

NOTICE

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ACKNOWLEDGMENTS

In 1988, the National Association of Bond Lawyers published its original *Model Engagement Letters* report. The report was prepared by the Model Engagement Letter Committee and was approved by the Board of Directors of the Association on November 12, 1987. The purpose of the 1988 report was to provide bond counsel with representative examples of engagement letters for various types of financings by states and their political subdivisions.

In 1996, President William H. McBride and the Board of Directors requested that the Committee on Professional Responsibility prepare a revised report reflecting current ethical and legal developments and to respond to the changes in the practice of bond counsel since 1988. Work on the revisions began in the fall of 1996, and continued throughout 1997 and into 1998 under Presidents Julianna Ebert and William H. Conner. Committee participants were:

Margaret B. Angel
John R. Axe
Mae Nan Ellingson
Roy J. Koegen
Mary Anne Braymer
Meredith Hathorn

Particular credit is accorded Committee members Meredith Hathorn and Mary Anne Braymer, Board Advisor Robert W. Buck and Board members William H. McBride, John Gardner, Susan Weeks and Howard Zucker, each of whom contributed tireless support, thoughtful analysis and careful drafting. The Committee also wishes to express its appreciation to Frederick O. Kiel, NABL's Honorary Director and Editor of *The Bond Lawyer*, for his final editorial review of its work product. In addition, many other Association members, too numerous to list here, made valuable and thoughtful recommendations.

Geoffrey C. Hazard, Jr., Director of the American Law Institute, and William Freivogel, Senior Vice President and Deputy Loss Prevention Counsel of Attorneys' Liability Assurance Society, Inc., reviewed the report in 1997 and made additional contributions.

The Committee greatly appreciates support for this project provided by the Board of Directors and the contributions made by the various Association members who participated in this project.

Roy J. Koegen
Chair
Committee on Professional Responsibility

MODEL ENGAGEMENT LETTERS

This second edition of *Model Engagement Letters* was prepared by the Committee on Professional Responsibility (the "Committee") of the National Association of Bond Lawyers ("NABL "). The Board of Directors has authorized the distribution of this report for the assistance of bond counsel.

The model engagement letters included in this report (the "Engagement Letters") are revisions of the model engagement letters included in the *Model Engagement Letters* report published in 1988. The purpose of this report is to provide bond counsel with representative examples of engagement letters for two categories of financings by states and their political subdivisions: governmental bonds and conduit bonds (hereinafter "bonds"). While a letter format is presented, bond counsel may enter into various forms of agreements with a client. Regional or local custom and applicable law may require that the agreement be in traditional contract form or may require provisions (*e.g.*, nondiscrimination clauses) not discussed in this report.

The Engagement Letters address issues raised by the adoption in 1983 by the American Bar Association ("ABA") of its Model Rules of Professional Conduct (the "Rules"), which now have been adopted in most jurisdictions, and the role and functions of bond counsel as more fully discussed in NABL's *The Function and Professional Responsibilities of Bond Counsel* (Second Edition, 1995) ("*Function*"). The application of the Rules to bond counsel together with increased litigation regarding the interpretation of bond counsel's responsibilities, has highlighted the reasons for using engagement letters.

In some states the Rules have been adopted in modified form, and in other jurisdictions the Rules do not apply. In addition, interpretations of the Rules vary from state to state. Bond counsel must have a thorough understanding of the applicable ethical rules and laws in the jurisdiction governing the engagement and should revise the Engagement Letters to reflect those rules and laws.

As discussed in *Function*, the Rules strongly suggest that the terms of the engagement be in writing. The Committee believes that consistent use of written engagement letters will (a) minimize disagreements or misunderstandings; (b) focus attention on the conditions and guidelines that will govern the proposed attorney-client relationship; and (c) lead to more productive relationships.

This report addresses the issues discussed in *Function* which arise from the special role of bond counsel including identification of the client, the scope of bond counsel services, compensation arrangements, conflicts of interest and waivers of such conflicts. One of the most significant changes in the Engagement Letters since the first edition is that a client is identified. As stated in *Function*, "bond counsel must identify a client in order to analyze and deal appropriately under the Model Rules with a number of relatively common situations involving duties of loyalty, confidentiality, privilege, communication, and consent." Bond counsel should no longer be considered "counsel to the transaction" or "counsel to the bondholders." Once the client is identified, careful analysis of the scope and nature of the representation is necessary to specify bond

counsel's duties in the transaction and to identify and address potential conflicts. Engagement letters make it possible to delineate clearly the scope of bond counsel's engagement and assist in clarifying the role of bond counsel for both attorney and client. Under the Rules, analysis of potential conflicts is impossible without knowing whom one represents.

This report includes an expanded conflicts section and accompanying annotations that are intended to provide bond counsel with a framework for evaluating various conflicts situations. The analysis of conflicts of interest in the context of public finance transactions has been, and will continue to be, the subject of extensive debate. During the preparation of this report, the discussion of conflicts of interest among Committee members and members of the Board of Directors revealed an array of analytical approaches to conflicts issues. For many conflicts questions confronting bond counsel, no clear guidance exists. Thus, this report cannot, and will not, be the final word on the subject. NABL will continue to provide opportunities for the debate and scholarly discussion of conflicts of interest rules through the Bond Attorneys' Workshop and its seminars and publications.

The Engagement Letters are designed for the use of lawyers rendering the bond opinion in a transaction. Bond counsel may also serve in a variety of other roles, if permitted under controlling laws, court rules, regulations, codes of professional responsibility or state rules of ethics. Nothing in this report should be construed to imply that any combination of counsel roles in a municipal bond transaction is *per se* a conflict of interest. Each transaction, the lawyers' roles in the transaction, and the governing ethical rules of the relevant jurisdiction must be analyzed. If, after the initial engagement, bond counsel undertakes an additional role in a transaction, bond counsel should consider amending its original engagement letter or entering into a separate engagement letter to reflect the new undertaking.

The Engagement Letters also address the situation in which an issuer retains two or more firms as bond counsel. The Engagement Letters include proposed language for such arrangements and anticipate that separate engagement letters will be provided by each bond counsel firm. *Function* identifies certain ethical and professional issues related to this practice that should be considered.

This report contains Engagement Letters for governmental bonds and conduit bonds. In each case, the Engagement Letters assume that the issuer of the bonds is bond counsel's client. In the case of conduit bonds, the Engagement Letter further assumes that although the issuer is the client, the conduit borrower is responsible for the payment of bond counsel's fee. Accordingly, this report also includes a model fee letter to be sent to a conduit borrower. If a party to the transaction other than the issuer is bond counsel's client, the applicable Engagement Letter will require appropriate modification. Following these model letters, this report includes annotations discussing various issues. The Engagement Letters and the fee letter are marked with parenthetical uppercase letters keyed to the relevant annotations. Finally, this report contains a bibliography of certain relevant materials.

The Engagement Letters are intended to assist bond counsel and are not intended to create a standard as to either scope or wording. The Committee recognizes that engagement letters actually

used will reflect varying state rules and practices, as well as factual differences and personal and firm practices. Coverage of any matter in the Engagement Letters is not intended to suggest that bond counsel must address that subject in an engagement letter. Similarly, non- coverage of any matter does not suggest that it is improper to include that matter in an engagement letter. The Committee's intent is to provide guidance rather than prescribe precise language.

Neither the Committee members nor NABL can take responsibility as to the completeness and accuracy of the materials contained herein; accordingly, readers are encouraged to conduct independent research of original sources of authority. This report is not intended to provide legal advice or counsel as to any particular situation.

GOVERNMENTAL BONDS (A)

[Letterhead of Bond Counsel]

_____ , _____

_____ (B)

Attention: _____

Re: Proposed Issuance of \$_____ Bonds of [Issuer]

Dear _____:

The purpose of this engagement letter is to set forth certain matters concerning the services we will perform as bond counsel to [Issuer] (C) (the "Issuer") in connection with the issuance of the above-referenced bonds (the "Bonds"). We understand that the Bonds are being issued for the purpose of _____ and will be secured by _____ [with additional security being provided by _____.] We further understand that the Bonds will be [purchased at negotiated sale by _____ [sold at a public sale] during the month of _____. (D)

SCOPE OF ENGAGEMENT (E)

In this engagement, we expect to perform the following duties:

Delete, modify, or supplement the following as may be consistent with the scope of your engagement.

- (1) Subject to the completion of proceedings to our satisfaction, render our legal opinion (the "Bond Opinion") regarding the validity and binding effect of the Bonds, the source of payment and security for the Bonds, and the excludability of interest on the Bonds from gross income for federal [and state of issue] income tax purposes.
- (2) Prepare and review documents necessary or appropriate to the authorization, issuance and delivery of the Bonds, coordinate the authorization and execution of such documents, and review and, where appropriate, draft enabling legislation.
- (3) Assist the Issuer in seeking from other governmental authorities such approvals, permissions, and exemptions as we determine are necessary or appropriate in connection with the authorization, issuance and delivery of the Bonds, except that we will not be responsible for any required Blue Sky filings.

- (4) Review legal issues relating to the structure of the Bond issue.
- (5) Prepare election proceedings or pursue validation proceedings.
- (6) Review those sections of the official statement, private placement memorandum or other form of offering or disclosure document to be disseminated in connection with the sale of the Bonds involving _____. (F) [We understand that _____ will act as disclosure counsel to the Issuer and (a) will assist in the preparation of the official statement and (b) will advise with respect to compliance with state and federal securities laws.]

If bond counsel will assume greater responsibility for disclosure matters, see (G).
- (7) Assist the Issuer in presenting information to bond rating organizations and providers of credit enhancement relating to legal issues affecting the issuance of the Bonds.
- (8) Prepare and review the notice of sale pertaining to the competitive sale of the Bonds.
- (9) Draft the continuing disclosure undertaking of the Issuer.

Our Bond Opinion will be addressed to the Issuer [and _____] and will be delivered by us on the date the Bonds are exchanged for their purchase price (the "Closing"). (H)

The Bond Opinion will be based on facts and law existing as of its date. In rendering our Bond Opinion, we will rely upon the certified proceedings and other certifications of public officials and other persons furnished to us without undertaking to verify the same by independent investigation, and we will assume continuing compliance by the Issuer with applicable laws relating to the Bonds. During the course of this engagement, we will rely on you to provide us with complete and timely information on all developments pertaining to any aspect of the Bonds and their security. (I) We understand that you will direct members of your staff and other employees of the Issuer to cooperate with us in this regard. [In rendering our Bond Opinion, we will expressly rely upon other counsel as to {describe matters upon which bond counsel will rely.}] (J)

Optional Paragraph Addressing Use of Co-counsel

[We understand that you have retained _____ who will also be rendering a Bond Opinion in this transaction pursuant to a separate letter of engagement, a copy of which you will provide to us. [[_____/other counsel] will be responsible for performing the following responsibilities: [_____]] (K)

Our duties in this engagement are limited to those expressly set forth above. Among other things, our duties do not include: (L)

Delete, modify, or supplement the following as may be consistent with the scope of your engagement.

- (a) Except as described in paragraph (6) above, assisting in the preparation or review of an official statement or any other disclosure document with respect to the Bonds, or performing an independent investigation to determine the accuracy, completeness or sufficiency of any such document or rendering advice that the official statement or other disclosure document does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they were made, not misleading.
- (b) Preparing requests for tax rulings from the Internal Revenue Service, or no action letters from the Securities and Exchange Commission.
- (c) Preparing blue sky or investment surveys with respect to the Bonds.
- (d) Except as described in paragraph (2) above, drafting state constitutional or legislative amendments.
- (e) Pursuing test cases or other litigation, [such as contested validation proceedings,] except as set forth above.
- (f) Making an investigation or expressing any view as to the creditworthiness of the Issuer or the Bonds.
- (g) Except as described in paragraph 9 above, assisting in the preparation of, or opining on, a continuing disclosure undertaking pertaining to the Bonds or, after Closing, providing advice concerning any actions necessary to assure compliance with any continuing disclosure undertaking.
- (h) Representing the Issuer in Internal Revenue Service examinations or inquiries, or Securities and Exchange Commission investigations.
- (i) After Closing, providing continuing advice to the Issuer or any other party concerning any actions necessary to assure that interest paid on the Bonds will continue to be excludable from gross income for federal income tax purposes (*e.g.*, our engagement does not include rebate calculations for the Bonds).
- (j) Addressing any other matter not specifically set forth above that is not required to I render our Bond Opinion.

ATTORNEY-CLIENT RELATIONSHIP (M)

Needs substantial revision if the Issuer is not your client.

Upon execution of this engagement letter, the Issuer will be our client and an attorney-client relationship will exist between us. [We understand that also has been engaged by the Issuer to {describe services other counsel to the Issuer is expected to provide.}] We assume that all other parties will retain such counsel, as they deem necessary and appropriate to represent their interests in this transaction. We further assume that all other parties understand that in this transaction we represent only the Issuer, we are not counsel to any other party, and we are not acting as an intermediary among the parties. Our services as bond counsel are limited to those contracted for in this letter; the Issuer's execution of this engagement letter will constitute an acknowledgment of those limitations. (L) Our representation of the Issuer will not affect, however, our responsibility to render an objective Bond Opinion. (N)

Our representation of the Issuer and the attorney-client relationship created by this engagement letter will be concluded upon issuance of the Bonds. Nevertheless, subsequent to Closing, we will mail the appropriate Internal Revenue Service Form 8038, prepare and distribute to the participants in the transaction a transcript of the proceedings pertaining to the Bonds. (O)

CONFLICTS (P)

Analysis of conflicts of interest issues requires a careful review of the facts and the application of the relevant ethical rules and laws to those facts. The paragraphs below provide only very general guidance and address only the most common circumstances where consent of the Issuer is or may be required. If the conflict involves another client, the other client's consent will also be required. Certain conflicts involving former clients may require the consent of the former client, but not of the Issuer. (Q) Additional paragraphs addressing certain conflict situations can be found in annotations Q and R. Review of annotations P, Q and R and of the applicable ethical rules and laws in the jurisdiction governing the engagement is essential before using any of the optional paragraphs addressing conflicts of interest.

Optional Paragraphs Addressing Direct Adversity -Rule 1.7(a)

Applicable ethical rules prohibit us from undertaking the representation of parties with directly adverse interests unless we reasonably believe the representation of either client will not adversely affect our representation of the other client and unless we obtain the consent of both clients. Because {describe facts}, the Issuer's interests in this transaction [are] [may be] adverse to those of _____ (the "_____"). Consequently, we want to provide you with sufficient information to allow you to evaluate the ramifications of the dual representation and the significance of granting your consent. {Describe here the subject matter of the adverse representation and the possible consequences, providing sufficient facts, legal implications and possible effects to permit the Issuer to appreciate the significance of its consent to the existing representation. Specific topics that should be discussed include your possible withdrawal from the engagement if a material conflict does arise and how you propose to deal with any confidential

information you receive from either client.}. Despite these possible limitations, we do not believe that our representation of the _____ will adversely affect our representation of, or our relationship with, you or *vice versa*, and seek your consent by the execution of this letter. We have already obtained the consent of the to our representation of you in this engagement.

Please note that pursuant to Rule 1.7(a), consent must have been obtained from *all* other affected clients *prior* to sending this letter.

Optional Paragraph Addressing Material Limitation Rule, Including Certain Multiple Representations -- Rule 1.7(b)

[It is possible that our representation of the Issuer as bond counsel could be materially limited by {describe simultaneous representation or material limitation}. {Describe here the subject matter of the existing limitation and provide sufficient facts, legal implications and possible effects to permit the Issuer to appreciate the significance of the simultaneous representation or limitation. Specific topics that might be discussed include your potential withdrawal if a material conflict arises and how you plan to deal with any confidential information you receive from a client. } We do not believe, however, that this [simultaneous representation] [limitation] will adversely affect our ability to represent you because {describe mitigating factors that permit representation}. With these factors in mind, we believe we can fulfill our professional responsibilities as described in this letter and seek your consent by your execution of this letter.]

For optional paragraph concerning former clients see annotation (Q).

Optional Paragraph Addressing Prospective Consent (R)

[As you are aware, our, firm represents many political subdivisions, companies and individuals. It is possible that during the time that we are representing the Issuer, one or more of our present or future clients will have transactions with the Issuer. It is also possible that we may be asked to represent, in an unrelated matter, one or more of the entities involved in the issuance of the Bonds. We do not believe such representation, if it occurs, will adversely affect our ability to represent you as provided in this letter, either because such matters will be sufficiently different from the issuance of the Bonds so as to make such representations not adverse to our representation of you, or because the potential for such adversity is remote or minor and outweighed by the consideration that it is unlikely that advice given to the other client will be relevant to any aspect of the issuance of the Bonds. Execution of this letter will signify the Issuer's consent to our representation of others consistent with the circumstances described in this paragraph.]

FEES (S)

Based upon: (i) our current understanding of the terms, structure, size and schedule of the financing represented by the Bonds; (ii) the duties we will undertake pursuant to this engagement letter; (iii) the time we anticipate devoting to the financing; and (iv) the responsibilities we will

assume in connection therewith, we estimate that our fee will be between \$_____ and \$_____. Our fee may vary: (a) if the principal amount of Bonds actually issued differs significantly from the amount stated above; (b) if material changes in the structure or schedule of the financing occur; or (c) if unusual or unforeseen circumstances arise which require a significant increase in our time or responsibility. If, at any time, we believe that circumstances require an adjustment of our original fee estimate, we will advise you [and prepare and provide to you an amendment to this engagement letter]. (T) In addition, we will expect to be reimbursed for all client charges made or incurred on your behalf, such as travel costs, photocopying; deliveries, long distance telephone charges, telecopy charges, filing fees, computer-assisted research and other expenses. We estimate that such charges will be in the range of \$_____ to \$_____. Our fee is usually paid at the Closing, and we customarily do not submit any statement until the Closing unless there is a substantial delay in completing the financing. If this transaction is delayed beyond _____we reserve the right to present for payment an interim statement. We may submit an additional statement for client charges following the Closing.

If, for any reason, the financing represented by the Bonds is not consummated or is completed without the delivery of our Bond Opinion as bond counsel, or our services are otherwise terminated, we will expect to be compensated at our normal hourly rates (currently ranging from \$_____ to \$_____ depending on personnel) for time actually spent on your behalf, plus client charges, as described above.

Substitute the following contingency provisions if applicable.

We understand and agree that our fees will be paid at the Closing. If the financing is not consummated, [we understand and agree that we will not be paid] [we understand that we will not be paid for our time expended on your behalf but will be paid for client charges made or incurred on your behalf.

RECORDS

At your request, papers and property furnished by you will be returned promptly upon receipt of payment for outstanding fees and client charges. Our own files, including lawyer work product, pertaining to the transaction will be retained by us. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to dispose of any documents or other materials retained by us after the termination of this engagement.

If the foregoing terms are acceptable to you, please so indicate by returning the enclosed copy of this engagement letter dated and signed by an authorized officer, retaining the original for your files. We look forward to working with you.

[Bond Counsel]

By: _____

[Accepted and Approved (U) [Issuer]

By: _____

Its: _____

Title: _____

Date: _____

Enclosure

*[Authorized by [Ordinance] (Resolution) [Order] No_____, dated
_____, _____.]

cc: [Governing Body] (B)

ENGAGEMENT LETTER

CONDUIT BONDS (V)

[Letterhead of Bond Counsel]

_____, _____

_____, _____ (W)

Attention: _____

**Re: Proposed Issuance of \$ _____ [Issuer] _____
Revenue Bonds (_____ Project –Series _____)**

The purpose of this engagement letter is to set forth certain matters concerning the services we will perform as bond counsel to [Issuer] (C) (the "Issuer") in connection with the issuance of the above-referenced bonds (the "Bonds"). We understand that the Bonds are being issued for the purpose of financing _____ (the "Project"), and that the Bonds will be limited obligations of the Issuer, payable solely from revenues received from [Borrower] (the "Borrower") and secured by _____ [with additional security being provided by _____.] We further understand that the Bonds will be [purchased at negotiated sale by _____] [sold at a public sale] during the month of _____. (D)

SCOPE OF ENGAGEMENT (E) (X)

In this engagement, we expect to perform the following duties:

Delete, modify, or supplement the following as may be consistent with the scope of your engagement.

- (1) Subject to the completion of proceedings to our satisfaction, render our legal opinion (the "Bond Opinion") regarding the validity and binding effect of the Bonds, the source of payment and security for the Bonds, and the excludability of interest on the Bonds from gross income for federal [and state of issue] income tax purposes.
- (2) Draft the basic agreements governing the issuance of the Bonds and the [loan of Bond proceeds] [lease of the Project] to the Borrower.
- (3) Prepare and review other documents necessary or appropriate to the authorization, issuance and delivery of the Bonds, coordinate the authorization and execution of documents, and review and, where appropriate, draft enabling legislation.

- (4) Prepare the Issuer's declaration of official intent to reimburse Project costs paid by the Borrower prior to the issuance of the Bonds.
- (5) Assist the Issuer in seeking from other governmental authorities such approvals, permissions and exemptions as we determine are necessary or appropriate in connection with the authorization, issuance, sale and delivery of the Bonds, except that we will not be responsible for any required Blue Sky filings. [We understand, however, that the Borrower will be responsible for obtaining all approvals and permits relating to the construction and operation of the Project.] (Y)
- (6) Assist the Issuer in obtaining a private activity bond volume cap allocation.
- (7) Review legal issues relating to the structure of the Bond issue.
- (8) Draft the necessary public notice and proceedings for the required public hearing with respect to the Project and the form of approval of the Project by _____ {applicable elected representative}.
- (9) Pursue validation proceedings.
- (10) Review those sections of the official statement, private placement memorandum or other form of offering or disclosure document to be disseminated in connection with the sale of the Bonds involving _____. (F) [We understand that _____ will act as counsel to the Issuer and will deliver at the closing a letter regarding the accuracy and completeness of information concerning the Issuer in the Official Statement and that will act as counsel to the Borrower and will deliver at the closing a letter regarding the accuracy and completeness of information concerning the Borrower and the Project in the Official Statement.]

If bond counsel will assume greater responsibility for disclosure matters, see (G).

- (11) Assist the Issuer in presenting information relating to the structure and legality of the Bonds to bond rating organizations and providers of credit enhancement.
- (12) Prepare and review the notice of sale pertaining to the competitive sale of the Bonds.

Our Bond Opinion will be addressed to the Issuer [and _____] and will be delivered by us on the date the Bonds are exchanged for their purchase price (the "Closing"). (H)

The Bond Opinion will be based on facts and law existing as of its date. In rendering our Bond Opinion, we will rely upon the certified proceedings and other certifications of public officials, officers of the Borrower and other persons furnished to us without undertaking to verify the same by independent investigation, and we will assume continuing compliance by the Issuer and the Borrower with applicable laws relating to the Bonds. During the course of this engagement, we will rely on the Borrower to provide us with complete and timely information on all developments

pertaining to any aspect of the Project, the Bonds and the security for the Bonds. (I) [In addition we may require the Borrower to engage an independent engineer, a feasibility consultant, or other experts to provide us with certain information about the Project.] [In rendering our Bond Opinion, we will expressly rely upon other counsel as to {describe matters upon which bond counsel will rely}.] (J)

Our duties in this engagement are limited to those expressly set forth above. Among other things, our duties do not include: (L)

Delete, modify, or supplement the following as may be consistent with the scope of your engagement.

- (a) Except as described in paragraph (10) above, assisting in the preparation or review of an official statement or any other disclosure document with respect to the Bonds, or performing an independent investigation to determine the accuracy, completeness or sufficiency of any such document or rendering advice that the official statement or other disclosure document does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they were made, not misleading.
- (b) Preparing requests for tax rulings from the Internal Revenue Service, or no action letters from the Securities and Exchange Commission.
- (c) Preparing blue sky or investment surveys with respect to the Bonds.
- (d) Except as described in paragraph (3) above, drafting state constitutional or legislative amendments.
- (e) Pursuing test cases or other litigation, [such as contested validation proceedings,] except as set forth above.
- (f) Making an investigation or expressing any view as to the creditworthiness of the Borrower, any credit enhancement provider, or the Bonds.
- (g) Assisting in the preparation of, or opining on, a continuing disclosure undertaking pertaining to the Bonds or, after Closing, providing advice concerning any actions necessary to assure compliance with any continuing disclosure undertaking.
- (h) Representing the Issuer in Internal Revenue Service examinations or inquiries, or Securities and Exchange Commission investigations.
- (i) After Closing, providing continuing advice to the Issuer, the Borrower or any other party concerning any actions necessary to assure that interest paid on the Bonds will continue to be excludable from gross income for federal income tax purposes (*e.g.*, our engagement does not include rebate calculations for the Bonds).
- (j) Addressing any other matter not specifically set forth above that is not required to render our Bond Opinion.

ATTORNEY-CLIENT RELATIONSHIP (M)

Needs substantial revision if the Issuer is not your client.

Upon execution of this engagement letter, the Issuer will be our client and an attorney-client relationship will exist between us. [We understand that _____ also has been engaged by the Issuer to {describe services other counsel to the Issuer is expected to provide.}] We assume that all other parties, including the Borrower, will retain such counsel, as they deem necessary and appropriate to represent their interests in this transaction. We further assume that all other parties understand that in this transaction we represent only the Issuer, we are not counsel to the Borrower or any other party, and we are not acting as an intermediary among the parties. Our services as bond counsel are limited to those contracted for herein; the Issuer's execution of this engagement letter will constitute an acknowledgment of those limitations. (L) Our representation of the Issuer will not affect, however, our responsibility to render an objective Bond Opinion. (N)

Our representation of the Issuer and the attorney-client relationship created by this engagement letter will be concluded upon issuance of the Bonds. Nevertheless, subsequent to Closing, we will mail Internal Revenue Service Form 8038, prepare and provide to the participants in the transaction a transcript of the proceedings pertaining to the Bonds. (O)

CONFLICTS (P)

Analysis of conflicts of interest issues requires a careful review of the facts and the application of the relevant ethical rules and laws to those facts. The paragraphs below provide only very general guidance and address only the most common circumstances where consent of the Issuer is or may be required. If the conflict involves another client, the other client's consent will also be required. Certain conflicts involving former clients may require the consent of the former client, but not of the Issuer. (Q) Additional paragraphs addressing certain conflict situations can be found in annotations Q and R Review of annotations P, Q and R and of the applicable ethical rules and laws in the jurisdiction governing the engagement is essential before using any of the optional paragraphs addressing conflicts of interest.

Optional Paragraphs Addressing Direct Adversity --Rule 1.7(a)

Applicable ethical rules prohibit us from undertaking the representation of parties with directly adverse interests unless we reasonably believe the representation of either client will not adversely affect our representation of the other client and unless we obtain the consent of both clients. Because {describe facts}, the Issuer's interests in this transaction [are] [may be] adverse to those of _____ the “_____”). Consequently, we want to provide you with sufficient information to allow you to evaluate the ramifications of the dual representation and the significance of granting your consent. {Describe here the subject matter of the adverse representation and the possible consequences, providing sufficient facts, legal implications and possible effects to permit the Issuer to appreciate the significance of its consent to the existing representation. Specific topics that should be discussed include your possible withdrawal from the engagement if a material conflict does arise and how you propose to deal with any confidential

information you receive from either client.}. Despite these possible limitations, we do not believe that our representation of the _____ will adversely affect our representation of, or our relationship with, you or *vice versa*, and seek your consent by the execution of this letter. We have already obtained the consent of the _____ to our representation of you in this engagement.

Please note that where required by Rule 1.7(a), consent must have been obtained from *all other affected parties prior* to sending this letter.

Optional Paragraph Addressing Material Limitation Rule, Including Certain Multiple Representations -- 1.7(b)

[It is possible that our representation of the Issuer as bond counsel could be materially limited by {describe simultaneous representation or material limitation}. {Describe here the subject matter of the existing limitation and provide sufficient facts, legal implications and possible effects to permit the Issuer to appreciate the significance of the simultaneous representation or limitation. Specific topics that might be discussed include your potential withdrawal if a material conflict arises and how you plan to deal with any confidential information you receive from a client. } We do not believe, however, that this [simultaneous representation] [limitation] will adversely affect our ability to represent you because {describe mitigating factors that permit representation}. With these factors in mind, we believe we can fulfill our professional responsibilities as described in this letter and seek your consent by your execution of this letter.]

For optional paragraph concerning former clients see annotation (Q). Optional Paragraph Addressing Prospective Consent (R)

[As you are aware, our firm represents many political subdivisions, companies and individuals. It is possible that during the time that we are representing the Issuer, one or more of our present or future clients will have transactions with the Issuer. It is also possible that we may be asked to represent, in an unrelated matter, one or more of the entities involved in the issuance of the Bonds. We do not believe such representation, if it occurs, will adversely affect our ability to represent you as provided in this letter either because such matters will be sufficiently different from the issuance of the Bonds so as to make such representations not adverse to our representation of you, or because the potential for such adversity is remote or minor and outweighed by the consideration that it is unlikely that advice given to the other client will be relevant to any aspect of the issuance of the Bonds. Execution of this letter will signify the Issuer's consent to our representation of others consistent with the circumstances described in this paragraph.]

FEES (Z)

Although the Issuer will be our sole client, the Borrower will be responsible for paying our legal fees. [We have sent a letter to the Borrower regarding our fees.] **OR** [Enclosed is a copy of our letter sent to the Borrower regarding fees.] (AA)

RECORDS

At your request, papers and property furnished by you will be returned promptly upon receipt of payment for outstanding fees and client charges. Our own files, including lawyer work product, pertaining to the transaction will be retained by us. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to dispose of any documents or other materials retained by us after the termination of the engagement.

If the foregoing terms are acceptable to you, please so indicate by return the enclosed copy of this engagement letter dated and signed by an authorized officer, retaining the original for your files. We look forward to working with you.

[Bond Counsel]

By: _____

Accepted and Approved

[Issuer]

By: _____

Its: _____

Title: _____

Date: _____

[Enclosure]

cc: [Governing Body] (B)

FEE LETTER
CONDUIT BONDS

[Letterhead of Bond Counsel]

[Borrower]

Attention: _____

Re: Proposed Issuance of \$ _____ [Issuer] _____
Revenue Bonds (_____ Project –Series _____)

The purpose of this letter is to advise you of our fee estimate and to describe the services we will perform as bond counsel to [Issuer] (the "Issuer") in connection with the issuance of the above-referenced bonds (the "Bonds"). We understand that the Bonds are being issued for the purpose of financing _____ (the "Project"), and that the Bonds will be limited obligations of the Issuer payable solely from revenues received from [Borrower] (the "Borrower") and secured by _____ [with additional security being provided by _____]. We further understand that the Bonds will be [purchased at negotiated sale by _____ sold at a public sale] during the month of _____. We understand that you, as the Borrower, will be responsible for paying our fees as bond counsel.

SCOPE OF ENGAGEMENT

In this transaction, we expect to perform the following duties:

Delete, modify, or supplement the following as may be consistent with the scope of your engagement This list of duties should be substantially identical to the list used in the engagement letter.

- (1) Subject to the completion of proceedings to our satisfaction, render our legal opinion (the "Bond Opinion") regarding the validity and binding effect of the Bonds, the source of payment and security for the Bonds, and the excludability of interest on the Bonds from gross income for federal [and state of issue] income tax purposes.
- (2) Draft the basic agreements governing the issuance of the Bonds and the [loan of bond proceeds] [lease of the Project] to the Borrower.
- (3) Prepare and review other documents necessary or appropriate to the authorization issuance and delivery of the Bonds, coordinate the authorization and execution of documents, and review and, where appropriate, draft enabling legislation.

- (4) Prepare the Issuer's declaration of official intent to reimburse Project costs paid by the Borrower prior to the issuance of the Bonds.
- (5) Assist the Issuer in seeking from other governmental authorities such approvals, permissions and exemptions as we determine are necessary or appropriate in connection with the authorization, issuance, sale and delivery of the Bonds, except that we will not be responsible for any required Blue Sky filings. [We understand, however, that Borrower's counsel will be responsible for obtaining all approvals and permits relating to the construction and operation of the Project.]
- (6) Assist the Issuer in obtaining a private activity bond volume cap allocation.
- (7) Review legal issues relating to the structure of the Bond issue.
- (8) Draft necessary public notice and proceedings for the required public hearing with respect to the Project and the form of approval of the Project by _____ {applicable elected representative}.
- (9) Pursue validation proceedings.
- (10) Review those sections of the official statement, private placement memorandum or other form of offering or disclosure document to be disseminated in connection with the sale of the Bonds involving _____. [We understand that _____ will act as counsel to the Issuer and will deliver at the closing a letter regarding the accuracy and completeness of information concerning the Issuer in the Official Statement and that _____ will act as counsel to the Borrower and will deliver at the closing a letter regarding the accuracy and completeness of information concerning the Borrower and the Project in the Official Statement.]

If bond counsel will assume greater responsibility for disclosure matters, see (G).

- (11) Assist the Issuer in presenting information relating to the structure and legality of the Bonds to bond rating organizations and providers of credit enhancement.
- (12) Prepare and review the notice of sale pertaining to the competitive sale of the Bonds.

Our Bond Opinion will be addressed to the Issuer [and _____] and will delivered by us on the date the Bonds are exchanged for their purchase price (the "Closing").

The Bond Opinion will be based on facts and law existing as of its date. In rendering our Bond Opinion, we will rely upon the certified proceedings and other certifications of public officials, officers of the Borrower and other persons furnished to us without undertaking to verify the same by independent investigation, and we will assume continuing compliance by the Issuer and the Borrower with applicable laws relating to the Bonds. During the course of this engagement, we rely on you to provide us with complete and timely information on all developments pertaining to any aspect of the Project, the Bonds and the security for the Bonds. Among other things, we will require the Borrower to execute a certificate of fact relating to the Project and the use of Bond proceeds. [In

addition, we may require that you engage an independent engineer, a feasibility consultant or other expert to provide us with certain information about the Project.] [In rendering our Bond Opinion, we will expressly rely upon other counsel as to {describe matters upon which bond counsel will rely}.]

Our duties in this engagement are limited to those expressly set forth above. Among other things, our duties do not include:

Delete, modify, or supplement the following as may be consistent with the scope of your engagement. This list of excluded duties should be substantially identical to the list contained in the engagement letter.

- (a) Except as described in paragraph (10) above, assisting in the preparation or review of an official statement or any other disclosure document with respect to the Bonds, or performing an independent investigation to determine the accuracy, completeness or sufficiency of any such document or rendering advice that the official statement or other disclosure document does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they were made, not misleading.
- (b) Preparing requests for tax rulings from the Internal Revenue Service. (c) Preparing blue sky or investment surveys with respect to the Bonds.
- (c) Except as described in paragraph (3) above, drafting state constitutional or legislative amendments.
- (d) Pursuing test cases or other litigation, [such as contested validation proceedings,] except as set forth above.
- (e) Making an investigation or expressing any view as to the creditworthiness of the Borrower, any credit enhancement provider, or the Bonds.
- (f) Assisting in the preparation of; or opining on, - a continuing disclosure undertaking pertaining to the Bonds or, after Closing, providing advice concerning any actions necessary to assure compliance with any continuing disclosure undertaking.
- (g) Representing the Issuer in Internal Revenue Service examinations or inquiries, or Securities and Exchange Commission investigations.
- (h) After Closing, providing continuing advice to the Issuer, the Borrower or any other party concerning any actions necessary to assure that interest paid on the Bonds will continue to be excludable from gross income for federal income tax purposes (*e.g.*, our engagement does not include rebate calculations for the Bonds).
- (i) Addressing any other matter not specifically set forth above that is not required to render our Bond Opinion.

ATTORNEY-CLIENT RELATIONSHIP

In this transaction, the Issuer will be our client and an attorney-client relationship will exist between the Issuer and us. We understand that you have retained _____ to act as your counsel. We assume that you and other parties to the transaction will retain such counsel, as you deem necessary and appropriate to represent your interests in this transaction. In performing our services as bond counsel, we will represent the interests of the Issuer exclusively. We will not be representing you or any other party and will not be acting as an intermediary among the parties. Our representation of the Issuer will not affect, however, our responsibility to render an objective Bond Opinion.

FEES (BB)

Although the Issuer will be our sole client, you will be responsible for paying our legal fees. Based upon: (i) our current understanding of the terms, structure, size and schedule of the financing represented by the Bonds; (ii) the duties we will undertake pursuant to our engagement letter with the Issuer and as described in this letter; (iii) the time we anticipate devoting to the financing in connection therewith; and (iv) the responsibilities we will assume, we estimate that our fee will be between \$_____ and \$_____. Our fee may vary: (a) if the principal amount of Bonds actually issued differs significantly from the amount stated above; (b) if material changes in the structure or schedule of the financing occur; or (c) if unusual or unforeseen circumstances arise which require a significant increase in our time or responsibility. If, at any time, we believe that circumstances require an adjustment of our original fee estimate, we will advise you [and prepare and provide to you an amendment to this letter]. In addition, we will expect you to reimburse us for all client charges made or incurred in connection with the Bond issue, such as travel costs, photocopying, deliveries, long distance telephone charges, telecopy charges, filing fees, computer-assisted research and other expenses. We estimate that such charges will be in the range of \$_____ to \$_____. Our fee is usually paid at the Closing, and we customarily do not submit any statement until the Closing unless there is a substantial delay in completing the financing. If this transaction is delayed beyond, we reserve the right to present to you for payment an interim statement.

If, for any reason, the financing represented by the Bonds is not consummated or is completed without the delivery of our opinion as bond counsel, or our services are otherwise terminated, we will expect you to compensate us at our normal hourly rates (currently ranging from \$_____ to \$_____, depending on personnel) for time actually spent on the Bond issue, plus client charges, as described above.

Substitute the following contingency provisions if applicable.

If the financing is not consummated, [we understand and agree that we will not be paid] [we understand that we will not be paid for our time expended, but will be paid for client charges made or incurred in connection with this transaction].

If the foregoing terms are acceptable to you, please so indicate by returning the enclosed copy of this engagement letter dated and signed by an authorized officer, retaining the original for your files. We look forward to working with you.

[Bond Counsel]

By: _____

Accepted and Approved [Borrower]

By: _____

Its: _____

Title: _____

Date: _____

[cc: [Issuer]]

[Accepted and Approved]

[Issuer]

By: _____

Its: _____

Title: _____

Date: _____

ANNOTATIONS

- A. This engagement letter is applicable only to governmental bonds.
- B. The engagement letter should be addressed to the person to whom the authority has been lawfully delegated to engage bond counsel receive communications and, if necessary, give consent. Bond counsel should consider, however, expressly reserving the right to communicate directly with the governing body. It may be appropriate (or, in certain jurisdictions, necessary) to have the engagement letter approved by legislative action of the Issuer. At the time of bond counsel's submission of the letter to the engaging party, consideration should be given to sending a memorandum to other known parties to the transaction stating that the Issuer is bond counsel's client and spelling out the scope and limitations of bond counsel's role. Otherwise doubt as to this matter might arise and courts might infer that bond counsel has a client relationship with any party who reasonably supposed itself to be a client. If such a memorandum is sent, procedures should be established to send it to new parties, as they become part of the transaction. Consideration also should be given to including in the memorandum a statement that bond counsel may contact other parties directly (*i.e.*, not through their counsel), unless otherwise advised in writing. *See* the discussion of Rules 1.2 and 1.13 in *Function*.
- C. Bond counsel's obligation to render 3D objective legal opinion in a public finance transaction is usually a responsibility owed to more than one party to the transaction. This fact does not mean, however, that each party who may be relying on bond counsel's opinion is a client. The Rules contemplate that a lawyer to a transaction represent at least one party who is entitled to: (i) rely on that lawyers advice and (ii) be assured that its lawyer is not providing services to an adverse party in the same transaction without the client's consent. By identifying the client, bond counsel can determine whether potential conflicts exist under Rules 1.7 and 1.9 and also can assess properly the situation in terms of the other Rules addressing duties of loyalty, confidentiality, privilege, and communication. *See Function --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -Significance of Client Relationship"* in which it is noted that bond counsel should not conclude that the identification of a client would preclude substantive law obligations to non-clients.
- D. The structure of the financing should be described in as much detail as is known at the time of engagement, specifying the parties to the transaction, the nature of the transaction (*e.g.*, competitive or negotiated public offering, private placement, etc.) and the security, including the use of any credit enhancement facilities. A description of the structure will minimize misunderstandings and serve as a foundation for renegotiating fees if the transaction changes. In the event that the structure materially changes or the transaction is significantly delayed, bond counsel should consider amending or supplementing the engagement letter.
- E. Rule 1.2 provides that a lawyer shall abide by the decisions of a client concerning the objectives of representation. The rule further provides that a lawyer may limit the objectives of the representation if the client consents after consultation. The purpose of this section of the Engagement Letter is to set forth the understanding between bond counsel and the Issuer as to

the objectives of the engagement. The duties bond counsel undertakes are likely to vary from engagement to engagement. The list of duties provided in the Engagement Letters is a representative sample of the duties that might be undertaken by bond counsel. In preparing an engagement letter, bond counsel should modify this list, as well as the list of duties expressly not undertaken by bond counsel to ensure that the actual scope of the engagement is accurately described. For example, in most jurisdictions validation proceedings are not available and should not be described as part of bond counsel's duties. Conversely, bond counsel is often expected to render opinions that the Bonds are exempt from registration under the Securities Act of 1933, as amended, and that any trust indenture or bond resolution is exempt from qualification under the Trust Indenture Act of 1939, as amended. If bond counsel expects to render such opinions or undertake other duties, they should be described in the engagement letter.

The principal function of bond counsel in any transaction is to render an approving opinion that may be relied upon by bondholders. Providing such a service is contemplated by Rule 2.3, which provides that a lawyer may undertake an evaluation of a matter affecting a client for use by others if the client consents after consultation. The duties listed in this paragraph include those that are typically necessary to allow bond counsel to render an approving opinion. If the services to be provided might require the disclosure of confidential information of the Issuer, bond counsel should make sure the Issuer understands this possibility and consents to the disclosure of the information. In certain circumstances, bond counsel and the Issuer may wish to define the scope of representation more narrowly than the traditional bond counsel function, such as acting as special tax counsel or acting as bond counsel but not giving a tax opinion. *See* discussion of Rules 1.2 and 2.3 *in Function*.

- F. Bond counsel should specify what portions of the disclosure document are being reviewed. General subject matters, *e.g.*, authority for the Bonds, legal opinion, tax-exemption, etc., should be referenced since, in most cases, a draft official statement will not have been prepared at the time bond counsel is retained.
- G. In the event that bond counsel will undertake broader responsibilities with respect to disclosure matters, inclusion of a paragraph similar to the following is suggested as a substitute for paragraph 6:

Assist the Issuer in preparing the official statement, private placement memorandum or other form of offering or disclosure document (the "Official Statement") and, subject to satisfactory completion of our review, provide to the Issuer written advice that, in the course of our participation, no information has come to our attention which leads us to believe that the Official Statement, as of its date (except for the financial statements, other statistical data, feasibility reports and statements of trends and forecasts[, and information concerning the Letter of Credit, Bond Insurer, and DTC] contained in the Official Statement and its appendices, as to which we will express no belief), contains any untrue statement of material fact or omits to state any material fact necessary to make the statements in the Official Statement, in light of the circumstances under which they were made, not misleading.

- H. Reference is made to the Model Bond Opinion Report published by NABL in June 1997, which states: "Practice varies as to the addressees of the opinion. It is frequently addressed to the Issuer or to the underwriters (or other original purchasers) or both or, occasionally, to an appropriate officer of the Issuer or to another party (such as the paying agent). Sometimes the opinion is not addressed to anyone. ...It is intended that the underwriters or other original purchasers from the Issuer may rely on the opinion and, if it is not addressed to them, they may be given a reliance letter." See *Function* --"THE BOND OPINION -*Limited Nature of Bond Opinion.*"
- I. Reliance upon the Issuer to provide such information to bond counsel does not abrogate any responsibilities bond counsel may have under federal and state securities laws or under general law. See *Disclosure Roles of Counsel in State and Local Government Securities Offerings*, (Second Edition), a joint publication of NABL and the American Bar Association and *Function* --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -*Legal Responsibilities Under General Law.*"
- J. Bond counsel may rely on the opinion of the Issuers counsel with regard to specific matters other than validity, including pending litigation, as well as on the opinions of counsel to credit enhancers and others, so long as such reliance is reasonable. Such anticipated reliance should be stated in the engagement letter.
- K. If other counsel, such as "co-bond counsel," is retained, the scope of work may need to be modified to reflect accurately the scope of responsibility. Dividing ultimate responsibility for particular aspects of work among various co-counsels requires thoughtful analysis by all co-counsel, and consultation with the client to ensure that the client knows which lawyer is responsible for which aspects of the transaction. See *Function* --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -I. *Client-Lawyer Relationship* -Model Rule 1.5 Fees." Bond counsel should rely upon the work product or opinion of other parties to the transaction only to the extent that such reliance is reasonable. For a discussion of co-counsel arrangements see *Standards of Practice* -- *Lawyer Proliferation in Public Finance Transactions* (1988).
- L. Defining the scope of engagement both by what bond counsel will do and by what it will not do adds clarity and reduces the chance of a later misunderstanding. Rule 1.2(c) permits bond counsel to limit the scope of representation but only after consultation with the client. As provided in the Rules, consultation includes communication of information sufficient to permit the client to appreciate the significance of the limitations of such representation. As part of such consultation, bond counsel should advise the Issuer of the importance of representation on matters for which responsibility is not assumed by bond counsel and the necessity for reliance upon the opinions of other counsel in the transaction (such as disclosure counsel, etc.). See *Function* --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL - I. *Client- Lawyer Relationship* -Model Rule 1.2 Scope of Representation."

- M. In responding to a request for a proposal, bond counsel should consider including a statement that the attorney-client relationship is created only upon selection as bond counsel and not before. To the extent that the request for proposal does not address all pertinent matters that would otherwise have been covered by an engagement letter, bond counsel may want to supplement the request for proposal with an appropriate engagement letter.

Recently, some Issuers have asked for an indemnification provision in their requests for proposal delivered to prospective bond counsel. The Engagement Letters do not include an indemnification provision for the benefit of the Issuer or any other party. The inclusion of such a provision could significantly alter the traditional attorney-client relationship to which a negligence standard applies. Arguably, such a provision would require bond counsel to become a guarantor pursuant to the contract established by the engagement letter. Moreover, 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.

- N. The Engagement Letters are drafted on the assumption that bond counsel represents only the Issuer, and is neither representing another party to the transaction nor acting as an intermediary among the parties. Bond counsel should make sure that each party understands the identity of bond counsel's client and the limited nature of the engagement. When no confidential information is contained in the engagement letter, this objective can be achieved by sending a copy of the letter to each party. Otherwise, bond counsel should consider sending a memorandum or letter to each party describing the engagement. *See also* Annotation B

Rule 2.2 applies to a lawyer acting as an intermediary between or among clients that may have conflicting interests. When a lawyer serves as an intermediary, that lawyer is seeking to broker an agreement among the parties, each of whom is the lawyer's client. Confidentiality and privilege usually will not exist among commonly represented clients, including clients using a single lawyer as an intermediary. Given the outmoded (but historical) view of bond counsel as "counsel to the transaction," parties may mistakenly view bond counsel as an intermediary under Rule 2.2. Bond counsel should make it clear to all parties to the transaction that the Issuer is bond counsel's sole client and that bond counsel is not acting as an intermediary. *See Function --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -II. Counselor -Model Rule 2.2 Intermediary."* Though bond counsel should not be considered an intermediary, general legal principles impose duties on bond counsel running to non-clients that can have severe consequences if breached. These principles arise primarily from common law concepts of agency, representation and reliance, and from statutory rules, both civil and criminal, relating to securities transactions. *See Function --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -Legal Responsibilities under General Law."*

- O. The engagement letter should clearly set forth when the attorney-client relationship between bond counsel and the Issuer will be concluded. In most transactions, the relationship terminates upon the delivery of the opinion. Many post-closing events may affect the Bonds, the tax-exempt status of interest on the Bonds, or liabilities of the parties to the transaction. Such

subsequent events might include a change in the project to be financed with Bond proceeds, a failure by one of the parties to comply with its contractual obligations (*e.g.*, rebate requirements, continuing disclosure requirements), or a change in federal or state law. If the Issuer wishes advice on post-closing matters, bond counsel should consider a separate engagement letter at that time.

- P. See Rules 1.7 and 1.9. See also *Function* --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -I. *Client-Lawyer Relationship* -Model Rule 1.7 Conflict of Interest: General Rule" and "Model Rule 1.9 Conflict of Interest: Former Client."

Before establishing a new attorney-client relationship, the Rules require bond counsel to evaluate whether he or she can adequately represent the interests of the client, without compromising duties to existing or former clients. In general, a conflict can arise under any of the following circumstances:

1. The representation of the client in the new engagement is directly adverse to an existing client (Rule I.7 (a));
2. The representation of the client in the new engagement may be materially limited by bond counsel's responsibilities to another client or a third person, or by bond counsel's own interests (Rule I.7 (b));
3. The new engagement involves the same or a substantially related matter in which bond counsel represented a former client, and the interests of the client in the new engagement are materially adverse to those of the former client (Rule I.9 (a)); or
4. The new engagement involves the same or a substantially related matter in which bond counsel's former firm had previously represented a client whose interests are materially adverse to the client in the new engagement and about whom bond counsel has acquired confidential information (Rule 1.9 (b)).

Examples of situations that require analysis under the Rules are:

- (a) The representation of more than one party in the same transaction (*e.g.*, acting as bond counsel to the Issuer and letter of credit bank counsel);
- (b) The representation of a party in a transaction while representing another party to that transaction in a separate, unrelated matter (*e.g.*, acting as bond counsel to the Issuer while your firm represents the underwriter in an unrelated bond issue);
- (c) The representation of a party in a transaction where a former client is also a party (*e.g.*, acting as bond counsel to the Issuer where your firm has previously acted as counsel to the underwriter in connection with the Issuer's bonds).

The resolution of any potential conflict situation depends upon the specific facts and circumstances of each case. The Rules do not offer any *per se* guidelines. When a conflict, or a potential conflict, is identified, careful analysis is required.

Conflicts under Rule 1.7 (a) and (b) are discussed in this annotation P. Conflicts with former clients under Rule 1.9 (a) and (b) are addressed in annotation Q.

Direct Adversity (Rule 1.7(a)): If a contemplated representation is or will be directly adverse to another client, the duty of loyalty owed to that other client necessarily would be affected. The general rule is that adverse representation of concurrent clients is *prima facie* improper and can be Cured, if at all, only by consent of both clients. Moreover, a bond lawyer may not attempt to Cure such a conflict by consent unless the bond lawyer reasonably believes that the representation of each client will not be adversely affected by the representation of the other client. In some jurisdictions, governmental entities may not consent to conflicts that are directly adverse (see below).

In determining whether the conflict can be cured by consent, bond counsel should consider, among others, the following factors: (i) the capacity of bond counsel to represent the existing client and the new client with undivided loyalty, (ii) the ability of bond counsel to protect adequately the confidentiality of each client, (iii) any limitation or alteration in the quality of the representation of one client because of the representation of the other client, (iv) the probability that the representation will lead to substantive harm to either client, (v) the sophistication of the clients, and (v) the likely analysis of the circumstances by a disinterested lawyer.

Material Limitation (Rule 1.7(b)): In some instances, a bond lawyer's ability to represent a new client may be materially limited by responsibilities to other clients or third parties, or by the lawyer's own interests. A "material limitation" is 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. A material limitation may also include the situation where bond counsel represents multiple parties to the same transaction and the clients' interests are generally aligned. By its terms, 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. As with a direct adversity conflict, a bond lawyer may not attempt to Cure a material limitation conflict by consent unless the bond lawyer reasonably believes that the representation of the new client will not be adversely affected by the material limitation. In some jurisdictions, the consent of a governmental entity may not be effective.

Consent from Governmental Entity: A special concern for public finance lawyers is obtaining consent to a conflict of interest from a governmental entity. Some jurisdictions do not permit such consent. Although highly criticized, the Iowa Supreme Court, Board of Ethics and Conduct in Formal Ethics Opinion 95-20 held that, even with consent, a single law firm may not be bond counsel in a negotiated offering if either (i) another lawyer in the firm is currently representing the underwriter in an unrelated matter or (ii) the underwriter is a regular client of the firm. The New Jersey Attorney General reached a similar conclusion in 1984 based on New Jersey Rule of Conduct 1.7(b)(2), which was amended from the Model Rule to provide expressly that a public entity cannot consent to a conflict of interest. *See*

Function --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -I. *Client-Lawyer Relationship* -Model Rule 1.7 Conflict of Interest: General Rule."

Effect of Rules: In general, a breach of the Rules may give rise to disciplinary action, but is not *per se* malpractice, or a breach of a contractual obligation to a client. In describing a possible conflict to, or seeking consent from, a potential client, care should be taken to ensure that bond counsel does not inadvertently create an additional contractual obligation.

- Q. Entering into an engagement as bond counsel to the Issuer raises the question of a possible conflict with bond counsel's former clients. See *Function* --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -I. *Client-Lawyer Relationship* -Model Rule 1.9 Conflict of Interest: Former Client." Rule 1.9 is designed to protect confidences of former clients and is premised on the theory that relevant confidences could have been acquired by the lawyer during the former representation. Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of that client. Rule 1.9 addresses situations involving two types of former clients: (i) former clients of the lawyer and (ii) former clients of the lawyer's former law firm.

Former Clients of the Lawyer (Rule 1.9(a)): After a lawyer's representation of a client ceases, the lawyer may not, without the consent of the former client, represent another client in the same or a substantially related matter in which the new client's interests are materially adverse to those of the former client. No consent from the Issuer (the new client) is required by Rule 1.9 (a), unless the disclosure of confidential information is necessary to obtain consent of the former client. Consider, however, that consent might be required under Rule 1.7(b): *e.g.*, feelings of loyalty for a former client might constitute a material limitation.

To determine whether Rule 1.9 (a) applies to any of bond counsel's former clients, bond counsel should consider: (i) whether the client is truly *former* client of bond counsel; (ii) whether the interests of the current and former client are "materially adverse;" and (iii) whether there is a "substantial relationship" between the two representations.

Although consent of the Issuer generally is not required under Rule 1.9(a), where obtaining the consent of the former client may require disclosure of confidences of the Issuer, the following optional paragraph may be used in the engagement letter.

Optional Paragraph Seeking Consent of Issuer to Disclosure of Confidential Information to Former Client --Rule 1.9(a)

We represented _____ (the "_____") in connection with the Issuer's bonds; a matter, which we have concluded, is substantially related to the Bonds. Because the Issuer's interests may be [materially adverse to] those of the _____ in this bond transaction, we need to obtain the consent of to our representation of the Issuer as bond counsel in this transaction. During our consultation with the _____, it may be necessary to disclose {describe any information necessary to

obtain informed consent from former client}, and we hereby seek your consent to such disclosure by the execution of this letter. If you have questions or concerns about our former or (possible) future representation of the _____, or if you would like us to consult with your general counsel on this matter, please let us know.

If bond counsel has represented a former client in a matter that is not substantially related and materially adverse to the engagement by the Issuer, bond counsel may want to include the following paragraph for informational purposes only.

Optional Paragraph Notifying Issuer of Former Client's Participation in Transaction

We want to advise you that _____ (the " _____ ") has been our client in past transactions that are not substantially related to the issuance of the Bonds. Even though your interests may be [adverse to] [different from] those of the _____ in this bond transaction, applicable ethical rules permit us to represent you as bond counsel. If you have questions or concerns about our former or (possible) future representation of the _____ or if you would like us to consult with your general counsel on this matter, please let us know.

Former Clients of the Lawyer's Former Law Firm (Rule 1.9(b)): After a bond lawyer has left a law firm, that bond lawyer may not knowingly represent a new client in the same or a substantially related matter in which the bond lawyer's former firm had previously represented a client (1) whose interests are materially adverse to the new client and (2) about whom the lawyer has acquired confidential information. This Rule may be waived, however, with the consent of the former firm's former client. The consent of the new client is not required, unless disclosure of confidences of the new client may be required to obtain the consent of the former client. This Rule is similar to Rule 1.9 (a), except that in this case the bond lawyer must have actually acquired confidential information from the former client. While the circumstances in which this Rule applies may seem obscure, the increasing mobility of lawyers among law firms may cause it to come into play more frequently.

R. Seeking Protective Consent to Conflicts of Interest.

In its Formal Opinion 93-372, the ABA addressed the ethical permissibility and effectiveness of a lawyer's obtaining advance consent for a conflict that may arise in the future. The Ethics and Professional Responsibility Committee of the ABA stated:

- [a] "that it is not ordinarily impermissible to seek such prospective waivers;
- [b] that the mere existence of a prospective waiver will not necessarily be dispositive of the question whether the waiver is effective;
- [c] that such waiver will ordinarily be effective only in circumstances in which the lawyer determines that there is no adverse effect on the first representation from undertaking the second representation and that the particular future conflict of interest as to which the waiver is invoked was reasonably contemplated [by the client] at the time the waiver was given; and

- [d] consent to a conflicting representation does not in itself constitute consent to the lawyer's disclosure, or use against the client's interest, of information relating to the representation under Rule 1.6."

The Opinion further states that, with respect to the disclosure or adverse use of information, "since the prospective waiver is sought at a time when the scope of the services that the lawyer will provide the client may not be fully defined, it cannot be assumed that the client and the lawyer have or could have an understanding of the confidential communications that are yet to occur between them" The Opinion also states that the better practice would be for any waiver to be in writing that expressly reflects the client's agreement and that, to ensure validity, the language of the consent should be "[positive, unequivocal, and inconsistent with any other interpretation." Formal Op. 93- 372 at 8 (citing *In re Boone*, 83 F. 944, 956 (N.D. Cal. 189)).

In conclusion, the Opinion warns: "even though one might think that the very purpose of a prospective waiver is to eliminate the need to return to the client to secure a 'present' second waiver when what was once an inchoate matter ripens into an immediate conflict, there is no doubt that in many cases that is what will be ethically required."

The optional paragraph included in the Engagement Letters requests prospective consent to a wide variety of potential conflicts arising out of new representations in matters unrelated to the issuance of the Bonds. A more narrow optional paragraph addressing the situation where the purchaser of the Bonds in a public sale may turn out to be a current or former client of bond counsel is set forth below. This paragraph takes the position that under the circumstances no conflict will exist.

Optional Paragraph Addressing Public Sales

Since the Bonds have not *yet* been marketed, the actual purchaser of the Bonds (the "Purchaser") cannot be identified at this time. We wish to point out that it is [highly likely] [possible] that the eventual Purchaser will be a broker-dealer or other financial institution that has been or is a client of this firm with respect to matters other than the proposed issuance of the Bonds. Under applicable ethical rules, we do not believe our representation of the Issuer will be either: (i) materially limited by the Purchaser being our client on other matters, or (ii) directly adverse to the Purchaser under these circumstances since (a) the terms of the Bonds, the Official Statement, the Bond resolution and our opinion will have been established prior to the acceptance of the low bid for the Bonds from the Purchaser, (b) the terms of said documents will not be modified in any material manner following the sale of the Bonds, and (c) all that remains to be completed subsequent to the Bond sale is the delivery of the Bonds to the Purchaser in accordance with the terms of the Official Statement and the Notice of Sale.

- S. Rule 1.5 requires that a lawyer, if not representing the client on a regular basis, tell the client the basis of the fee in order to permit the client to make an informed decision about the representation and its cost. See Rule 1.5 and *Function* --"PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL -I. *Client-Lawyer Relationship* -Model Rule 1.5 Fees." See also ABA Formal Opinion 93-379. Anyone of a wide variety of fee arrangements may

be negotiated between bond counsel and its client. The fee arrangements described here are not intended to be exclusive. Whatever fee arrangement is negotiated should be reflected accurately in the engagement letter.

- T. In order to avoid any misunderstanding, it is recommended that any amendments be in writing. Some state ethical rules or laws require that amendments be in writing.
- U. In many jurisdictions due authorization and execution of the engagement letter by the Issuer will be required. Even in jurisdictions where the engagement letter may be effective without the Issuer's signature, a signed engagement letter is still preferable, particularly where a consent to a conflict of interest is involved. Nevertheless, if obtaining the timely return of a signed engagement letter is likely to be difficult and execution by the Issuer is not required, bond counsel may want to consider sending the engagement letter without providing for the Issuer's countersignature. In such a case, bond counsel may want to include language to the effect that the Issuer will be deemed to have agreed to the terms of the engagement letter if it does not object within some reasonable period of time.
- V. This engagement letter is applicable only to conduit bonds where the Issuer is not the actual user of the proceeds or the ultimate obligor on the bonds (*e.g.*, private activity bonds with a third party borrower).
- W. This letter assumes that your client is the Issuer, but that the conduit borrower will be paying bond counsel's legal fees. The engagement letter should be addressed to your client. This letter may be adapted to a fact pattern where your client is the Borrower or another party to the transaction. *See also* Annotation B.
- X. As noted in annotation (E), bond counsel is often called upon to render opinions that the Bonds are exempt from registration under the Securities Act of 1933, as amended, and that any trust indenture or bond resolution is exempt from qualification under the Trust Indenture Act of 1939, as amended. In a conduit financing, particular care should be taken in describing bond counsel's undertaking with respect to federal and state securities laws. Under federal law, the loan to the conduit borrower and any third party guarantees (*e.g.*, letters of credit or bond insurance) are treated as separate securities from the Bonds themselves. Bond counsel should describe precisely whether its opinion will cover only the Bonds or whether it will cover other securities as well.
- Y. In some circumstances bond counsel may be asked to undertake responsibilities that normally would be handled by Borrower's counsel. For example, bond counsel might be asked to handle certain real estate matters if the Borrower's counsel is from out of state. Ordinarily such an additional undertaking should not give rise to a conflict of interest, but bond counsel should consider carefully whether the undertaking might create an attorney-client relationship with the Borrower, or constitute a material limitation on bond counsel's ability to represent the Issuer. *See* Rule 1.7(b). Even if bond counsel concludes that the undertaking will not affect the attorney-client relationship with the Issuer, the additional duties should be described in the

engagement letter. If the additional undertaking could be viewed as adversely affecting bond counsel's ability to represent the Issuer, bond counsel should seek the Issuer's consent to the undertaking. In a few instances the additional undertaking may be so inconsistent with bond counsel's representation of the Issuer that it would be impermissible under Rule 1.7 even with consent.

- Z. The Borrower in a conduit financing typically will be expected to pay the legal fees of the Issuer and various other parties (*e.g.*, the Trustee and the Letter of Credit Bank). Although this practice is customary, payment of fees by someone other than your client could be viewed as creating to some degree a divided loyalty. To be as careful as possible, bond counsel may want to seek the Issuer's formal consent to the fee arrangement by having the Issuer countersign the fee letter. The payment of the fees of issuer's counsel by a conduit borrower is discussed in Opinion of the Virginia State Bar Standing Committee on Legal Ethics No. 546 (March 1, 1984), which holds that the legal fees of counsel to an industrial development authority may be assessed to the borrower without creating multiple representation.
- AA. If the Issuer is bond counsel's client, but bond counsel's fees are to be paid by the Borrower, a separate fee letter should be sent to the Borrower. A suggested form of that letter is attached. The fee letter should describe the services bond counsel proposes to provide and the fee arrangement. The letter should also make clear that the Issuer, not the Borrower, is bond counsel's client.
- BB. The fee arrangements between the Borrower and Bond Counsel described here are not intended to suggest that other fee arrangements are necessarily inappropriate. Whatever fee arrangement is negotiated should be reflected accurately in the fee letter.

Select ABA Model Rules of Professional Conduct (1984)

Rule 1.2. Scope of Representation

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
- (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.
- (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.5. Fees

- (a) A lawyer's fee shall be reasonable. 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (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 writing 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. 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.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if
 - (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved; and
 - (3) the total fee is reasonable.

Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) 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.

Rule 1.7. Conflict of Interest: General Rule

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9. Conflict of Interest; Former Client

- (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 consents after consultation.
- (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 has acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client consents after consultation.

- (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 Rule 1.6 or Rule 3.3 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 Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Rule 1.10. Imputed Disqualification: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c) or 2.2.

Rule 2.3. Evaluation for Use by Third Persons

- (a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if
 - (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
 - (2) the client consents after consultation.
- (b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

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