

Ethics for Bond Attorneys 101

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The Essentials

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Ethics for Bond Attorneys

- Brief Background
- Basis of Liability and Resources Available
- Know and Identify Your Client
- Competence
- Engagement Letters & Fee Letters
- Avoiding and/or Managing Conflicts of Interest
- Confidentiality
- Other Considerations
- Questions



Brief Background

Why are we talking about ethics?

The practice of bond law is a peculiar one

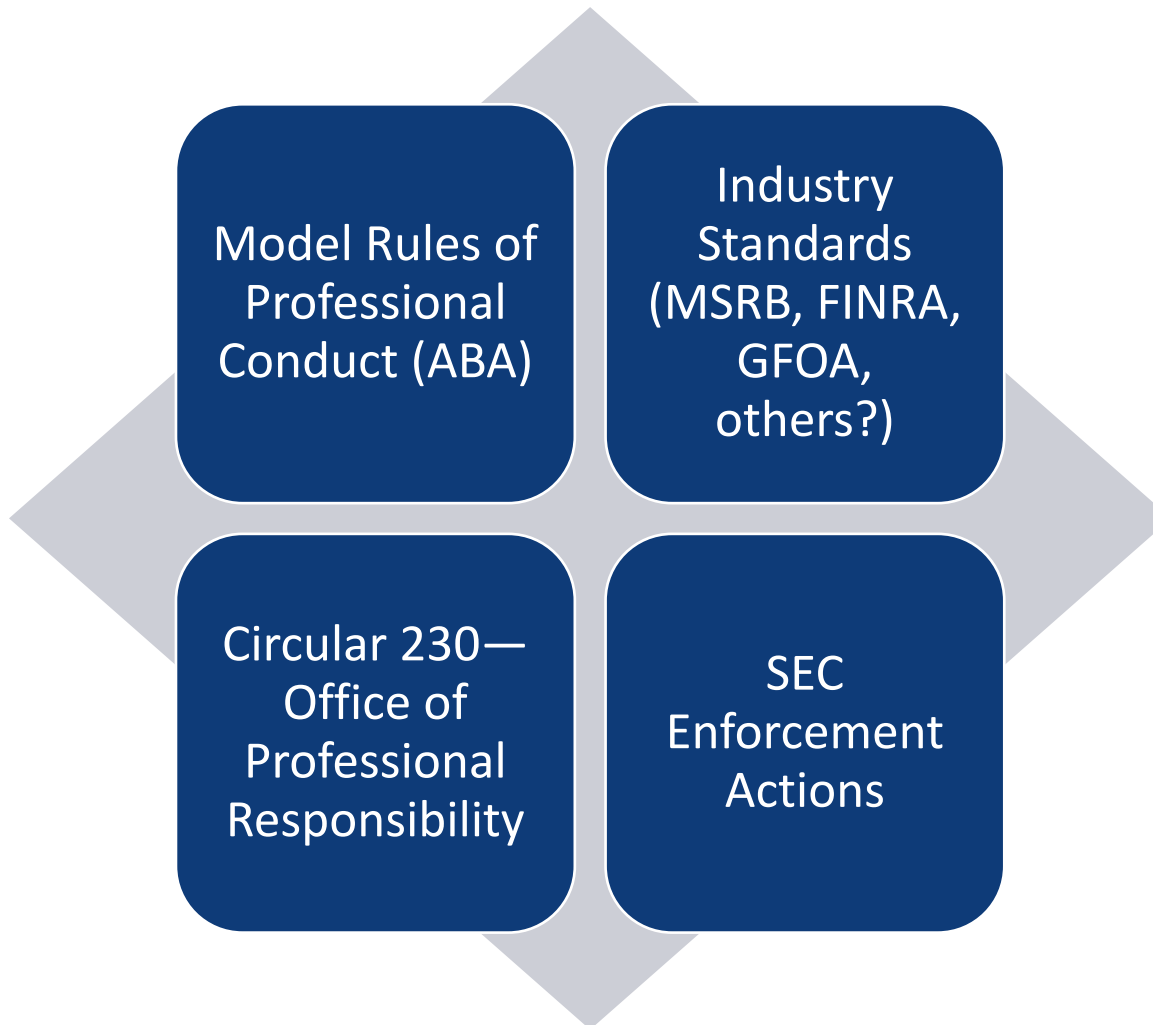
Increasing Bond Counsel liability, for instance

- Failing to deliver competent service
- Failing to deliver what was expected by the client in the scope of services
- Unintentional and/or accidental breach of confidentiality

While a violation of the Model Rules may not give rise to a course of action, a violation may be evidence of a breach of the applicable standard of conduct and may be considered in a legal proceeding

If Bond Counsel must answer for an alleged conflict in addition to another legal claim, a jury is less likely to be sympathetic to Bond Counsel

Basis for Liability and Resources



Basis for Liability and Resources

NABL Publications

- The Function and Responsibilities of Bond Counsel
- Model Engagement Letters
- Model Bond Opinion Report
- Model Letter of Underwriters Counsel (2nd ed.)
 - Each is available at nabl.org website under Research

Case law

SEC Enforcement Actions

ABA Opinions

- Available at americanbar.org under Legal Opinion Resource Center

Takeaways

In addition to *knowing* and *thinking* about the Model Rules and applicable standards:

- Know and identify your client
- Be competent
- Use an engagement letter
- Avoid and manage conflicts of interest
- Be proactive
- Identify YOUR role in the transaction and let others know

Know and Identify Your Client

Evolution of Bond Counsel away from “counsel to the transaction”

Important to identify 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: Competence requires that an attorney provide competent representation *to a client*

Special considerations regarding the entity as client

Beware of the dishonest client

- Do some research on your potential client

When does the attorney-client relationship begin? When does it end?

When may you have duties to third parties?

Polling Question #1

Which of the following roles does your firm primarily serve?

- a) Bond counsel
- b) Issuer's counsel
- c) Underwriter's counsel
- d) Disclosure Counsel
- e) Borrower's Counsel
- f) Purchaser's/lender's counsel
- g) Trustee's counsel

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*



According to Function:

- Bond lawyers must be familiar with (or, in particular transactions, associate with 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.

Competence - Opinions

Key ethical consideration in opinion practice is *competence*

NABL opinion reports provide guidance

Types of opinions:

- Unqualified Bond Counsel Opinion
 - Regarding the validity and tax exemption of bonds
 - Must be 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

Competence - Opinions

Types of opinions:

- Other Opinions
 - May be unqualified or qualified (reasoned)
 - Supplemental Opinions, Enforceability Opinions, Disclosure Counsel Letters, Trustee Counsel Opinions, Borrower Counsel Opinions, Underwriter Counsel Letter, Bank Counsel Opinions, Bankruptcy Opinions, and Issuer's Counsel (e.g. local counsel) opinions
 - The Bond Purchase Contract provides a road map of opinions required to be delivered at closing
 - *Resolve opinion expectations at the outset of a transaction*

Competence – Substantive and Technology

- Note other areas where lawyers are expected to be competent:
 - Substantive areas depending on the deal
 - State law, federal tax law, securities law
 - Note recent focus on technology

Comment 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.]

Competence – Other Considerations

Model Rule 1.3: Diligence states “A lawyer shall act with reasonable diligence and promptness in representing a client.”

- “Perhaps no professional shortcoming is more widely resented than procrastination.”
- Juggling a busy workload and demanding client expectations will not excuse incompetence.

Competence – Other Considerations

Dodd-Frank Act

(1) Requires municipal advisors to register with the SEC, (2) Establishes a fiduciary duty between a municipal advisor and the municipal entity, and (3) Subjects 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.”

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

Polling Question #2

Do you and/or your firm always use engagement letters for each matter?

- a) Yes
- b) No

Engagement Letters

Key tool in managing exposure to liability

A formal contract or engagement letter

- Must be signed by the appropriate representatives of the parties

Benefits of Engagement Letters

- Minimize disagreements or misunderstandings
- Focus attention on conditions that govern the attorney-client relationship
- Define scope of services

Engagement Letters

Benefits of Engagement Letter

- Identify any consents and disclosures upon which consents are based
- Specify client's obligations
- Call attention to areas requiring additional representation or necessity for other professionals

Engagement Letters

Key Components of engagement letters:

- Identification of the client
- Addressee
- Identification of points of contact

- Model Rule 1.4: Communications

- Scope of engagement/services (nature and purpose of the transaction)

- Model Rule 1.2: Scope of Representation and Allocation of Authority between Client & Lawyer
- What services are excluded from engagement?
 - Model Rule 1.2(c) requires consultation and informed consent from the client

- Compensation arrangements

- Model Rule 1.5: Fees
- Fees must be reasonable and clearly communicated
- Contingent fees (fees contingent on successful closing of the bonds) must be in writing

- Conflicts of interest (and waivers thereof)
- Other common and less common provisions

Fee Letters

- Very similar benefits of an **Engagement Letter**
- Creates a written understanding between an attorney/firm and an entity that is not the attorney/firm's client
 - Typically, the entity responsible for paying the attorney/firm's fees and expenses
- Can also be used as a **conflict waiver**
- Some bond counsel attach their Engagement Letter with their client as an exhibit to their Fee Letter

Avoiding and/or Managing Conflicts of Interest

Benefits of having and using formal and informal client intake process

- **Model Rule 1.7: Conflict of Interest: Current Clients**
 - 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
- **Reasonable belief the representation will not be adversely affected**
 - Objective Analysis
- **Consent (waiver)**
- **State Law issues?**



Avoiding and/or Managing Conflicts of Interest

Model Rule 1.9: Duties to Former Clients

- Ethical duties continue after termination of the attorney-client relationship, such as confidentiality and conflicts of interest

Questions to ask when evaluating a potential conflict with a former client:

- Is the client truly a former client? (i.e., has the engagement been terminated and does the client understand it has been terminated?)
- Are the interests of the current and former clients “materially adverse”?
- Is there a “substantial relationship” between the two representations?

Benefit of termination letters

Other conflicts? Prior work product? Transaction under audit? Should you represent issuer on an audit of deal for which you gave opinion?

Avoiding and/or Managing Conflicts of Interest

Conflict Waivers

- Knowledgeable, informed consent can only be given if the client is apprised of all pertinent facts and potential consequences
- Must be confirmed in writing
- Can be blanket or specific
- Prospective waivers
 - 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

Confidentiality

- **Model Rule 1.6: Confidentiality of Information**
 - 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) of this Model Rule
 - 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
- **Be aware of the attorney-client privilege when communicating with clients and non-clients**
 - Related but not synonymous concepts



Confidentiality



- **Is your firm data secure?**
- **Are you aware of and comply with firm security protocols?**
- **What are “reasonable efforts”**
 - Maintaining confidentiality can prove difficult in the digital age, especially with increasing cybersecurity threats
 - 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
 - Use caution when working remotely (Covid-19 Pandemic)
 - Facts and circumstances analysis
 - ABA Formal Op 17-477R provides guidance; evolving issue
 - Does it make a difference if the information is considered “public” under State sunshine laws?

Other Considerations

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*

Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

- *(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer (and see ABA Formal Op 477)*

Questions

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