

New York State Bar Association

Committee on Professional Ethics

Opinion 802 – 11/28/06

Topic: Municipal bond counsel;
multiple representation.

Digest: A lawyer may serve as both “bond counsel” and counsel to the borrower in an issuance of tax-exempt bonds as long as (1) bond counsel’s role is limited to opining on the transaction and not negotiating the terms of the bond and (2) borrower consents to the limitation of the lawyer’s role or, if there are multiple clients involved, they all consent to the multiple representation.

Code: DR 5-105(A); DR 5-105(C)

QUESTION

1. May a law firm serve as both bond counsel and borrower’s counsel in connection with the issuance of tax-exempt bonds by a conduit bond issuer such as an industrial development agency or municipal housing authority?

OPINION

2. A tax-exempt organization described in Section 501(c) of the Internal Revenue Code (the “borrower”) intends to submit an application to a local industrial development agency (the “IDA”) requesting assistance in connection with a proposed tax-exempt improvement project whereby the IDA will issue tax-exempt bonds for the benefit of the borrower.¹ Prospective underwriters of the bond issue will require the written opinion of “bond counsel” relating to the tax-exempt status of the bonds and their exemption from registration under federal securities laws. The borrower has been a client of the inquiring law firm for a

¹ In a typical IDA bond financing the borrower will enter into an installment sales agreement with the IDA pursuant to which the borrower is required to make installment payments sufficient to provide payment of the principal of, and interest on, the bonds issued by the IDA.

period of time and has asked the law firm to act both as borrower's counsel and as bond counsel in connection with the proposed bond issue.

3. At the outset, we recognize that there is a tension between the roles of bond counsel and borrower's counsel. Bond counsel is expected to provide, for the benefit of prospective bond purchasers, an objective judgment on questions such as the tax-exempt status of the bonds, while borrower's counsel may be expected by some clients to act as a partisan advocate, by, for example, seeking aggressive tax positions.

4. Canon 5 of the New York Code of Professional Responsibility (the "Code") governs a lawyer's duty of loyalty to a client. DR 5-105(A) of the Code provides that a lawyer has a conflict of interest if (i) the lawyer's judgment on behalf of a client is likely to be adversely affected thereby or (ii) the employment would involve the lawyer in representing "differing interests." DR 5-105(C) of the Code provides, however, that a lawyer may represent multiple clients in the face of such a conflict if (i) "a disinterested lawyer would believe that the lawyer can competently represent the interest of each" and (ii) each client consents to the representation after full disclosure of the implications, advantages and risks of so doing.

5. To analyze this inquiry under DR 5-105, we begin with the question of who the client is when a lawyer is retained as "bond counsel." We see two possibilities. First, the client could be the borrower, who is retaining bond counsel to deliver an opinion on which ultimate investors might rely. In that case, there would be one client in both engagements and no conflict under DR 5-105. The client would need to understand, however, that the duty of the law firm as concurrent bond counsel is solely to opine on the bonds from a neutral perspective² and this would limit the lawyer's ability to act as an "advocate." In addition, the law firm may have a duty to disclose that the firm represents the borrower in any opinion it may render, although such a duty stems primarily from contract or tort law rather than from an attorney-client relationship.

6. Alternatively, the borrower could be hiring the law firm to represent another entity, such as the IDA.³ We understand that such multiple representation is not unusual in this area. A publication of the National Association of Bond Lawyers notes, "In various circumstances and in various jurisdictions, it may not be unusual for a lawyer who serves as bond counsel to serve as issuer's counsel, conduit borrower's counsel, underwriter's counsel, or

² See American Bar Association Model Rule 2.3 (addressing when a lawyer may provide an evaluation of a matter affecting a client for the benefit of someone other than the client).

³ See, e.g., N.Y. State 580 (1987) ("The client [of bond counsel] may properly be viewed as the IDA").

trustee's counsel in the same or other transaction involving some or all of the same parties.”⁴

7. In this case, there are two clients with differing interests. The potential interest of the borrower in aggressive tax approaches is a differing interest from the IDA's presumed interest in conservative tax approaches. The question remains whether such a conflict is waivable under DR 5-105(C). As noted above, DR 5-105(C) requires that the proffered engagement pass a “disinterested lawyer” test and that consent be obtained from the affected clients.

8. We conclude that in most circumstances the conflict is consentable, provided that bond counsel's role is limited to opining on the transaction and not negotiating the terms of the bond. As we noted in N.Y. State 753 (2002), a lawyer may not be put in the position “of negotiating with him or herself.” Particularly because of the apparent widespread acceptance of multiple representation in the relevant practice area, however, we conclude that bond counsel's professional judgment in delivering an opinion on the tax-exempt status and validity of the bonds will not necessarily be affected by the fact that he or she is also representing the borrower. Indeed, the borrower will be looking to counsel for counsel's view of the status of the bonds, and there is no reason to believe counsel would render a different opinion to the borrower if counsel were not engaged as bond counsel. Of course, consent of both clients must also be obtained after providing the disclosure required by DR 5-105(C).

9. In addition to the duties arising from the attorney-client relationship, bond counsel may also have obligations to the ultimate purchasers of the bonds who rely on the opinion that bond counsel renders. But those duties primarily derive not from the Code but from contract, tort or other law. We agree with the conclusion of a New Jersey ethics opinion that “[b]ond counsel has a duty to those who may ultimately purchase the bonds in reliance upon the opinion of bond counsel, but this duty does not spring from an attorney/client relationship, it is based upon the law of torts and the concept of third party beneficiary.” New Jersey 658 (1992).

CONCLUSION

10. In accordance with the limitations cited herein, the question is answered in the affirmative.

(1-06)

⁴ National Association of Bond Lawyers Committee on Professional Responsibility, THE FUNCTION AND PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL 3 (2nd ed. 1995). *Accord*, National Association of Bond Lawyers Committee on Professional Responsibility, THE FUNCTION AND PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL 58 (1987) (“Bond counsel may represent more than one party to the transaction when doing so is permitted under applicable rules regarding multiple representation and conflicts of interest.”).
