The Selection and

Evaluation of Bond Counsel

1998
Edition

NATIONAL ASSOCIATION OF BOND LAWYERS

NOTICE

Neither the National Association of Bond Lawyers nor its Special Committee on The Selection and Evaluation of Bond Counsel takes 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. If you discover any errors or omissions, please direct your comments to the President of the Association or to the Chair of the Committee.

NATIONAL ASSOCIATION OF BOND LAWYERS
1761 S. Naperville Road, Suite 105
Wheaton, IL 60187
630/690-1135
Fax 630/690-1685

TABLE OF CONTENTS

I. Introduction

Each year bond counsel assist state and local governments ("Issuers") in raising billions of dollars for a wide range of public purposes. This 1998 edition of *The Selection and Evaluation of Bond Counsel* has been prepared by a special committee of the National Association of Bond Lawyers ("NABL") and its distribution has been authorized by NABL's Board of Directors to provide guidance to Issuers in the selection of bond counsel and evaluation of their services.

The highly specialized professional services rendered by bond counsel are essential to the implementation of Issuers' financing programs. Although there is no single correct approach, the selection and evaluation process should enable an Issuer to identify law firms likely to perform competently and efficiently and thereby protect and promote the Issuer's interests. While price is a factor for Issuers to consider, it should not be the overriding factor, since lack of other qualifications (experience, quality of personnel to handle the matter, etc.) could create unwanted delays and subject the Issuer to unnecessary risks, particularly in light of stepped-up enforcement activities of the SEC and the IRS directed against Issuers. Recent SEC enforcement efforts, while making it clear that a public official's responsibilities and duties do not end when counsel is retained, suggest that reasonable reliance on the advice of competent counsel may provide a defense to a public official in appropriate circumstances.

The traditional function of bond counsel is to render an opinion on the validity and tax-exempt status of all forms of obligations ("bonds") issued by state and local governments. The Issuer also may engage bond counsel to perform a number of other functions that go beyond what is required to render the bond opinion. There also may be other lawyers representing the Issuer, including the Issuer's general counsel, or representing other parties to the transaction. It is important that, at the outset of a financing, the Issuer and the various counsel involved understand the scope of responsibility of each.

The increasing complexity of municipal finance highlights the need for the Issuer and bond counsel to define clearly the scope of the services that bond counsel is to provide. The NABL publication *Model Engagement Letters* provides representative examples of bond counsel engagement letters for different types of bonds as well as useful guidance and insights with regard to the responsibilities of bond counsel.

Susan Weeks, Chair

David A. Caprera, M. Jane Dickey, Richard S. Fox, Edward S. Sinick, and Paul A. Webber, Members

NABL Special Committee on ***The Selection and Evaluation of Bond Counsel***

May 1, 1998

II. Role and Services of Bond Counsel

A. Need for an Approving Legal Opinion and Its Function

Normally, bonds are not marketable without an accompanying opinion of nationally recognized bond counsel that addresses the following subjects: (1) the validity of the bonds and, in some instances, the source of payment or security for the bonds; and (2) the excludability of interest on the bonds from gross income for federal income tax purposes.

The market expects that the bond opinion will reflect the objective judgment of bond counsel, regardless of who is bond counsel's client (typically the Issuer) or who is paying bond counsel's fee (often the beneficiary of the financing in a conduit bond issue); however, the bond opinion does not constitute a guarantee or imply a recommendation concerning the marketability, creditworthiness, or value of the bonds, the likelihood of repayment, the possibility of default, or the eligibility or suitability of the bonds for a particular investor.

B. Role of Bond Counsel

The primary role of bond counsel in a transaction is to provide an expert and objective legal opinion concerning the validity of the bonds and, typically, the excludability of interest on the bonds from gross income for federal income tax purposes. When bond counsel is retained in a transaction, an attorney-client relationship is established (typically with the Issuer). The Issuer and bond counsel should have a clear understanding of bond counsel's role in the transaction and the services to be performed by bond counsel. The services necessary or incidental to rendering the bond opinion generally include those described below, but bond counsel's role or services in a particular transaction may be expanded beyond these activities.

C. Scope of Services

The scope of the services to be provided by bond counsel will be the subject of an understanding, preferably in the form of an engagement letter or other written agreement, between the Issuer and bond counsel. Services that may be performed by bond counsel include the following:

1. rendering the bond counsel 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 income tax purposes;

2. preparation and review of documents necessary or appropriate to the authorization, issuance, sale, and delivery of the bonds, coordination of the authorization and execution of these documents, and review and, where appropriate, drafting of enabling legislation;

3. assisting the Issuer in seeking from other governmental authorities any approvals, permissions, and exemptions necessary or appropriate in connection with the authorization, issuance, sale, and delivery of the bonds;

4. reviewing legal issues relating to the structure of the bond issue;

5. preparing election proceedings or pursuing validation proceedings;

6. reviewing or preparing those sections of the offering document to be disseminated in connection with the sale of the bonds that relate to the bonds, financing documents, bond counsel opinion, and tax exemption;

7. assisting the Issuer in presenting information to bond rating organizations and credit enhancement providers relating to legal issues affecting the issuance of the bonds; and

8. reviewing or preparing the notice of sale or bond purchase contract for the bonds and reviewing or drafting the continuing disclosure undertaking of the Issuer.

Bond counsel services typically do not include matters that are not required to render the bond opinion, such as preparation of offering documents (except as described above), IRS ruling requests or blue sky or investment surveys. Further, unless bond counsel is specifically engaged to perform such services, bond counsel services do not typically extend to post-closing activities such as responding to IRS examinations and inquiries or SEC investigations, performing rebate calculations, or preparing continuing disclosure documents.

The increasing complexity of bond transactions often results in the Issuer either engaging bond counsel to perform additional services that range beyond those necessary to give the bond opinion or retaining other counsel, such as Issuer counsel, special tax counsel, or disclosure counsel, to provide these additional services. It is very important that the Issuer and bond counsel have a clear understanding at the beginning of the transaction about the nature of bond counsel's role, the services required to consummate the transaction, which of those services bond counsel will provide, and the fee for the services of bond counsel. An engagement letter or other written agreement with bond counsel provides a vehicle for the Issuer and bond counsel to delineate the scope, nature, and duration of the attorney-client relationship and the services to be undertaken by bond counsel as well as the fee arrangement. As the transaction evolves, it may be appropriate for the Issuer and bond counsel to amend the terms of the engagement to add additional services for bond counsel to perform or for the Issuer to retain other counsel to perform those services.

D. Indemnification

The role of bond counsel does *not* extend to serving as a guarantor of the bond transaction. Some Issuers have attempted to make comprehensive and open-ended indemnification provisions a condition of the retention of bond counsel. Such provisions may seek an agreement of bond counsel to indemnify the Issuer from damages and claims of damages arising from or in connection with bond counsel's performance of its duties without regard to a finding of professional misfeasance. In effect, this makes bond counsel a guarantor of results or an insurer. These indemnification requirements have their origin in state procurement codes for the provision of goods and services (*e.g.*, contracts for the purchase and installation of computer systems or construction contracts) in which the provider is able to obtain insurance to guarantee the performance of its undertaking. In contrast, bond counsel are retained to provide professional services, and there exists a significant body of law that governs the liability of attorneys for their conduct. Far-reaching indemnification requirements may create tension with the ethical obligations of a lawyer to exhibit loyalty, objectivity, and impartiality in the provision of services and advice to a client; such indemnification requirements may have the unintended effect of causing bond counsel to provide overly conservative advice to Issuers rather than their best professional judgment. Bond counsel should expect to be held to the appropriate legal standards for their work, including liability, if appropriately determined, for legal malpractice; they should not be asked to insure results or "guarantee" transactions. It should be noted that an indemnity clause creates potential contractual liability that ordinarily is not covered by bond counsel's professional liability insurance policy.

III. Duration and Extent of Engagement

Prior to the selection process, an Issuer needs to make several basic decisions concerning the engagement of bond counsel, including the duration of the bond counsel engagement, the types of bond issues for which a firm will serve as bond counsel, and whether one or more firms may provide all or part of the bond counsel services or additional services over a particular period of time.

Bond counsel firms may be engaged (1) for all transactions by the Issuer over a period of time, (2) for a series of related transactions, (3) for all transactions of a particular type by the Issuer over a period of time, or (4) for a single transaction. The appropriate length or scope of engagement may vary depending upon factors such as the Issuer's overall financial program or the nature of a particular financing.

Engagement of bond counsel over an extended period of time enables such counsel:

1. to participate knowledgeably in the early planning and legal structuring of the Issuer's financings;

2. to work efficiently and cost-effectively in successive transactions, without duplication of services;

3. to become familiar and maintain familiarity with the unique characteristics of the Issuer, the statutes or charter provisions governing its operations, and the covenants contained in its outstanding bond issues;

4. to be available between financings to answer questions about the application of arbitrage and other federal tax legislation or regulations, the Issuer's obligations contained in covenants securing outstanding bonds or under state or local law, and the application of continuing disclosure and other securities law regulations; and

5. to provide continuity when there are changes in Issuer personnel.

Retaining bond counsel for a series of transactions is appropriate when multiple series of bonds are issued to finance a project that is constructed in phases. Many of the same considerations listed above are equally applicable to such an engagement.

Alternatively, an active Issuer may choose to distribute its work among several bond counsel firms over a period of time based upon the type of bonds to be issued or upon other criteria. When different bond counsel firms have different strengths, an Issuer may choose, for example, to have one firm serve as bond counsel on all tax and revenue anticipation financings and another firm serve as bond counsel for all special assessment bond issues. This approach may offer an Issuer access to more resources than might be available from one firm and may provide flexibility by allowing firms to serve as back-up alternatives to each other.

An Issuer that issues bonds infrequently might select bond counsel for a single transaction. It also may be appropriate for an active Issuer to select bond counsel for a particular transaction:

1. when an unusual or novel financing is undertaken and the bond counsel firm selected has demonstrated special expertise in such financings;

2. when the Issuer is acting as a conduit for financing by others and the Issuer chooses to accept as bond counsel the firm selected by the private beneficiary (see Section VII for a discussion of approaches a conduit Issuer might consider in the selection of bond counsel); or

3. when the Issuer expects to deliver many bond issues in a relatively short time and considers that the work should be shared by several firms of bond counsel to avoid excessive reliance on any one of them.

Prior to the selection process the Issuer also needs to decide whether one or more firms will provide all or part of the bond counsel services in a particular transaction. See Section VI for a discussion of the factors the Issuer may consider in determining whether to divide bond counsel's responsibilities for a particular transaction between two or more firms and the establishment, structuring and practical aspects of a co-bond counsel relationship.

IV. Selection Process

Selecting a lawyer or firm as highly specialized as bond counsel can be an exacting task for an Issuer. In addition to following an Issuer's adopted hiring procedures, state and local laws need to be examined to determine what requirements of any general procurement laws may be applicable. Existing financial covenants or contractual obligations may also place constraints on the hiring process.

Described below are a variety of selection processes. The best selection process would be to combine the elements of each, as they may be appropriate for the Issuer.

A. Past Experience with Issuer

The knowledge gained through working with a bond counsel firm allows an Issuer to judge, independently, a firm's abilities and quality of work. Representatives of the Issuer will have had an opportunity to judge such subjective factors as thoroughness, creativity, integrity, motivation, service, timeliness, ability to work with others, response to pressure and other intangibles, as well as being able to assess the knowledge, expertise, and technical competence of the bond counsel firm.

B. Recommendations and References

An Issuer that has not had direct experience with particular bond counsel may consider recommendations by other lawyers or experts working in the financial community of the Issuer, such as financial advisors, underwriters, attorneys, or the chief financial officers of other local governments, who are trusted and respected by the Issuer. References by and discussions with individuals who have been involved with bond counsel in similar financings may serve as a reasonable substitute for direct experience. In reviewing such references, consideration should be given to the comparability of services previously provided with those being sought by the Issuer.

C. Interviews

The Issuer's general counsel, chief financial officer, or a selection committee may interview prospective bond counsel. Such interviews may be helpful in discerning the expertise of the prospective bond counsel firms and whether bond counsel and the involved Issuer personnel will be able to develop a compatible working relationship. An appropriate selection committee might include Issuer personnel from affected departments (such as legal, finance, management, and public works) and the Issuer's general counsel.

D. Requests for Proposals; Requests for Qualifications

Another technique for selecting bond counsel is the use of a request for proposals ("RFP"). The RFP can be published and distributed generally, or it can be targeted to firms with credentials known to the Issuer. The RFP process should be combined with consideration of the Issuer's past experience, recommendations from reliable experts and knowledgeable public officials, and individual interviews in order to avoid undue reliance upon a simplistic comparison of fee quotations.

One alternative to RFPs is to use a Request for Qualifications ("RFQ"). This enables the Issuer to receive from bond counsel firms statements of their qualifications and defers fee considerations until after a careful and studied evaluation of qualifications. After a group of well-qualified bond counsel firms has been chosen from the original responses, the Issuer may solicit more specific proposals from those firms addressing fees, financing structure, staffing, and other terms for the particular engagement.

V. Selection and Evaluation Criteria

The matters discussed in the following sections may serve as the basis for the RFP or RFQ or questions to be asked of prospective bond counsel.

A. Expertise

One of the primary criteria in evaluating prospective bond counsel is the level of expertise of the firm and of the individual lawyers under consideration for a particular engagement.

Expertise is the successful combination of the knowledge, experience, skills, and motivation needed to perform effectively the services required by the Issuer. Bond counsel must be familiar with (or involve other lawyers who are familiar with) those areas for which bond counsel will accept responsibility in the engagement. These may include complex federal tax law and regulations, issues of securities law, and the principles of law affecting state and local governmental affairs. Depth of knowledge and experience can be revealed not only by sheer numbers of transactions completed by the firm, but also by the variety and complexity of transactions in which the firm has participated.

Evaluation of expertise should include a review of the types of municipal financings or related transactions in which a firm has been involved, the experience and skills of the individual lawyers, and the firm's areas of practice. A description of such expertise could be elicited by asking the following:

> Briefly describe the firm's practice in public finance and related areas of law and give a brief history of the firm. Provide a firm résumé, if available.

Confidence of the professional community in a particular lawyer or firm is often an indication of expertise. The confidence and stature that a firm commands may be determined by asking members of the legal or public finance community about the reputation of a firm and the experience they have had with the firm in the past. An Issuer could ask:

> Name not more than five issuers' counsel, financial advisors, investment bankers, or representatives of financial institutions with which the firm has worked on public finance or related transactions. Provide the names and telephone numbers of individuals who may be contacted as references.

The Issuer may also ask other members of the public finance community about their experiences with bond counsel firms.

B. Experience

Experience, to some extent, can be quantified. The number of transactions in which specific lawyers have participated is relevant, especially transactions similar in structure to the

transaction then being contemplated by the Issuer. A demonstrated record of accomplishment in related practice areas may also be significant.

In the course of the selection process, an Issuer should determine the experience level of prospective bond counsel (as bond counsel or as other counsel) in the particular type of financing to be undertaken. An Issuer could ask:

> Identify and briefly describe comparable financings in which the firm has served as bond counsel or other counsel during the past two years. If you have noted unique, complex, or challenging issues in connection with the proposed financing, indicate how the experience and expertise of your firm will be utilized to complete the necessary legal work.

Also relevant are the various types of issuers (including the prospective Issuer) represented by the firm as bond counsel or in other capacities. A municipality, for instance, might look for a firm that has represented similar municipalities. If a firm has already represented the same Issuer in the past, it will be familiar with the Issuer's charter or other organizational documents and financing needs, as well as the procedures and the individuals involved.

An Issuer could ask:

> Name not more than five issuers represented by the firm that are similar to the Issuer, describe the nature of the representation, and for each issuer list the address and telephone number of an official who may be contacted as a reference.

C. Service Delivery Capabilities

A bond counsel firm should have the capability and the availability of personnel and technology to provide service in a timely and efficient manner. The firm should assign sufficient personnel so that it can complete its tasks within the designated time frame. The individual lawyers participating in a transaction, as well as the firm as a whole, should have sufficient expertise and capacity to recognize the relevant legal issues, prepare the documents, handle the negotiations, and complete the steps necessary for an orderly closing.

An Issuer could evaluate the proposed staffing on a transaction and the abilities of the lawyers involved by asking the following:

> Give brief résumés of the lawyers in the firm's public finance department who would be assigned to work with the Issuer during this engagement. Describe the anticipated division of duties among partners, associates, and paralegals. If any additional lawyers with your firm may be available for consultation, even though they are not assigned to work with the Issuer, identify them and their specialized expertise.

The Issuer might also ask prospective bond counsel firms about their ability to undertake any additional services requested by the Issuer or to provide legal advice in connection with functions that may be performed by other parties.

D. Conflicts of Interest

Bond counsel is typically retained by the Issuer to render the bond counsel opinion and must, prior to accepting any engagement as bond counsel, make a determination under the rules regulating lawyers' conduct whether any current or past client relationship or other interests will or may give rise to a conflict of interest that either disqualifies bond counsel or requires the informed consent of the Issuer or other clients.

It is possible that over a period of time bond counsel may assume a variety of counsel roles in an Issuer's bond financings or in other financings involving participants in the transaction, for example: bond counsel, special tax counsel, underwriter counsel, Issuer counsel, Issuer disclosure counsel, trustee counsel, or conduit beneficiary counsel (see Section VII). With respect to a particular bond issue, bond counsel may represent more than one party to the transaction when permitted under applicable ethical rules. The NABL publications *Function and Professional Responsibilities of Bond Counsel* and *Model Engagement Letters* discuss the application of these ethical rules to bond counsel.

During the selection process, the Issuer should state its position, if any, on conflicts and could ask bond counsel the following:

> Describe any existing or potential conflict of interest arising from your relationships with or representation of other parties that should be considered as a factor in determining your objectivity, and provide to the Issuer sufficient facts, legal implications, and possible effects in order for the Issuer to appreciate the significance of each potential conflict and grant an appropriate waiver, if necessary.

The Issuer may also want to designate the official(s) responsible for receiving information concerning the conflict and the waiver of any conflict (if permitted by the laws of the Issuer's jurisdiction), and may also adopt procedures designed to prevent conflicts of interest in the future.

E. Fees

As a criterion for selection of bond counsel, fees should be considered only after the Issuer has selected a group of applicants who are fully qualified. The Issuer should consider specifying the basis of bond counsel compensation since prospective bond counsel firms may respond with a variety of fee arrangements, making it difficult for the Issuer to compare and evaluate the fee proposals. Several bases could be used for establishing fees: the size and type of the issue, hourly rates, "blended" hourly rates of the several lawyers to be involved, a set maximum fee, or a combination of any of these. Requiring that fee proposals be made on the same basis will allow the Issuer to make a valid comparison, so long as it is based upon the same services for the same period of time.

Usually only the type and estimated amount of bonds are known at the time of engagement of bond counsel. At such an early stage, it may be difficult to predict the schedule, structure, time limitations, or the novelty or difficulty of the questions involved or the complexity of the transaction; therefore, the Issuer should adopt procedures for periodic reporting, consultation, and modification of fee arrangements. If there is some uncertainty about the appropriate type or amount of bonds to be issued, the scope of the transaction, or the Issuer's program, consultation with bond counsel could be most helpful prior to the time when the Issuer will be required to finalize the scope and terms of the financing. In such situations the Issuer may prefer to request one type of fee arrangement to apply during the consultation phase and another kind of fee arrangement to apply when the scope and terms of the financing have been determined.

Additional services (for example, those rendered subsequent to the closing of transactions, such as assistance with arbitrage rebate or continuing disclosure compliance or responding to IRS examinations or inquiries or SEC investigations) require additional compensation that, if requested, should also be specified in the engagement letter or other written agreement with bond counsel.

F. Requesting Statements of Acceptable Legal Positions

The ultimate goal of the selection or evaluation process is to retain the most qualified bond counsel. Because certain bond transactions require unique knowledge within the speciality of bond law, it may be desirable for an Issuer to ask prospective bond counsel to discuss a proposed financing in some detail for the purpose of determining whether a bond counsel firm, in fact, possesses the requisite degree of expertise.

In recent years, some Issuers have provided a detailed description of the proposed financing and have required prospective bond counsel to respond in writing with an analysis of the applicable state law, securities law, and federal income tax restrictions. In many cases, the description of the financing is accompanied by a list of questions - in effect asking prospective bond counsel to give a legal opinion as to whether certain features of the financing plan comply with applicable state law and federal tax law, or in some cases seeking disclosure of information or techniques that may be proprietary to other clients.

While it may be reasonable for an Issuer to ask prospective bond counsel to state their position on certain legal issues, it is not reasonable to require that the financing be researched,

analyzed, and "approved" prior to the establishment of the attorney-client relationship. Aside from the obvious hardship imposed, these requests create the impression of "opinion shopping" by the Issuer. Ultimately, of course, bond counsel's opinion will be dependent upon the facts and circumstances in effect at the actual date of delivery of the bonds.

G. Other Criteria

In some cases criteria in addition to those discussed above may facilitate the selection process. Whatever the criteria the Issuer intends to use, it should so advise prospective bond counsel prior to beginning the selection process.

VI. Co-Counsel Relationships

A. Determination of Single or Multiple Counsel in a Particular Transaction

For a variety of reasons, an Issuer may decide to divide bond counsel's responsibilities for a particular transaction between two or more firms. An Issuer may choose to retain co-bond counsel (hereafter referred to as “co-counsel”) in a particular transaction to gain the additional experience or capabilities that a second firm may provide. For example, an Issuer might request two firms to serve as co-counsel where one has a particularly thorough knowledge of state law and the other has significant experience in the chosen financing structure or specialized expertise in a particular area of law. If special expertise is required, then in addition to bond counsel an Issuer might retain, for example, special tax counsel to render an opinion on selected tax aspects of the bond issue. In this arrangement, each firm may take sole responsibility for a portion of the work and render an opinion covering the subject matter for which it is responsible, and one or both firms may rely on the other's opinion.

Some Issuers also have chosen to utilize co-counsel where two firms combine their efforts as bond counsel, sharing the work and responsibilities. In such event, both firms generally give identical opinions. For instance, certain Issuers have structured co-counsel relationships between established bond counsel firms and minority or women-owned or local or regional law firms as a means of furthering the opportunities in public finance law for such firms. The stated goals often are to encourage development of expertise in minority, women-owned, or local or regional firms by lowering barriers to entry to the field. Whatever the Issuer's goals may be in selecting co-counsel, those goals must be communicated clearly to each firm in order to ensure that the Issuer's objectives are attained and that co-counsel are able to effectively serve the Issuer.

A decision to use more than one bond counsel firm in a specific transaction or to use different bond counsel firms in different types of bond issues should balance the benefits derived from the distribution of work with the possible duplication of services of bond counsel and potential overall higher fees. A decision to use one or more bond counsel firms needs to be made prior to the selection process. It should be implemented in a manner that will allow an Issuer to retain qualified bond counsel as well as meet its goals in using more than one firm.

Whether an Issuer utilizes one or more bond counsel firms, an engagement letter or other written agreement with each firm will enable the Issuer to delineate clearly the scope, nature, and

duration of bond counsel services to be performed as well as the division of responsibilities in the event that more than one firm is retained.

B. Establishment of Co-Counsel Relationships and Qualifications

Issuers may choose to establish a co-counsel relationship by soliciting joint-venture proposals or by independently selecting two firms and directing that they work together as co-counsel. The qualifications for the co-counsel firms, either individually or together as a team, should be based upon the selection criteria discussed above in Section V, adapted as necessary to meet the Issuer's particular goals and objectives in retaining co-counsel.

C. Division of Work and Fees

The co-counsel firms, together with the Issuer, should agree in writing to the expected division of the legal services required and the allocation (and method of determination) of fees. Depending on the Issuer's objectives and the relative skills of the firms, each co-counsel firm might take primary responsibility for certain portions of the transaction, such as drafting financing documents, drafting Issuer approval proceedings, attending meetings of the Issuer's governing body, drafting portions of the offering document relating to the bonds, tax analysis and documentation of the transaction, preparation of closing documents, and review and comment on underwriting documents.

In many cases, each firm is expected to render the identical approving legal opinion. Alternatively, if consistent with the Issuer's objectives, one or both firms may render an opinion that is limited to certain legal issues. For example, one firm might render the federal tax opinion while the other firm might address matters of applicable state law. To the extent that one firm is relying on the opinion of the other firm as to certain legal matters, that reliance must be expressly stated. The Issuer and each firm should clearly agree at the beginning of the transaction as to allocation of responsibilities, including opinion matters, and as to the appropriate division of fees for the work performed and for the opinions rendered, with due regard to applicable ethical requirements.

D. Practical Aspects of Co-Counsel Relationship

Each co-counsel firm should manage the practical aspects of the co-counsel relationship in a manner that is intended to meet the Issuer's needs. The Issuer may designate one of the co-counsel firms as primarily responsible for coordination of the bond counsel activities. The co-counsel relationship is most likely to be successful if there is prompt and accurate exchange of information between co-counsel, which should include: the scheduling and holding of all meetings regarding the transaction, distribution of all documents to co-counsel, reports on meetings attended by only one firm, discussion of applicable legal issues, and updating information between co-counsel.

E. Professional Responsibilities

The establishment of a co-counsel arrangement in no way diminishes the professional responsibilities of either co-counsel. The Issuer must recognize that in a co-counsel relationship the aggregate time spent by both firms likely will be greater than the time that would have been spent by a single firm acting as sole bond counsel. The nature of the co-counsel relationship entails a certain amount of overlap of effort and time by both firms. Each co-counsel must do sufficient work, independently, to support its opinion and generally both firms will attend meetings and review some or all of the documentation. Each co-counsel firm must perform its work with the highest level of skill and diligence in fulfilling the professional responsibilities owed to the Issuer, as the client, as well as to investors and to the other co-counsel.

F. Monitoring and Evaluation of the Co-Counsel Relationship

The Issuer should monitor and evaluate the co-counsel relationship to determine whether its goals are being achieved. In particular, the Issuer periodically should review the efficacy of its selection, monitoring and evaluation procedures, the direct and intangible costs to the Issuer of the co-counsel relationship, and whether the selection of co-counsel has resulted in the effective delivery of the highest quality services while furthering the Issuer's goals and objectives. Absent the periodic review and evaluation of the co-counsel relationship by the Issuer, it may prove difficult for co-counsel to ascertain whether the Issuer's goals have been achieved or whether the co-counsel relationship should be modified to better serve the Issuer.

VII. Conduit Financings

"Conduit bonds" are obligations issued by an Issuer for the benefit of a private beneficiary, such as a for-profit corporation or a non-profit organization. Typically, Issuers are not obligated to repay conduit bonds from their own resources; instead debt service is paid solely by the private beneficiary.

In a conduit financing, bond counsel fees generally are paid by the private beneficiary. For that and other reasons (*e. g.*, when the private beneficiary is undertaking a number of conduit financings throughout the country) the private beneficiary may want to select bond counsel. Issuers, on the other hand, often want to use their existing bond counsel, who will provide continuity and who will be responsible to the Issuer and serve the Issuer's interests.

The following are alternative approaches a conduit bond Issuer might consider:

1. Engage Issuer-designated bond counsel on all conduit issues. In special circumstances, allow the beneficiary to engage a bond counsel firm to produce the basic documentation to be reviewed by the Issuer's bond counsel.

2. Permit the private beneficiary to select any bond counsel that, after review of its qualifications, is found to be acceptable to the Issuer.

3. Provide an approved list of bond counsel and allow private beneficiaries to select from that list.

While an Issuer of conduit bonds is not obligated to repay those bonds from its own resources, it could be subject to costs of defense and may suffer damage to its reputation in the event of an IRS examination or inquiry or SEC investigation or enforcement action, or a private action under the securities laws relating to the conduit bonds, and a conduit Issuer, its officers, or employees may have potential liability in the event of an adverse ruling or judgment in such a proceeding. Even if the Issuer does not participate in any way or review the selection of bond counsel for conduit issues, it is important that it have its general counsel or special Issuer counsel participate in the transaction to ensure that the limited role of the Issuer is recognized, that the Issuer is appropriately protected, and that the Issuer is participating only in transactions in which applicable standards of competence and disclosure are met.

VIII. Evaluation of Engagement

It is appropriate for the Issuer to evaluate the quality of services rendered by bond counsel. Taking the time to make a meaningful evaluation will improve the quality of service because the Issuer can identify specific areas in which it seeks improvements and assist bond counsel in determining which areas of service the Issuer values most.

Evaluations should be made soon after a bond closing by the Issuer's representatives who worked closely with bond counsel during the course of the year or during the transaction and should measure bond counsel's performance in light of the services agreed upon. In order for an evaluation to be effective, it is necessary that the results be communicated to bond counsel.