NATIONAL ASSOCIATION OF BOND LAWYERS

NABL U PRESENTS - THE ESSENTIALS 2023
April 19-21, 2023 ♦ Baltimore, MD

Ethics for Bond Attorneys 101

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I. INTRODUCTION

There are numerous examples where Bond Counsel liability has arisen in recent years. Failure to comply with the rules of professional responsibility may result in discipline, such as suspension or loss of license. While a violation of the rules of professional responsibility may not in itself give rise to a cause of action, a violation may be evidence of a breach of the applicable standard of conduct and may be considered in a legal proceeding. In addition, from a practical perspective, if Bond Counsel must answer for an alleged conflict of interest in addition to another legal claim, a jury is less likely to be sympathetic to Bond Counsel. Lawyers in the municipal finance industry must be aware of and sensitive to pronouncements by the Internal Revenue Service ("IRS"), the Securities and Exchange Commission (the "SEC"), and state and federal courts that may affect the manner in which legal services are provided to clients engaged in this industry. The rules of professional responsibility apply to every aspect of the bond lawyer's practice. New technology and methods of communication are also impacting the way in which bond lawyers communicate with clients and other members of the financing team and create new application of existing regulations.

II. THE MODEL RULES AND OTHER RESOURCES

A. The Model Rules. The Model Rules of Professional Conduct (adopted by the American Bar Association ("ABA") in 1983, as amended, the "Model Rules") have been adopted in almost all states (although the rules adopted in many states have not adhered, verbatim in all respects, to the Model Rules). The Model Rules are applicable to Bond Counsel. According to the introduction to the Model Rules, they are:

> . . . rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. . . . The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. . . . Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

Model Rules, Scope, ¶ 14. The Model Rules are invoked as governing standards in the context of disciplinary or disqualification proceedings, and not as the basis for a separate cause of action. In

comment 20 to the Scope of the Model Rules, it is stated that "...nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Violations of the Model Rules are considered by courts as evidence of standards of care in civil actions based on allegations of malpractice, misrepresentation, and other common law or statutory concepts.

B. Function and Professional Responsibility of Bond Counsel. After promulgation of the Model Rules, the Function and Professional Responsibility Subcommittee of NABL prepared *Function and Professional Responsibilities of Bond Counsel* ("Function"). This paper reviews the historic and modern role of Bond Counsel and focuses on select Model Rules to highlight the special role and function of Bond Counsel. The most recent version of Function (the Third Edition, 2011) is available on the NABL website.

C. NABL Model Engagement Letters. The *Model Engagement Letters*, Second Edition (1998) ("Model Engagement Letters") is available on the NABL website.

D. NABL Model Bond Opinion Report. The *Model Bond Opinion Report* (the "Model Bond Opinion Report") is available on the NABL website.

E. NABL Model Letter of Underwriters' Counsel. The *Model Letter of Underwriters' Counsel* (Second Edition) (2017) is available on the NABL website.

F. Federal, State, and Local Laws, Regulations, Decisions, and Guidance. Bond Counsel must be familiar with the rules of professional conduct applicable in the jurisdictions in which he or she practices, and with applicable federal, state, and local laws (including securities laws, tax laws, secured transaction laws, and constitutional and statutory provisions relevant to the particular bond issue) and the rules, standards, decisions, and guidelines promulgated by various industry groups and self-regulatory organizations, such as the Municipal Securities Rulemaking Board. Particular attention should be paid to recent SEC enforcement activity and the SEC's increased focus on conflicts of interest and municipal advisors.

III. EVOLUTION, PURPOSE AND ROLE OF BOND COUNSEL

A. Historical Role of Bond Counsel.

(i) Historical role of Bond Counsel was to review the transcript and provide underwriters or investors with objective opinion of independent counsel that bonds were valid and enforceable obligations of the issuer. Bond Counsel was not viewed as an advocate for one particular party. The historical view that Bond Counsel served as "counsel to the transaction" is no longer generally accepted. *See B.L.M. v. Sabo & Deitsch et al*., 64 Cal. Rptr. 2d 335 (Cal. App. 4th, 1997) (the court specifically rejected the theory that Bond Counsel was counsel to the transaction). Courts have reached similar conclusions under the Model Rules.

(ii) Representation of a "client":

(1) Important to identify your client in order to determine how to analyze and deal appropriately under the Model Rules with situations involving duties of loyalty,

confidentiality, privilege, conflict, communication, and consent. For instance, Model Rule 1.1 requires that an attorney provide competent representation *to a client*.

(2) Client must be an entity capable of receiving communications and, if necessary, giving consent.

(3) Some portion of the representation may involve more of an "advocacy" role than the purely objective function inherent in the rendering of a Bond Counsel opinion.

B. Even if Bond Counsel identifies a client, it may owe duties to third parties, including bondholders, based on common law and statutory concepts such as misrepresentation, reliance and agency. *See* Model Rule 2.3. These duties, to the extent they exist, arise primarily from common law concepts of agency, representation and reliance, and from statutory rules, both civil and criminal, relating to securities transactions.

C. The Model Rules assume that if a lawyer renders professional services in a transaction, at least one party to the transaction is a client of that lawyer who is either entitled to such services, or entitled to not have the lawyer render such services to another party in the transaction without the client's consent.

D. It may be advisable to communicate to the working group exactly who Bond Counsel represents in the transaction. In this context, consider whether the working group distribution list or the language on the cover of the Preliminary Official Statement and Official Statement indicating who Bond Counsel is representing is adequate. Bond Counsel may also consider sending a letter to transaction participants who may otherwise assume that Bond Counsel is representing or providing advice to them. For example, Bond Counsel to a state-wide bond bank who prepares documents, certificates, or questionnaires for participating governmental participants to complete may want to specifically disclaim that it represents those participants in the bond bank's financing program.

E. Particularly in conduit financings for public agencies (e.g., when a joint powers authority issues for one of its members) or private entities (e.g., exempt facilities, industrial development bonds, or multifamily housing issues), Bond Counsel fees may be paid by someone other than the issuer. This does not necessarily make the second party Bond Counsel's client.

F. In reliance letters or opinions to other parties to the transaction (such as supplemental opinions to the underwriter), Bond Counsel should consider noting that it has not acted as the addressee's legal counsel and has not entered into an attorney-client relationship with the addressee.

IV. COMPETENCE

Model Rule 1.1 Competence.

> *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
>
> *Comment*
>
> *{Parts [3] through [7] of the Comment are omitted from this outline.}*
>
> *[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.*
>
> *[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.*
>
> *[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice,* ***including the benefits and risks associated with relevant technology****, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)*

A. Duty to be Competent. A lawyer should only handle matters in which he or she is, or can reasonably become, competent. The comments to Model Rule 1.1 set forth factors to be considered in determining competence including, among other things, the relative complexity and specialized nature of the matter and the lawyer's training and experience. Note that in 2012, as a result of the report of the ABA Commission on Ethics 20/20 (the "20/20 Commission"), the ABA adopted technology amendments to the Model Rules, including adding the emphasized language to Comment [8] to Rule 1.1 noted above. The 20/20 Commission made clear that the modification of Comment [8] "does not impose any new obligations on lawyers. Rather, it is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

A municipal finance practice is complex. According to Function:

> [b]ond lawyers must be familiar with (or, in particular transactions, associate other lawyers who are familiar with) those areas for which bond counsel has accepted responsibility in the engagement, including the highly technical fields of municipal/local government law, tax law and securities law. Each attorney acting as bond counsel needs an appreciation of the general nature and requirements of all three of these areas of law in order to seek and obtain the assistance of others with requisite expertise.
>
> In particular bond transactions, issues may arise that require knowledge of other practice areas, such as corporate law, bankruptcy and creditors' rights, real estate and commercial law (e.g., Article 9 of the Uniform Commercial Code). It is not unusual for particular bond transactions to involve some form of dispute resolution, administrative hearing or litigation, including validation proceedings, test cases and direct challenges to the issuer's authority to issue bonds. In these situations, the scope of bond counsel's representation may necessarily involve other practice areas, such as administrative, regulatory, utility, injunctive relief and eminent domain matters. As stated in the Comment to Model Rule 1.1: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge." Depending on the nature and scope of the engagement, bond counsel need not necessarily be able to advise their client on questions that may arise in these other practice areas. If such issues are within the scope of the engagement, adequate representation can be provided through necessary preparation and study or through the association of a lawyer of established competence. Of course, each lawyer in the transaction, including specialists, co-counsel and supervisory or subordinate lawyers, must individually address the issue of his or her competence and that of other lawyers (if any) for whom he or she is responsible.

B. Other Considerations.

(i) Communicate with other members in your firm working on the matter (e.g., tax partner). Understand the transaction and the flow of money. Know your role and what you are responsible for (and what you are not responsible for) and know what other members of the finance team are responsible for (e.g,. opinions to be delivered, document drafting responsibility, due diligence review, filing/recording of security-related documents). In situations where lawyers from more than one law firm are providing legal services to a client on the same matter, it is important that the lawyers consult on the allocation of responsibility and scope of services to be provided. *See* Model Rule 1.1, Comment 7.

(ii) See Model Rule 1.3 *Diligence*, stating "A lawyer shall act with reasonable diligence and promptness in representing a client." "Perhaps no professional shortcoming is more widely resented than procrastination." *See* Model Rule 1.3, Comment 3. Keep in mind, however, if you cannot give a competent answer, consider waiting. Even in the event of an emergency it is important to give a competent answer, "for ill-considered action under emergency conditions can jeopardize the client's interest." *See* Model Rule 1.1, Comment 3.

(iii) Juggling a busy workload and demanding client expectations will not excuse incompetence. In an environment where multitasking is the norm, attorneys are expected to do more in less time while simultaneously handling a significant number of transactions. Lawyers need to be aware of the exposure to potential liability which arises from inattention to detail and prudent due diligence.

(iv) Dodd-Frank Act. Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended Section 15B of the Securities Exchange Act of 1934 to (1) require municipal advisors to register with the SEC, (2) establish a fiduciary duty between a municipal advisor and the municipal entity, and (3) subject municipal advisors to additional anti-fraud provisions. Excluded from the term "municipal advisor" are "attorneys offering legal advice or providing services that are of a traditional legal nature." To avoid potential liability, Bond Counsel must be confident that all advice provided in connection with a transaction fits within this exception and can be tied to his or her duties as legal counsel.

C. Opinion Practice.

(i) Model Bond Opinion Report provides sample opinions.

(ii) Key ethical consideration in opinion practice is *competence*.

(1) *Unqualified Bond Counsel Opinion*. Bond Counsel "may render an 'unqualified' opinion regarding the validity and tax exemption of bonds if it is firmly convinced (also characterized as having a 'high degree of confidence') that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion." Model Bond Opinion Report, page 7.

An opinion is not a guaranty of an outcome, but rather an expression of professional judgment. *Third-Party Closing Opinions: A Report of the TriBar Opinion Committee, 53; Business Lawyer*, 591, 596, cited in 2003 Report at page 8. Refer to Circular 230 (31 CFR Part 10), which governs practice before the IRS; proposed regulations under Circular 230 (proposing standards for practice before the IRS relating to state or local bond opinions); and the interim definition of State or Local Bond Opinion under §10.35(b)(9), which is applicable to opinions rendered after June 20, 2005 (2005-26 I.R.B. 1373, June 27, 2005).

(2) *Other Opinions*. Opinions to be delivered at closing in addition to the final Bond Counsel opinion may include, but are not limited to, opinions from borrower's counsel, underwriter's counsel, disclosure counsel, special tax counsel, supplemental opinions from Bond Counsel, trustee counsel, issuer counsel or local counsel, and counsel to the insurer, guarantor, or other form of credit enhancement device.

(iii) Other considerations for opinions practice:

(1) Are you authorized by your firm opinion protocol to give the requested opinion? Should you (or your firm) give the opinion?

(2) Is the opinion consistent with the scope of the representation as outlined in the Engagement Letter? *See* Model Rule 1.2 *Scope of Representation*.

(3) Who are the addressees? *See* Model Rule 2.3 *Evaluation for Use by Third Persons*. This rule concerns evaluation by a lawyer of a matter affecting a client for the use of someone other than the client. This rule is the closest recognition in Model Rules to bond opinion practice.

(4) Are all addressees represented by counsel? *See* Model Rule 4.3 *Dealing with Unrepresented Person*.

(5) What should be covered in an opinion/negative assurance letter regarding disclosure?

V. ENGAGEMENT LETTERS

A. A proper engagement letter can be used as a shield in a professional liability situation. A written engagement letter or formal contract – which is the preference of a substantial number of larger issuers – should be transaction-specific and will aid in Bond Counsel's practice in several ways. An engagement letter sent prior to or shortly after the commencement of substantive work on a transaction will yield the greatest benefits for both Bond Counsel and the client. Note that an engagement letter must be executed by the appropriate parties on behalf of the client *and* the law firm.

B. Special attention should be given to any guidelines for outside counsel or other related documents provided by the client. The requirements in any such guidelines should be consistent with the engagement letter, as they are usually incorporated by reference into the scope of services.

C. An engagement letter will:

(i) Specify when the attorney/client relationship is established (e.g., upon execution of the engagement letter or at an earlier point), serving as a starting point for duties to begin to run and for conflicts to be considered. For instance, when responding to a request for proposal, it is advisable to include a statement that the attorney/client relationship is created only upon selection as Bond Counsel and agreement as to the responsibilities of Bond Counsel.

(ii) Minimize disagreements or misunderstandings by setting forth terms and duties of counsel, potentially reducing Bond Counsel's exposure.

(iii) Focus attention on the conditions and guidelines that govern the proposed attorney/client relationship.

(iv) Define the scope of legal services, address limits on Bond Counsel's responsibilities, and correct any misperceptions.

(v) Specify the client's obligations.

(vi) Call attention to areas where the engagement of additional representation or other professionals may be required.

D. Contents of an Engagement Letter. The following are major areas that should be addressed in an engagement letter. Refer to Model Engagement Letters for more information.

(i) *Addressee.* The engagement letter should be addressed to the person with authority to enter into such contracts generally. If unknown, ask someone. Note that some states/jurisdictions require the legislative body to approve such contracts.

(ii) *Communications.* It is important to determine who speaks for the client. See Model Rule 1.13 which provides that the client is the "organization" acting through its duly authorized constituents. See also ABA Formal Op 97-405 (April 19, 1997) discussing when and under what circumstances a lawyer represents the entire government or just a particular agency or department. The opinion provides that in the absence of an express agreement the identity of the government client may be inferred from the reasonable understandings and expectations of the lawyer and responsible government officials, taking into account such functional considerations as how the government client presented to the lawyer is legally defined and funded, whether it has independent legal authority with respect to the matter for which the lawyer has been retained, and the extent to which the matter involved in the proposed representation has general importance for other governmental components in the jurisdiction. A misunderstanding as to who Bond Counsel's client is subjects Bond Counsel to broader potential liability. In addition, the engagement letter should also address any special requirements on the use or prohibition of the use of certain types of communication such as requirements for the use of secured email, cyber-security and network encryption of communications. Failure to adhere to reasonable security protocols could subject your firm to liability or a violation of the Model Rules.

(iii) *Nature and Purpose of Issue.* Outline the basic facts of the transaction as you know them, so that if the structure materially changes, you can renegotiate the terms and scope of the engagement and fees, if necessary.

(iv) *Excluded Parties.* In some situations, it may be advisable to identify certain parties to the transaction you will *not* be representing. There is no Model Rule governing non-engagement letters.

(v) *Scope of Services.* Outline the services that you contemplate will be necessary in order to perform your duties given the facts as they have been described.

(vi) *Compensation Arrangement.* Many fees in a Bond Counsel transaction are contingent (or effectively contingent) on closing. A contingent fee is permitted, but under Model Rule 1.5 a contingent fee must be in writing (unless a state's particular language in adopting such rule provides otherwise). If fees are paid by a third party/not your client, consider a fee letter (such as to the borrower in a conduit transaction) (see "Fee Letter" below).

(vii) *Potential Conflicts of Interest and Waivers of Such Conflicts.* The engagement letter is an opportunity to disclose the fact that he, she, or the firm has done or is doing work for some other party in the transaction, such as the underwriter, in unrelated matters. Where

the underwriter has not yet been selected, a general warning of this possibility should be sufficient, but should be followed with a confirmation when selection occurs.

(viii) *Document Retention Policy.* As more law firms move towards a paperless work environment, the engagement letter may provide the appropriate place to disclose to a client document retention policy as it relates to converting paper documents generated or received by the firm into an electronic format as well as what is done with the originals.

(ix) *Indemnification Provisions*. Review carefully and avoid if possible. Have the language reviewed by the firm risk of loss attorney/staff member. Note that a cause of action against Bond Counsel arising out of contract, rather than negligence might not be covered by Bond Counsel's professional liability policy. *See* Ethics–Conflicts of Interest and Engagement Letters, Bond Attorneys Workshop, 2007. C.

Issuers sometimes request (such as in a request for proposals) that Bond Counsel enter into an agreement to indemnify the issuer for losses associated with an incorrect Bond Counsel opinion. These agreements should be avoided if possible for a variety of reasons, including issues of insurance coverage, creation of liability where none existed, and deprivation of defenses. As a result, some law firms have declined to respond to such requests where indemnification is a baseline requirement. But in some states, Bond Counsel must accept such indemnification provisions which are non-negotiable with the issuer client. See also Section 10.27 of Circular 230 which prohibits "contingent fees" in representing a client before the IRS.

(x) *End of Representation.* An engagement letter should also include a statement as to when the attorney/client relationship is concluded. This statement is useful in dealing with conflicts of interests, such that the analysis becomes one of the duties owed to former clients should a conflict arise in the future.

(xi) *Caution - Form Contracts*. Be aware that form contracts (such as form procurement contracts) may not "fit" the Bond Counsel/client relationship for a variety of reasons and will need to be carefully reviewed and revised.

E. <u>Scope of Services to be Provided.</u>

Model Rule 1.2 - Scope Of Representation And Allocation Of Authority Between Client And Lawyer

> *(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.*
>
> *...*

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

{The Comment is omitted from this outline.}

Model Rule 1.4 - Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

{The Comment is omitted from this outline.}

(i) *Services Generally*. Both Function and Model Engagement Letters delineate the services to be performed by Bond Counsel, but those services may vary from state to state and transaction to transaction. The engagement letter or contract gives Bond Counsel the opportunity to state clearly the limitations of the legal services to be provided and the scope of each opinion to be rendered. Perhaps, just as important, many malpractice insurers make the use of an engagement letter a requirement in order for coverage to be available under the applicable policy. The services to be rendered include (at least) those which are necessary to enable Bond Counsel to render the legal opinion regarding the validity and binding effect of the obligations, the source of payment and security for the obligations, and the federal (and state, if applicable) income tax treatment of interest on the obligations.

The engagement letter should state any anticipated opinion limitations, to the extent known at the time. This may include language stating that Bond Counsel will rely upon the certified

proceedings and certifications of public officials and other persons furnished to Bond Counsel without undertaking to verify the same by independent investigation.

The engagement letter should also include any assumptions that Bond Counsel will make, such as assuming that the client or others will provide Bond Counsel with complete and timely information on all developments pertaining to the bonds and their security. Bond Counsel may rely upon the work product or opinion of other parties to the transaction only to the extent that such reliance is reasonable. If there is co-Bond Counsel, the engagement letter may include a statement as to the role and responsibilities of co-Bond Counsel.

(ii) *Additional Services*. Many Bond Counsel engagements include services beyond the "traditional" or historical roles of Bond Counsel. For example, it is now presumed that Bond Counsel will undertake the necessary diligence and provide advice on the Internal Revenue Code requirements with respect to the tax-exemption of interest on the proposed issue.

(iii) *Securities Law Advice*. Bond Counsel may also provide advice and opinions on issues arising under federal securities laws, such as preparing the official statements, private placement memoranda, other disclosure documents, or portions thereof (especially if acting as disclosure counsel in addition to Bond Counsel), drafting the continuing disclosure undertaking of the issuer or conduit borrower or remedying disclosure deficiencies of issues; conducting a review of compliance with prior ongoing disclosure undertakings, and advising and assisting with preparing and filing ongoing disclosure documents.

(iv) *Exceptions*. Engagement letters should also specifically state which tasks are *outside* the described scope of Bond Counsel services. These exclusions may include, depending on the circumstances, drafting the disclosure documents, opining on securities issues, preparing blue sky surveys, responding to examinations, inquiries, or investigations by the IRS or the SEC; taking responsibility for continuing disclosure and monitoring post-closing compliance with Internal Revenue Code requirements (including arbitrage rebate); or providing other post-closing advice.

Limiting the scope of Bond Counsel's services is permitted under Model Rule 1.2(c) provided the client gives "informed consent" after consultation with the client and the limitation is reasonable under the circumstances. The Terminology Section of Rule 1.0 of the Model Rules includes a definition for informed consent and provides that lawyers must communicate "adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."

Bond Counsel should also consider disclaiming responsibility for providing financial advice in the engagement letter. Such advice should not be considered part of the role of Bond Counsel (and may not be covered by a firm's malpractice insurance), but explicit notice to the client may be helpful in a later dispute as to the agreed-upon scope of services.

Bond Counsel should also be aware that if Bond Counsel prepares IRS Form 8038, the IRS will consider Bond Counsel to be a paid tax return preparer, subject to IRS regulations, including registration, continuing education, compliance checks and ethical standards.

F. Compensation.

Model Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

...

Comment

{Parts [1], [4] and [6] – [9] of this Comment are omitted from this outline.}

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible

for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

(i) The Model Rules provide that both fees and expenses should be clearly communicated to the client, with enough information to permit the client to make an informed decision concerning the representation. Fees and expenses should be reasonable.

G. Fee Letter. In situations where an attorney's client is not the party responsible for paying that attorney's fee, it may be advisable to obtain a fee letter from the entity responsible for paying the fee (e.g. in a conduit transaction where Bond Counsel represents the issuer, but the conduit borrower is nevertheless responsible for paying Bond Counsel's fee). Fee letters are typically in addition to, rather than in lieu of, engagement letters. Fee letters can also be used to highlight and receive acknowledgement and agreement on other important matters like conflicts of interest and the scope of a project. Some Bond Counsel choose to attach their executed engagement letter as an exhibit to the fee letter and have the party responsible for paying their fee acknowledge and agree to the matters described in the engagement letter.

VI. CONFLICTS OF INTEREST

Model Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

{Parts [5], [6], [9] - [12], [14] – [17], [19], [21], [23] – [25], and [27] – [33] of this Comment are omitted from this outline.}

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under

paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

Identifying Conflicts of Interest: Directly Adverse

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have

the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

A. Current Clients. A consequence of having a successful law practice is that you inevitably will need to assess and manage conflicts of interest. The larger the firm, the more complex is the process whereby Bond Counsel will need to ascertain whether the firm as a whole has a conflict of interest in a matter. As many clients still "run into" and deal with one another, even small law firms focused solely on public clients will need to address issues relating to conflicts. It is also an oddity of our practice that Bond Counsel often regards the entire "finance team" as working towards a common goal, a view that can reduce sensitivity to actual, business or perceived conflicts of interest.

As noted in the Comments, to resolve a conflict of interest under Model Rule 1.7 it is necessary to: identify the client(s), determine whether a conflicts exists, decide whether the representation may be undertaken despite the conflict (e.g., whether the client can consent to the engagement), and if so, obtain the informed consent of the client after consultation.

Keep in mind the following points when analyzing a potential conflict of interest:

(i) Identification of a client by Bond Counsel is critical for determining the application of Model Rule 1.7 to an engagement. *See Brown and Williamson Tobacco Corporation v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) (must know who client is in order to accurately identify actual or potential conflicts).

(ii) Before establishing a new attorney/client relationship, the Model Rules require an evaluation of whether he, she or the firm can represent adequately the interests of the client without compromising duties to existing or former clients. Bond Counsel should complete a thorough conflicts check to evaluate whether the proposed representation of the issuer presents no conflict, "business" or "political" conflicts that are only generally adverse and do not require consent, or a current or potential conflict requiring informed consent.

(1) Having and following a formal client intake process will help identify potential conflicts of interest. Many firms have come to the realization that a formal client intake process is a significant factor in managing malpractice liability. There is also value in informal conversations with colleagues regarding new and/or ongoing representations to identify potential conflicts.

(2) From a practical perspective, Bond Counsel may want to take advantage of the tools available to him or her to conduct as much due diligence as possible regarding not just the client or other individual bringing the matter to the firm, but also regarding other transaction participants. For instance, it would be good to avoid doing business, among other things, with investment bankers under investigation by the SEC, agency officials facing indictment for corruption and persons with no, or virtually no, experience in the type of project to be funded with bond proceeds.

(iii) The subject of conflicts is fact-specific, and the facts may change over time. For instance, as transactions change and new parties are added or replaced, new conflicts checks need to be run.

(iv) Fees paid by someone other than the client will not automatically result in a conflict of interest. Model Rule 1.8(f) specifically prohibits an attorney from accepting compensation from a person other than the client unless: the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and information relating to representation of a client is protected as required by Rule 1.6.

B. Is there a Conflict of Interest? Under the Model Rules, a concurrent conflict of interest exists if there is: (a) *direct adversity*, where two clients are fundamentally antagonistic to one another, or (b) *material limitation*, where the quality of Bond Counsel's representation may be affected by duties to another client, a former client, a third person, or by its own interests.

(i) *Direct Adversity*. If a contemplated representation is or will be directly adverse, the duty of loyalty owed to the client will, necessarily, be affected. The general rule is that adverse representation of concurrent clients is *prima facie* improper and can rarely be cured by consent. Direct adversity normally means an adverse position in litigation. However, an

"[a]dverse interest[] may arise between entities independent of their involvement as parties to a lawsuit." *West Virginia ex rel. Morgan Stanley & Co. v. MacQueen*, 416 S.E.2d 55, 60 (W. Va. 1992) [citations omitted].

(ii) *Material Limitation*. Model Rule 1.7(b) deals with competing interests that may distract Bond Counsel from the main task of loyally serving his or her client. A "material limitation" translates to an impairment of representation, i.e., "when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Model Rule 1.7(b) requires the consent of the client(s) whose representation may be materially limited by the lawyer's other duties or interests. In cases of common representation, consent should be obtained from all affected parties.

(iii) *Imputation*. Any knowledge possessed by one attorney in a firm is presumptively possessed by all other attorneys in the firm.

(iv) *Reasonable Belief.* In cases of either direct adversity or material limitation, Bond Counsel cannot undertake a new representation unless Bond Counsel reasonably believes that the representation (or the existing client relationship) will not be adversely affected, *i.e.*, that the proposed representation will not materially interfere with the lawyer's independent professional judgment. "Reasonable belief" is defined under the Terminology section of the Model Rules in Rule 1.0 to mean that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." "Reasonable belief" is determined by applying an objective analysis.

(v) *Consultation*. If Bond Counsel reasonably believes the representation (or in cases of direct adversity, the relationship) will not be adversely affected, then the client(s) must be consulted and advised of the current or potential conflict. The Ninth Circuit has held that the lawyer "must explain to [the clients] the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to [withhold consent]." *Unified Sewerage Agency v. Telco Inc.*, 646 F.2d 1339, 1346 (9th Cir. 1981) (citing *In re Boivin*, 533 P.2d 171, 174 (1975)). Ideally Bond Counsel will call or meet with the client for consultation *prior to* sending the engagement letter.

(vi) *Consent*. Only after coming to the reasonable belief that the representation will not be adversely affected can Bond Counsel consult with the client to seek consent (also referred to as a "waiver of conflict"). Consent must be confirmed in writing. Knowledgeable, informed consent can only be given if the client is apprised of all pertinent facts and potential consequences. Note that there are certain scenarios that cannot be cured by consent.

Obtaining consent from a governmental entity client can be particularly tricky, and special attention should be paid to the applicable state law requirements for consent to be valid. Even if a conflict waiver is permissible, it is critical to determine the correct person to execute the waiver and whether its existence should be communicated to the governing board. Some agencies, for example, require Bond Counsel to deal only with issuer's counsel (city attorney, county counsel, etc.) on legal matters.

C. Future Conflicts. Prospective conflicts and prospective conflict waivers can be helpful in the municipal finance practice where practitioners tend to represent a limited universe of municipal issuers, conduit borrowers and certain underwriters. Prospective waivers should be reevaluated when a conflict does arise to determine whether the waiver sufficient covers the issue and whether it is reasonable to believe the client contemplated the conflict when signing the waiver. It may be prudent to inform the client each time that a new, presumably waived, conflict does arise in order to reduce the risk that the client will later assert that the waiver was not effective. The best practice will typically be to seek a new waiver from the client specifying the circumstances of the newly identified conflict. *See* also ABA Formal Op. 05-436.

D. Former Clients.

Model Rule 1.9 Duties to Former Clients

> *(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.*
>
> *(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client*
>
> *(1) whose interests are materially adverse to that person; and*
>
> *(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.*
>
> *(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:*
>
> *(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or*
>
> *(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.*
>
> *{The Comment is omitted from this outline.}*

(i) Ethical duties continue after termination of the attorney-client relationship, such as confidentiality and conflicts of interest. Model Rule 1.9 addresses conflicts of issue with respect to former clients.

(ii) A common scenario in the municipal finance industry is when Bond Counsel represents the issuer in a new transaction and had served as underwriter's counsel or trustee's counsel in a separate transaction. Comment 2 to Rule 1.9 specifically states that a lawyer

"is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."

There is considerable support for the premise that having once served as underwriter's counsel, later serving as Bond Counsel in another transaction would not be "the same or substantially related matter." There are representations where such determination may not be appropriate, e.g., when Bond Counsel has learned confidential information from the underwriter that would be useful in negotiating on behalf of the issuer. Care should also be taken to ensure the termination of any prior engagement. Work conducted between bond issues for a "former" client may suggest that the attorney-client relationship still exists.

(iii) Comment 9 to the Model Rule 1.9 notes that the provisions of the Model Rules "are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing … ." Note that similar to conflict waivers for current clients, a waiver for representation regarding a former client also requires consultation and written consent.

(iv) Questions to ask when evaluating a potential conflict with a former client: (1) is the client truly a *former* client of Bond Counsel (i.e., has the engagement been terminated and does the client understand it has been terminated)? (2) Are the interests of the current and former clients "materially adverse?" (3) Is there a "substantial relationship" between the two representations?

VII. OTHER ETHICAL CONSIDERATIONS FOR BOND ATTORNEYS

A. Confidentiality.

Model Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

{Parts [1] through [17], and [20] of this Comment are omitted from this outline.}

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

(i) A core principle in the attorney-client relationship is that absent informed consent provided by the client a lawyer has a duty to make "reasonable efforts" to protect confidentiality. The lawyer is not guaranteeing confidentiality.

(ii) Prior to 2003, the Model Rule version permitted disclosure of confidential client information in very limited circumstances - "to prevent reasonably certain death or substantial bodily harm," in defense of the lawyer's own interests, or to comply with other law or a court order. This rule was amended in 2003 to "more effectively protect the interests of the corporate client and to protect the professional integrity of the buyer from a client using his or her services to further a crime as fraud." *Report of the ABA Corporate Responsibility Task Force.* The rules applicable in most states tend to permit broader disclosure - as of 2004, 43 states *permitted* a lawyer

to disclose confidential information to prevent a client's criminal fraud; eighteen states permitted such disclosure to rectify substantial loss resulting from client crime or fraud, using the lawyer's services; four of those states required a lawyer to make such a disclosure, and only nine states and the District of Columbia *forbade* a lawyer from revealing such information. *See also* "The Functions and Responsibilities of Bond Counsel", 2011 Edition, at FN 68.

(iii) Does the lawyer's duty change with a public entity as a client, in light of open records and sunshine laws? *See* ABA Formal Opinion 480 (March 6, 2018) (www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.authcheckdam.pdf).

(iv) What are the standards for "reasonable efforts? The factors to be considered are also set forth in Comment [18]. They include:

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, [1] the sensitivity of the information, [2] the likelihood of disclosure if additional safeguards are not employed, [3] the cost of employing additional safeguards, [4] the difficulty of implementing the safeguards, and [5] the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). (Emphasis and numbers added.)

(v) Maintaining confidentiality can prove difficult in the digital age, especially with increasing cybersecurity threats. Day-to-day activities, such as using email and other electronic means of communication, electronic document retention tools (such as cloud storage), social media, or an unsecured internet network, may jeopardize the ability to keep client information confidential, even if such disclosures are unintentional. Working remotely or in public spaces raise similar concerns. This issue has become particularly important in light of the COVID-19 pandemic and the use of video conferencing to conduct client business. Risks are not simply limited to an external intrusion into the video conference. Counsel must also be mindful of whether or not the space in which counsel participates in the video conference is secure (i.e. **who** else and **what** else can hear you).

(vi) Confidentiality in the digital age is not just a concern for your firm IT department. The Comments to Model Rule 1.6 make it clear that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks of technology." Comment [18] goes on to make two other important points. First, the security measures to be undertaken may be established by negotiations between the client and the lawyer. It is common for Bond Counsel to have a written legal services contract with the issuer, or it is common for the issuer to include requirements in an RFP process for Bond Counsel. Bond Counsel firms should be ready to negotiate confidentiality requirements with the client. Second, Comment [18] points out that other laws may govern a lawyer's security responsibilities.

(vii) Responsibilities of Supervising Lawyers. Rule 5.1 provides: "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of

Professional Conduct." Rule 5.3 requires a lawyer to make sure assisting nonlawyers, including vendors, cooperate in complying with the rules. Formal Opinion 477 (May 11, 2017; revised on May 22, 2017) of the ABA Standing Committee on Ethics and Professional Responsibility sets forth the steps that the supervising lawyers in a firm should take:

> In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no difference than the other obligations for supervision of office practices and procedures to protect client information.

See ABA Formal Opinion 477 (Revised on May 22, 2017).

(viii) Data Breach or Cyberattack. *See* ABA Formal Opinion 483 (October 17, 2018) (regarding a lawyer's duty to inform the client about a data breach or cyberattack).

B. Confidentiality and the Attorney-Client Privilege. Note that the concepts of confidentiality and attorney-client privilege are related but not synonymous. While the principle of confidentiality is provided for in Model Rule 1.6 (and is broader than privilege), the concept of attorney-client privilege (also referred to as the "testimonial privilege") is evidentiary in nature. The privilege protects communications (and lawyer's notes, drafts, research, and other work product) from being discoverable in a legal or administrative proceeding. The privilege belongs to the client.

C. Communications with Represented Parties.

Model Rule 4.2 Communications with Person Represented by Counsel

> *In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.*
>
> *{Parts [1] – [2] and [4] – [9] of this Comment omitted from this outline.}*
>
> *[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.*

(i) Model Rule 4.2 prohibits communications about the subject of a matter (such as a bond transaction) with other members of the finance team whom the Bond Lawyer knows to be represented by counsel *unless* the lawyer has the consent of the other lawyer or is authorized by

law/court order. Note the distinction of who must consent – not the member of the finance team but the other lawyer representing such party.

(ii) This Model Rule can prove to be particularly tricky in a practice where members of the finance team tend to get along and work toward the same goals, information is frequently widely shared and/or public given sunshine/public record laws, the due diligence necessary to deliver a Bond Counsel opinion frequently requires extensive interaction with the borrower or underwriter, and lawyers tend to have prior (or current) relationships (including attorney-client relationships) with other members of the finance team. Nevertheless, Bond Lawyers need to be mindful to not cross the line when it comes to communications with represented parties regarding the subject of the matter. Even if they were not included in the initial correspondence, it is best practice to copy counsel on emails, include counsel in formal and informal conference calls, and proactively ask for permission to speak with another party regarding the deal. Failure to maintain this habit can be particularly risky in the inevitable event Bond Counsel ends up serving as counsel on a transaction with an attorney who is not accustomed to the collegiality and flow of a bond transaction.