sold at public sale, State law probably provides for the place and time that notice of sale is to be published. Again, State courts vary in their determination of whether late publication is fatal, and if not how late can publication be. The law should be that if the issuer sent bidding materials to everyone who was likely to bid on the bonds, and no one complains that he didn’t get adequate notice, the sale should be upheld. However, it is unwise to rely on a court’s deciding the way I think it should.

The sale should be conducted strictly and no bidder should be allowed to change his bid in any respect after they are opened. Once, many years ago, a bond lawyer let one bidder make a minor change in his bid, and this change caused that bidder to be the winner. While this pleased that particular bidder, the other dealers of bonds in that State took all their future business away from that bond counsel and brought it to my partners and me.

**Refunding.** You may think that all the law you need to know about refunding pertains to the federal tax exempt status of the new bonds. There is more, especially with respect to general obligation bonds. I have already alluded to the need for payment and cancellation of the old bonds simultaneously with delivery of the new bonds if the issuer is close to the debt limit and the sinking fund offset rule does not apply under State law. In case of a high-to-low advance refunding it is necessary to put more money into the escrow than is available from an equal principal amount of new bond proceeds. The temptation is to issue more
than an equal principal amount of bonds to obtain this additional money, but look out! With the possible exception of Florida, State courts have uniformly held that this practice violates the election requirement for the issuance of general obligation bonds. A 1988 article of mine on this subject appears in 9 Municipal Finance Journal 95. I understand that Pennsylvania has enacted constitutional or statutory authority to exceed the amount of voted refunding bonds under some circumstances, and I don’t know whether other States have done so. If your State has not adopted such a law you had better advise the issuer to find some other source for the additional money needed in the escrow.

Conclusion. I have been talking about some of the basic knowledge you need to approve traditional municipal bonds. Litigation in various State courts of last resort has established this knowledge. Your clients will not care to have their bonds add to that store of authority.

ASSOCIATION RELEASES NEW WEBSITE (www.nabl.org)

NABL recently released its new website. The site has been completely reorganized and adds several new features, including a greatly expanded resource library (with a new search engine feature), expanded committee coverage, five forums in a “threaded message” format, an extensive useful links section, and general information about NABL and its services and publications. At the site, members can also join the NABL e-mail broadcast service (“NABL-Net”), which provides periodic updates on municipal legal topics.

The expanded resource library may be the most important aspect of the new site, since it will post current items of interest to municipal professionals, some of which may not be readily available elsewhere. At this point, the resource library is being intensively updated to include recent IRS tax rulings, SEC pronouncements, professional responsibility items (e.g., the New Jersey opinion), topical comments of municipal organizations, and various other items. All of the items are searchable through the new search engine. The library also serves as an archive for past issues of The Bond Lawyer (formerly The Quarterly Newsletter) (posted in PDF format), NABL comment letters, and other items not otherwise generally published by NABL.

The new site also contains five “threaded message” newsgroups (i.e., forums) for various topics (tax, securities, state and general, legal assistants’ forum, and job service). Under the new format, a person (who can remain anonymous) sends out a message — either as a new topic in the related forum or as a reply to another message in the related forum — and the original message and all related replies are posted as a separate “thread.” If the message sender wishes, any replies to the message will also be e-mailed to that sender. Users should keep in mind that the site is currently open to the public.

The legislative log is a comprehensive listing (in PDF format) of legislation proposed and/or enacted by the 105th Congress relating to municipal finance.

The useful links section contains extensive listings of web page links under various topics including Federal Agencies, Securities, Legal Assistants, Federal Courts, and Public Finance Network (municipal trade association websites).

Many thanks to David Miller and Amy Dunbar, who are primarily responsible for the conceptual framework of the new site, and to Laura Butera, the current site administrator.

Visitors to the site are encouraged to contribute their opinions about the structure and content of the new site. The newsgroups provide forums for members and interested parties to share and exchange their knowledge and expertise. Users are able to post their contributions on specific topics and receive feedback and responses from other contributors.

William L. Gehrig
1998 FUNDAMENTALS SEMINAR

As the 1999 Fundamentals Seminar is quickly approaching, it is appropriate to recognize — albeit belatedly — the success of the 1998 Fundamentals Seminar. The 1998 Fundamentals Seminar was held in Atlanta on April 15 through 17. Eric Ballou of Christian & Barton LLP chaired this year's seminar, which was graced by over 350 attendees.

The Fundamentals Seminar generally followed the tried and true format that has been developed during the past few years. The seminar began on Wednesday afternoon with an introductory session on the basic structure and documentation of a bond financing. Julianna Ebert, Doug Rollow, and Ann Atkins led this session. This session was followed by a new one-hour session on introductory tax law principles that was developed and led by Perry Israel and Linda Schakel. This session provided a tax overview to give participants a framework for the later sessions.

A case study, which has become somewhat of a tradition at the Fundamentals Seminar, then followed. This year's case study focused on a troubled hospital in Peachtree City and the efforts of a newly-elected mayor to save the hospital. Steve Matthews moderated the case study, and Jim Brennan starred as the beloved Mayor Braxton Bragg. Other participants included Samantha Briden, Charles Carey, Julianna Ebert, Bob Eidnier, Randy Huffman, Perry Israel, Bill Noth, Tom Peterson, Linda Schakel, Bruce Weisenthal, and Mary Wilson.

The participants were divided into three groups for Thursday's sessions as they took turns learning about tax law, securities law, state law, and ethics. Three-member faculty panels taught each session. Powerpoint® presentations were extensively used in these sessions.

On Friday, small break-out sessions were offered on 13 different topics. In addition, special sessions were offered for legal assistants (which a number of lawyers also attended).

Faculty members who assisted with the seminar but who are not mentioned above include Bill Gehrig, Meredith Hathorn, Scott Lilienthal, Lauren Mack, Leonard Marcinko, Roger Murray, Floyd Newton, Hobson Presley, Harriet Welch, and Mary Jo White. Legal assistants who coordinated and taught the sessions designed for legal assistants included Ann Atkinson, Carol Ann Caponigro, Elizabeth Dye, and Susan Parker.

The 1999 Fundamentals Seminar will be held next spring in Chicago, and we hope that we can produce an event as successful as the 1998 edition.

G. Mark Mamantov
Vice-Chair, 1998 Fundamentals Seminar

BOND DOGS

(Our feisty, fiery, furry, feline-feasting fellows once again find fault and fracture factoids with their regular review of the practice of bond law.)

Skippy: Well, this is our first report since the 1998 Bond Attorneys' Workshop.

Jake: If no news is good news, then it was a great conference. I mean it was well run, the new venue served adequately, and no one opposed the President-Elect. But the big news was that nursing homes have medical personnel and housing doesn’t, and the best joke (“when you’ve seen one assisted living unit, you’ve seen one assisted living unit”) was delivered by an official of the Treasury Department.

Skippy: Bond lawyers must be a really fun bunch if they get their amusement from government speakers announcing new revenue rulings. Chalk it up to a slow news year.

Jake: Say that again. In reporting on the conference, The Bond Buyer quoted S.E.C. Associate Director William Baker as having said the reason why there is an increase in municipal securities litigation is “[the S.E.C.] is bringing more cases.” Duh.
Skippy: Is there any truth to the rumor that a respected bond lawyer “borrowed” the “NABL Welcomes You to Chicago” sign and hung it in a concourse at the San Francisco airport in plain view of disembarking passengers?

Jake: None whatsoever. I’ve never heard of a respected San Franciscan. In San Francisco when they invite you to a “black tie only” dinner, you are expected to follow directions.

Skippy: The assisted living revenue ruling, 98-47, was a no-win situation for the government. If they said it was housing, the not-for-profits would be disappointed, but if they said it wasn’t housing, then the for-profits would be out of luck.

Jake: So, instead, they put the onus on the nursing industry to determine whether the little old man needing his insulin shot gets stuck by a trained professional (in which case it’s healthcare) or by an unskilled teenager who two hours earlier was practicing with a syringe, an orange, and an ounce of vodka (in which case it’s housing).

Skippy: The old microwave specter also reared its ugly head again. If the tenant is unable to operate a stove, the ruling allows the landlord to replace the stove with a microwave oven. The unstated implication is that when a new, capable tenant moves in the landlord has to put the stove back.

Jake: I can imagine this warehouse full of replacement microwaves and stoves with burly moving men schlepping them back and forth. Presumably it is all financeable as a “functionally related and subordinate facility.”

Skippy: Apparently we doused a smoldering fire with gasoline last column when we had the audacity to suggest that the New Jersey lawyers’ attack on the unauthorized practice of law by bond counsel from New York and Pennsylvania was motivated by desires to lessen competition.

Jake: In an open letter to Grand Poobah Floyd Newton, Jack Kraft, a New Jersey lawyer, stated that “Those mean spirited mongrels, Jake and Skippy, insult all NABL members with their gratuitous and inaccurate remarks.”

Skippy: That calumniator! Our reader knows that I am a 100% purebred Scottish terrier.

Jake: Anything wrong with being a mongrel?

Skippy: Ah, well, oh, no, some of my best friends are mean-spirited.

Jake: I still like Jack. According to Jack, business is so competitive in New Jersey that bond lawyers are being forced to diversify. At his last closing, Jack was heard to say, “Mr. Mayor, here is your bond opinion. Would you like fries with that?” Anyone who can actually attempt to legitimize the merits of New Jersey’s provincial rule on the basis of public interest and the role of the state — with a straight face — must be one hell of a lawyer.

Skippy: Sure, the same sort of lawyer who can argue that sharing a cigar, a case of CheezWhiz®, and a scuba mask with a 21-year-old intern does not constitute “inappropriate relations.”

Jake: We have three decisions worthy of bringing to our reader’s attention. In a Nebraska case, Fitzke vs. City of Hastings, the court held that the city could not condemn a cornfield for redevelopment purposes under a
statute that required property to be “blighted or substandard.”

**Skippy:** I shudder at the consequences had the court ruled in favor of the city. The only place in the state that could not have been condemned would have been the football field at the University of Nebraska — and that’s only because the cheerleaders use it for grazing at half time.

**Jake:** For our reader who engages in estate planning, we direct her attention to I.R.S. Tech Advice Memo 9815008 which held that the estate of a husband who murdered his wife and then committed suicide was not allowed a marital deduction for jointly-owned property notwithstanding state law to the effect that the murderer is deemed to predecease the victim.

**Skippy:** I’m sure our reader will take full advantage of this valuable interpretative pronouncement.

**Jake:** Our third action comes from the AICPA which had the nerve to expel one of its members, Joel D. Davis of Silver Spring, Maryland, under the Institute’s automatic disciplinary provisions following his conviction in a U.S. District Court of conspiracy to murder an I.R.S. agent.

**Skippy:** I am not aware that NABL has any similar sort of rule. To begin with, such a rule would conflict with NABL’s open membership policy. They need the dues. Furthermore, purchasers of bonds would probably pay up for the legal opinion of any lawyer willing to defend so zealously the interest of his or her client. And every bond lawyer knows that to get something done right, you have to do it yourself, so that the whole notion of conspiracy would be a foreign concept indeed.

**Jake:** We close this column with what we hope will become a semi-regular feature, recognizing a prominent dog for his or her potential contribution to the bond business. Our recipient of the Sapphire-Studded Collar this month is Mr. Peabody.

**Skippy:** Our reader will remember Mr. Peabody of Rocky and Bullwinkle fame as the inventor of the time-travelling way back machine. He and his pet boy Sherman would travel back in time to right injustice and save dogkind from catastrophe and devastation.

**Jake:** If I had the way back machine, I could go back to 1968, before there were arbitrage and industrial development bonds, and make my fortune.

**Skippy:** I think a more elegant and equally profitable alternative would be to go back to 1975 when one could issue $100 million of single family mortgage revenue bonds without volume cap, escrow the proceeds in SLGS which could be redeemed at any time at par, immediately advance refund the original bonds, adjusting yield for issuance expenses, and then set up a forward supply contract for an invested sinking fund to defease the refunding issue. Then years later when interest rates have more than doubled, the issue’s “compounded minor portion” would relieve all of the proceeds of yield restriction and the issuer could originate mortgages at 12% against 5% bonds. As the lawyer back in 1975, I would have taken as my fee the residual off of the loan portfolio.

**Jake:** Here’s to you, Mr. Peabody.
VOICE FROM THE PAST
Chapter 9

A 1962 statutory covenant between the States of New Jersey and New York limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for certain bonds issued and to be issued by the Port Authority. After several issues of bonds were sold and delivered, a 1974 New Jersey statute, with a like New York statute, retroactively repealed that covenant. This set the background for the April 21, 1977, decision of the United States Supreme Court in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

While this case was pending, an institutional investor had asked me to look at the pleadings and briefs in this case to determine whether the case was argued forcefully enough by the appellant United States Trust Co. or whether that investor should try to intervene or file a brief Amicus Curiae. After doing so, I advised the investor that appellant’s counsel presented the case well and thoroughly and I doubted that any filings on behalf of the investor would be useful. In this connection I became familiar with the holdings of the Supreme Court in impairment-of-obligation cases under Article I, Section 10 of the U.S. Constitution.

Previously the Court had held, "it is not every modification of a contractual promise that impairs the obligation of contract under federal law," and that the State "has the sovereign right . . . to protect the . . . general welfare of the people and we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary."

In the fall of 1976, while the U.S. Trust case was pending before the Supreme Court, I was acting, with Bill Eason and Bernard Parks, as bond counsel for an issue of bonds of the Metropolitan Atlanta Rapid Transit Authority payable from a special sales tax in Fulton and DeKalb Counties, Georgia. Nick Capozzoli of Mudge Rose was acting as underwriters’ counsel. The question arose about what the official statement could say about the right of the State to change the sales tax. For example, could the State reduce or eliminate the tax on food?

We knew that, regardless of the outcome of the U.S. Trust case, there would be some things the State could do and some things it could not do. I don’t recall whether it got down to wondering about reducing the tax on the sale of onions and increasing it on potatoes, but this illustrates the futility of predicting anything the legislature might do and then making a prediction about its constitutionality. Finally we hit on a solution, or at least a way to deal with the question instead of solving it. The official statement would simply say that the security of the bonds is protected by the impairment-of-obligation clause of the Constitution without specifying in detail the extent of such protection.

The underwriters decided to hold an information meeting in New York before the sale of the bonds, and asked various officials of the Authority, including its general counsel and the four of us, to attend the meeting and answer any questions that the potential underwriters and investors might have. We wondered what we could say if asked about the particulars of the protection given by that clause, and the only conclusion we reached was that whoever fielded the question would have to wing it. We hoped that no one would ask.

Then came the meeting. Early to the podium was the Authority’s general counsel, who talked about the creation of the Authority and various other matters that did not get close to the bonds themselves. Then one member of the audience asked him about the extent to which the State could change the sales tax. Without batting an eye, the general counsel said that the sales tax was part of the contract with the bondholders and the State could not change it at all under the U.S. Constitution.

Nick, Bill, Bernard, and I all glanced at each other and gulped and shrugged. No one in the audience challenged the general counsel’s assertion. When it was our turn no one asked any of the bond counsel or underwriters’ counsel about this question. We were home free.

We felt even freer when the Supreme Court, the following April, concluded that the repeal of the 1962 covenant amounted to an abuse of the discretion of the State legislatures, partly because
the results deemed to be for the public good by breaching the contract could be obtained in other ways. The majority opinion declared:

"The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

Manly W. Mumford

From this perspective, governmental entities, particularly local governments, are by nature ill-equipped to attack and solve the Year 2000 problem. Local governments are generally behind their federal and state counterparts in addressing it. Many are just beginning the assessment phase of their Year 2000 projects, and others in the assessment or remediation phase are finding that the job is larger and more complex than originally anticipated.

Based on census data as of 1992, there were over 84,000 local government entities in the United States. Many of these local governments have significant operations and budgets, in some cases considerably larger than the smallest state governments. Local government services are as important as those provided by the federal and state governments. Local governments operate airports, transit systems, schools, hospitals, correctional facilities and water and wastewater treatment facilities. They provide police, fire and emergency response services, operate court and criminal justice systems, maintain public health, vital statistics, property and other records, and are often a major regional employer.

Non-legal factors play a large role in how local governments are addressing the Year 2000 problem. Compared to the private sector, the public sector has, in general, more antiquated computer systems and less sophisticated information systems staff. Record management and archiving practices may be sloppy, and documents important to Year 2000 remediation and cost recovery, such as system specifications and software licenses, may be unretrievable. The elected or appointed executive and legislative officials--the top management of the organization--

YEAR 2000 REMEDIATION AND LIABILITY: LEGAL ISSUES AFFECTING LOCAL GOVERNMENT*

The Year 2000 problem affects every organization, large and small. Organizations best equipped to solve the problem are those with:

Decisive management which can bring together and lead the collective resources of the organization.

Structural flexibility to permit rapid and appropriate adjustments as the organization's Year 2000 problem changes in scope, complexity or seriousness.

Human and financial resources sufficient to "exterminate" the technical problem and deal with the associated operational, budgetary, legal and public relations implications.

are subject to political pressures in allocating and reallocating public resources. Many official local government positions are part-time commitments. Public managers may, like their small business counterparts, be too busy with daily work pressures to devote substantial time to understanding or managing the Year 2000 problem.⁵

Further complicating resolution of the Year 2000 problem in the public sector are legal principles specially applicable to government entities. This article is intended to identify the most significant of these legal principles and describe their impact on how local governments respond to the Year 2000 problem. To the extent that some of these principles may create barriers to effective resolution of the Year 2000 problem, this article will offer suggestions as to how public sector attorneys and attorneys representing private entities contracting with the public sector can minimize those obstacles.

**Background: Local Government Authority**

Local government entities are considered "creatures of the state." Under the doctrine known as "Dillon's Rule," municipal corporations can exercise only those powers conferred upon them by the state (which in some instances, because of "home rule" legislation or constitutional amendments, may be quite broad) or those which are necessary to the exercise of their corporate duties.⁶ One corollary of this general principle is that many activities, functions and procedures of local government are dictated or constrained by general or special laws or charter provisions.

**Undertaking Year 2000 Remediation**

The Year 2000 issue is, at its core, a technical problem requiring a technical solution. Considerable work must be performed by technical staff familiar with an organization's hardware, software programs, data interfaces and systems that may contain date-dependent embedded chips. This task must be performed by in-house staff or outside contractors. In either case, a governmental organization is at a disadvantage in hiring skilled workers to perform the remediation for the following reasons.

Local governments are typically subject to civil service statutes or collective bargaining restrictions, which may inhibit their ability to use staff creatively and to deploy human resources quickly. Civil service statutes may require competitive examinations for information system positions and the use of standing lists for new hiring. In some cases, civil service procedures are handled by another government agency, limiting the control an organization has over the entire process. Collective bargaining agreements may include a rigid classification system for job positions. They may restrict the redeployment of employees between departments and limit temporary hiring.

In the context of Year 2000 remediation, it may be desirable to transfer technical staff temporarily from a position in a lower priority (from a Year 2000 perspective) agency to a position in a higher priority agency. Employee retention is an important labor issue generally in Year 2000 remediation, and the private sector is focusing considerable attention on creating incentives to retain talented staff and/or obtain more services from existing staff. If the use of existing staff is not feasible or would be inadequate, it may be sensible to hire additional staff either on a temporary or permanent basis. In all cases, public sector organizations must keep in mind civil service and labor agreement restrictions. These restrictions may, due to substantive provisions or because of the time it takes to comply with procedural requirements, effectively prohibit the ability of public sector organizations to use existing staff to perform the bulk of Year 2000 remediation work.

**Outsourcing and Procurement Laws**

Instead of, or as a supplement to, using in-house staff, public agencies may choose to hire outside contractors to perform Year 2000 assessment, remediation and testing. Such outsourcing, however, poses its own set of complications. The public entity must follow statutorily mandated procurement and contract approval requirements. If the public agency fails to comply with the required procurement or approval process, under the law of most states, the contract is void.⁷

Hiring an outside contractor is a time-consuming process, typically taking between one to
three months in the best of circumstances. The public entity must prepare procurement documents, advertise contract availability and obtain and evaluate bids or proposals. The internal contract approval process must be followed, possibly entailing legislative approval, executive approval, department head sign-off, and certification by budget, legal and risk management departments.

Public procurement laws are designed to ensure an open and fair process for selecting government contractors and to eliminate fraud, waste and collusion. Although these are admirable goals that should not be compromised without close scrutiny, in the context of Year 2000 remediation, they adversely affect not only the schedule for remediation, but also the selection of the best person or firm for the job. Where a jurisdiction is required to select the "lowest responsible and responsive bidder," the jurisdiction must establish qualification thresholds based on experience, references or other objective criteria in order to assure the quality of services. It is difficult, if not impossible, for any organization (public or private) to establish objective criteria for Year 2000 remediation contractors because the entire Year 2000 compliance industry is new. Hence, if the jurisdiction is required to select the low bidder without considering subjective judgments of merit, confidence and personal commitment, the public entity may be at risk of selecting a contractor with inadequate technical or managerial competency or resources.

Public bidding laws also typically require a relatively precise definition of the scope of services, so that competing proposals can be compared on an equal and fair basis. Procurement laws discourage and often prohibit "problem-oriented specifications." In the context of the Year 2000 problem, unless in-house staff has already performed a thorough front-end analysis of needs, a local government will find it difficult to create detailed specifications for the work. Moreover, because of the unique nature of the Year 2000 problem, a government entity might benefit from a contractor selection process that allows contractors substantial flexibility in proposing solutions and alternatives.

In addition, counsel to a public entity will need to consider other procurement-related issues, such as whether the often more stringent public works bidding laws apply to remediation work on infrastructure and other systems, and whether and how a remediation contract can be made sufficiently flexible to allow for changes to the scope of work if unexpected problems arise or if other services (such as contingency planning) are required. At some point, counsel may be called upon to determine whether "emergency" provisions can be invoked under the applicable procurement laws. Finally, public officials will need to consider whether, in light of these and other problems, qualified technology consultants, already in high demand, will avoid government remediation work altogether.

Public procurement laws may be applicable not only to the hiring of general technical contractors, but also to other modes of remediation. For example, work may be performed by vendors on their own products. In some cases, it is sensible to use the same vendor. In others, it would be a violation of the software license or other contract to use anyone else. Counsel to the public entity must then consider whether having the original vendor perform the corrective work or buying an upgrade from the original vendor would implicate public bidding laws and, if so, whether contracting with the original vendor is a permissible "sole source."

If a jurisdiction decides it is safest or most cost-effective to replace non-compliant equipment, the applicable procurement process must be followed. That process must begin early enough so that the equipment is delivered and fully functional by the time (which may be January 1, 2000 or earlier, depending on how dates are used) the non-compliant equipment becomes vulnerable to actual Year 2000 inaccuracies.

**Paying for Year 2000 Remediation**

Procedural and substantive legal requirements affect how readily local governments can contract, or otherwise obtain and pay, for Year 2000 remediation services. Government entities in general are not authorized to contract, or expend money, beyond available appropriations. The budget and appropriation process in local government is
usually controlled by state law and charter provisions. These requirements may affect the timing of appropriations and supplemental appropriations. Mid-year transfers of appropriations, which may be required because of unexpected Year 2000 problems, may be restricted or necessitate special board approval. Local governments are often subject to property tax limitations, debt limits and referendum requirements affecting their ability to fund large, unanticipated expenditures.

If some local governments are tardy in addressing the Year 2000 problem, can states require local governments to perform the necessary remediation? In some cases, the answer to this question may be no. A number of jurisdictions have various forms of statutory or constitutional restrictions on "unfunded" mandates. In some cases, these requirements are procedural only, such as supermajority approval or mandated cost disclosure provisions. In other cases, however, local governments can refuse to undertake certain actions or activities unless the state mandate is accompanied by funding sufficient to carry out the mandate.

Public Sector Liability

If injury or damage is caused by Year 2000-related computer failures, individuals and corporations may seek compensation through tort-based lawsuits. Years ago, tort-based law suits against the government were barred by the common law doctrine of sovereign immunity. Most states have either abrogated or abolished common-law sovereign immunity, usually by statute. The ability of citizens to sue local governments for Year 2000 related injuries, therefore, will generally be governed by a state tort claims act or similar statute.

The language of state tort claims acts varies considerably. There are, however, some common provisions in these statutes that are relevant to the Year 2000 issue. Most statutes retain immunity for "governmental functions" such as enacting or failing to enact laws, regulations, and similar measures. A related provision found in most tort claims acts is one that grants immunity for claims related to government actions involving the use of discretion or
judgment. Governments are also usually immune from suits stemming from the provision of inadequate fire or police protection. In contrast, immunity is usually waived for suits claiming negligence of officers and government employees acting within the scope of their employment. In such instances, state law usually authorizes or mandates that the public entity defends against these claims, and indemnifies the officer or employee for any losses resulting from the claim.

In many jurisdictions, state law addresses the extent to which the government may be subject to liability for injuries caused by the condition of its property. Most statutes waive immunity for injuries caused by dangerous or defective government property. Other statutes do not focus on the defectiveness of the property itself, but rather subject public sector entities to liability for conditions arising from their negligent operation or maintenance of property.

The ability of local governments to avoid Year 2000-related liability using the doctrine of sovereign immunity will depend on the facts of each case and the application of each jurisdiction's tort claims act. In states where immunity is preserved for negligent or inadequate police and fire protection, for example, a suit alleging the failure of a jurisdiction's emergency response (911) system due to a Year 2000-related malfunction may be dismissed outright. The government might be liable, however, where its officers or employees are negligent in their Year 2000 remediation efforts, if this task was in the scope of their employment. Finally, Year 2000 suits may be successful under the theory that the continued use of non-compliant equipment constitutes negligent operation or maintenance of government property.

Public officials should also monitor legislative developments with respect to their states' tort claims act. As of the writing of this article, three states had passed legislation granting some form of immunity to public entities and officers for Year 2000-related suits, and nine additional states were considering the passage of similar legislation. 

[National Association of Bond Lawyers 1999 Seminar Schedule]
Cost Recovery by Public Entities

The issue of cost recovery for Year 2000 liabilities by public sector entities must take into account the fact that many public organizations are self-insured or are members of a municipal insurance pool. Self-insurance is essentially partial or full risk retention. Public entities may self-insure, not only for general liability claims, but also for professional liability (in the context of a public hospital, for example) and property damage losses. Public sector attorneys will need to consider whether potential Year 2000 liabilities should or must be taken into account in funding self-insurance reserves.

The insurance issue may be more complicated for a government entity that participates in a municipal insurance pool. These pools are typically created under the authority of state statutes and may be structured as a form of collective insurance purchasing or group self-insurance. Members may be required to sign participation agreements outlining their rights and obligations relative to the pool. Counsel to a governmental organization participating in an insurance pool should examine the relevant statutory and contractual provisions in light of potential Year 2000 liabilities. Public sector attorneys should, among other issues, consider the extent to which their client may be covered for its Year 2000 liabilities, the adequacy of self-insurance reserves to cover Year 2000 losses of all participants and the extent of the organization's exposure because of the Year 2000 problems of other pool participants. Additionally, finance officials should examine whether the pool may be vulnerable to Year 2000-related investment losses.

Public Perception and Access to Information

In responding to the Year 2000 challenge, governmental entities do not have as much control over the disclosure of information and records as do their private sector counterparts. All parties involved in public sector remediation should remember that public sector entities are typically subject to statutory requirements for open public meetings and access to governmental records.

How does this relate to the Year 2000 problem? The Year 2000 issue is always a management challenge. In the government sector, it is also a political and a public relations challenge. The problem has already attracted considerable media attention, and governments are likely to see increasing levels of attention and sophistication of media coverage. With books and articles about the Year 2000 issue using words like "doomsday" and "time bomb" and publishing stories of self-described "Year 2000 survivalist communities," there is already fear associated with the state of Year 2000 readiness. In formulating a public awareness and public relations strategy, government officials and private contractors assisting them are advised to bear in mind what reports, surveys, correspondence and other information related to the Year 2000 issue are likely to become public information.

Responding to the Challenge: Suggested Approaches

Many of the legal issues discussed above constrain local government response to the Year 2000 problem. Public sector attorneys and other officials, however, are accustomed to dealing with these constraints in other contexts. Whether they pose actual barriers to remediation depends a great deal on when the organization began its Year 2000 efforts and how large that task ultimately becomes. For those public sector officials concerned about the state of their organization's Year 2000 readiness and about the legal and financial barriers to successful remediation, the following actions may be considered:

- Help push the organization toward implementing project management changes recommended for private organizations (senior management team, accountable project manager, etc.).
- Develop an initial remediation plan for mission-critical services and systems without taking into account legal restrictions. Then, work to overcome the legal barriers, pare down the remediation plan, if possible, and take other actions to create the best remediation plan feasible within budgetary and legal limitations.
Consider getting state legislation. State legislators may be eager to help local governments where that assistance does not involve additional state funding.

Use relationships with labor unions, board officials, major employers and constituency groups to your advantage. Spread the work and share the credit.

Make sure you are informed about Year 2000 developments. It will be a waste of time, for example, insisting on an indemnification provision ("it's in our standard form") from a remediation contractor if the industry is not generally agreeing to them.

Cooperate with state government and other local entities. Combine resources and share information.

Examine state master contract lists for remediation vendors that can be hired without further public bidding.

Look for resources and information targeted to local government and public functions. Sign up for Year 2000 Internet list servers.

A Model for Action

The Year 2000 issue is a difficult challenge for local government, which must overcome the problem using available resources and within institutional constraints. The conventional wisdom is that government is bureaucratic, inefficient and slow. However, government is also called upon to respond to some of the most difficult challenges of all: natural disasters and other emergencies. Local governments often do their best work in these extreme situations. Although public officials should not give in to panic about the Year 2000 problem, they may be well-advised to approach the Year 2000 problem as they would an emergency situation. With a high level of commitment and resourcefulness, local government can successfully meet and conquer this challenge.

Susanna Burgett
Palmer & Dodge LLP
Boston

1 For purposes of this article, the term "local government" means all units of government subordinate to the state, including counties, cities, towns, villages, and special purpose or regional districts, commissions, authorities and boards.

2 Press Briefing by John Koskinen, Chair of the President's Council on Year 2000 Conversion (July 14, 1998).


7 See McQuillin, Municipal Corporations § 29.01 et seq. (3rd ed. 1990) for a discussion of legal issues related to public sector contracting.

8 McQuillin, Municipal Corporations § 29.73.05.

9 See 1 Shepard's, Civil Actions Against State and Local Government § 3.1 et seq. (2nd ed. 1992) and McQuillin, Municipal Corporations § 53.02, et seq. for a fuller discussion of sovereign immunity and tort claims acts.

If readers desire additional information about public sector Year 2000 issues, the following resources may be of interest: World Wide Web sites of the National League of Cities (http://www.nlc.org); the National Association of Counties (http://www.naco.org); the International City/County Management Association (http://www.icma.org); and Public Technology Inc. (http://pti.nw.dc.us).

EMPLOYMENT OPPORTUNITY

PUBLIC FINANCE ATTORNEY: Premier (95 attorney) Pittsburgh-based law firm with established but expanding public finance practice seeks one or two associates with minimum of two years' practice experience as bond/underwriter's counsel, or with extensive exposure to general municipal law and federal tax and securities issues related to municipal finance. Must possess strong interpersonal, communication, and analytical skills. Superior academic credentials expected. For consideration please send résumé and salary history to: Ann L. Smith, H.R. Coordinator, Thorp Reed & Armstrong, One Riverfront Center, 20 Stanwix Street, Pittsburgh, PA 15222.

LETTER TO THE EDITOR

September 15, 1998

Dear Sir:

Thanks for the review of Ehlers on Public Finance (September 1, 1998 issue). Let me clarify a couple of points.

You saw me in full color, cowboy hat, blue-jeans, and all: Sorry you missed the golden brown material in which I stood in the corral. It's the stuff the book cuts through. I am from Montana, but have been in Minnesota, doing bond issues, for nearly forty years and I'm a Midwesterner now. The photo was taken at the Klick Ranch near Montana's Bob Marshall Wilderness where dark suits, white shirts and shiny shoes are discouraged. Grizzly Riders International is an offshoot of The University of Montana Foundation, of which I was a trustee. Champagne, mountain air and dark tea clear the mind wonderfully: Bond lawyers might meet in Montana. Do not deprecate a man's hat while there.

All Over the Map. I'm consistent, not unfriendly, saying that bond attorneys primarily represent bond purchasers' and investors' interest and are not fiduciaries to issuers. That is not new to bond lawyers. The problem is accentuated when issues are negotiated and counsel are nominated by underwriters. Will underwriters nominate bond lawyers who side against underwriters? I am not unfriendly to bond lawyers, have worked with many: Issuers would flounder without their expertise and legal opinions. Some issuers' interests conflict with underwriter and investor interests, and issuers need corporate counsel. That was the point.

Mystery. Allegedly I talk about bond counsel conflicts arising out of local political and economic pressure, but (mysteriously) do not address conflicts when bond counsel bow to the will of
underwriters though compensated by issuers. The book talks about local economic and political pressure when hiring local corporate counsel. Yes, conflict occurs where bond counsel bow to underwriters, though paid by issuers.

**Fair Comment.** Your review was fair. You write to bond lawyers and naturally address issues of concern to them. It was just a little off saying that my views are generalized from my Montana experience: My experience is broader than that.

**Buy the Book.** Bond lawyers should buy the book even if, especially if, they are not having a good year. Some bought it already. The book is about much more than bond lawyers. Call 800 414 2395 or fax 507 645 2763. I will appreciate their business.

Sincerely,

Robert L. Ehlers, J.D.,
Author, Ehlers on Public Finance (at The Twin Cities)

**EDITOR'S NOTES**

Some of us unwashed Midwestern bond lawyers would like a closer and more personal relationship with the SEC and the IRS, who have influenced our clients' lives a lot as of late. We'd really like to give these folks our e-mail addresses so that they could be directly in touch when they make pronouncements which have anything to do with how we should be advising our clients.

The technology is out there. If Paul Maco at the SEC or Debra Kawecki at the IRS wished it so, they could advise us in direct fashion of their most recent positions. Then we'd not have to subscribe to those expensive services (BNA, Lexis®-Nexis®, and others) that tell us what the SEC and the IRS would have us do.

So why don't they? Are they bashful? Are they so far behind the technological curve? Probably not. Are their minions insufficiently motivated to assemble the database? Probably so.

These agencies' goal, in aid of their respective missions, should be instantaneous communication with us. Pure gold. Why can't/won't they do it? Who knows?

Murmurations have been heard about the fact that several of the Association's presidents have hailed from the same few law firms. That much is true.

With Floyd Newton's election, three of our chief executives have hailed from King & Spalding — Pope McIntire, Ted Hester, and now Floyd. Three of our presidents — Sharon White, Dean Pope, and Wally McBride — have called Hunton & Williams home, but Sharon is a transplant. When she was elected, she was a partner at Jones, Hall, Hill & White. Bernie Friel and Drew Kintzinger both hailed from Briggs & Morgan, and Jim Perkins and Neil Arkuss were Palmer & Dodge people.

None of these selections (trust me) had aught to do with the candidates' law firms' influence within the Association. These presidents put in uncountable hours in the service of the Association, and ascended to leadership on pure merit. They slogged through the committees, or through the Bond Attorneys' Workshop, or through service on the Board of Directors, distinguished themselves in many ways, on many projects, and eventually got to the presidency.

Some firms, one can reasonably conclude, are more willing than others to let their partners/shareholders spend uncompensated time laboring in the Association's vineyard.

Far from grouching about the concentration of leadership in these firms, we should joyfully commend them for committing firm resources to the Association and to their fellow bond lawyers, and for encouraging our own firms toward emulation.

It was good to learn that bond lawyers now have at least one good friend in the U.S. Senate. Well, near the U.S. Senate. The Bond Buyer (October 8) reports that James W. Ziglar, 53, formerly of Mudge Rose and O'Connor, Cavanagh, and lately of PaineWebber, is (oddly enough) the Senate's new Sergeant at Arms.

Darn few law firm web sites were called to our attention in response to the invitation extended here last quarter, so we defer to another day the
notion of reviewing them. We did see one Midwestern web site that had the Association's name wrong — three different ways! — and heard from a financial advisor and a printer who wanted us to know of their web sites.

We actually heard from Bernie Friel in late October. After chiding us for a grammatical error which was not our fault, he told us about his new car. (A bit of history here: Bernie's last new car, precluding only a large Ford van, which he prefers to forget, was a 1972 Ford station wagon with a 429-cubic-inch V-8 engine.) The new new car is a 1972 Ford station wagon, with the same engine, which he found — via the Internet — in Scottsdale, for only $2,000. With only 111,000 miles on it, Bernie advised, "it was hardly broken in."

He drove it back to St. Paul, threw several thousand dollars at it, and now contentedly employs it for commuting and for camping trips.

Now that it's autumn here in ciderspace, we're thinking about getting pasteurized. On the woolly caterpillar evidence (and the outcome of the Minnesota gubernatorial contest), we are bracing for the worst. More upset, avalanches, and glare ice are doubtless just around the corner, and we will be girding up our loins just as soon as we can find them.

But seriously, we are reliably advised that Jesse Ventura was a Navy Seal in Vietnam, and that his father was one of George Patton's tank jockeys, all of which suggests that he'll have not much trouble coping with state bond issues.

Back to the Mudwest. The Seventeen Year Cicadas are due out of the ground in just a few years, and as the day follows hard upon the night, the moles (which feed on the cicadas' larvae) are multiplying like rabbits, who take direction from no one. The white-tailed deer are also multiplying, so as to minimize the effects on their species of those who commit suicide, over and over, on the local roads, to the ongoing dismay of the insurance companies who have to play cleanup (headline: "Local Housewife Finds Deer in Lap").

Speaking of cycles (are you still with me here?), the tax-writing committees will be back at it during the next biennium, and you can expect to hear from their members. These folks can hurt us or help us, and we get to play the game and to help decide which they will do.

Yield burning, if you believe The Wall Street Journal (November 18), may be on the verge of being in our rear-view mirrors. This debacle has caused some of us many nights sans sleep, and we fervently hope that this dragon has met a fitting death. We are not — we really are not — numbers people. The financial advisors and the underwriters are the numbers people. We scriven. We second-guess. We look for Mr. Maco's red flags. But we don't run the numbers. Never have. Peace.

QUARTERLY LIMERICK
How ready are we for "plain?"
As in "Plain English" and the consequent pain?
Can ArthurL do it to us?
And with (or without) how much fuss?
Can issuers' budgets (for bond lawyers) take the strain?
So you couldn't relate to the meter;
So you nestled right up to the heater;
So you quibbled and moaned,
Cried a bit, and phoned home:
ArthurL will say, "What could be neater?"

Orin Macgruder
MEMBERSHIP SERVICES

Education Program

The Association conducts seminars and workshops dealing with matters of interest to the bond law community. These include:

- **February 11 and 12, 1999**: Tax Seminar, New Orleans — covering issues arising under the Internal Revenue Code and Treasury Regulations
- **April 7, 8 and 9, 1999**: Fundamentals of Municipal Bond Law, Chicago — intended for those with less than three years of experience in bond law
- **May 13 and 14, 1999**: Washington Seminar — covering the areas of securities, tax, and other timely Washington topics
- **September 22, 23 and 24, 1999**: Bond Attorneys' Workshop, Chicago — for lawyers with more than three years of bond experience — the preeminent annual gathering of bond lawyers, covering virtually all aspects of municipal bond law

These events offer members opportunities to exchange ideas about law and practice with fellow practitioners. For more information, call Executive Director Patricia Appelhans at 630/690-1135.

Law Reform: Committee Participation

Through its Committees on Arbitrage and Rebate, General Tax Matters, and Securities Law and Disclosure, as well as ad hoc committees and task forces, the Association regularly testifies and files written comments about proposed tax, securities and other federal legislation and regulations, and acts as an amicus curiae in judicial and administrative proceedings of general interest to the membership. (Amicus curiae guidelines are available from the Executive Director.) NABL members are invited to participate in committee activities. The Association works closely with public interest groups and industry organizations on matters of mutual interest.

Office of Governmental Affairs

In Washington, the Office of Governmental Affairs represents the Association in federal regulatory and legislative matters. It cooperates with state and local government groups, congressional and regulatory staffs, the Association's substantive committees, and individual members to help identify, inform, and educate Congress and federal regulatory agencies about public finance issues. Members may contact Administrative Assistant Laura Butera at 202/778-2244 (e-mail lbutera@hunton.com), or at 1900 K Street NW, Suite 1200, Washington, DC 20006-1109, to discuss legislative and regulatory issues, request copies of current public finance proposals before Congress or regulatory agencies, and obtain NABL comments on proposed securities and tax regulations. For those with Internet access who send their e-mail address to her, she maintains e-mail contact with members on timely issues.

Other Membership Benefits

- Subscription to *The Bond Lawyer*
- Information of immediate concern is mailed to the membership
- The Association's new website: www.nabl.org
- Preferential admission to the Association's educational programs at substantially reduced rates and reduced air fares
- Discounts on many of the Association's publications, including *Disclosure Roles of Counsel in State and Local Government Securities Offerings, Second Edition; Federal Taxation of Municipal Bonds* (through Aspen Law & Business); *Blue Sky Regulation of Municipal Securities*; and seminar course books
- Free access to the Association's Job Bank through which members can receive job listings and firms can seek members interested in employment opportunities
- No charge for placement in *The Bond Lawyer* of brief notices of employment opportunities available or sought
- Budget Rent-A-Car discount