



113th Annual Conference

May 19-22, 2019 • Los Angeles, California

Types of Legal Counsel Available to Issuers

Wednesday, May 22, 2019

Los Angeles, California

Timothy M. Ewell

Chief Assistant County Administrator, Contra Costa County, CA

Jacquelynne M. Jennings

Partner, Schiff Hardin, LLP

Dave Angelo Sanchez

Senior Counsel, Norton Rose Fullbright US LLP

Dee Wisor

Attorney, Butler Snow Law Firm



Government Finance Officers Association

Learn more by visiting us at gfoa.org • #GFOA2019



Timothy M. Ewell

Chief Assistant County Administrator, Contra Costa County, CA

GFOA Debt Committee Member



GFOA BEST PRACTICE

- Types of Legal Counsel
 - Drafted by the Committee on Governmental Debt Management (DEBT)
 - Approved by the GFOA Executive Board in September 2018
 - Sought to provide clarity to issuers on various types of legal counsel are part of financing team
 - <https://www.gfoa.org/types-legal-counsel>
- Background and Recommendation
 - Important for issuers to understand the different roles counsel may play during transactions
 - Minimize risks
 - Increased costs
 - Conflicts of interest

- ## Types of Counsel Addressed

- ### Issuers Counsel

- For example, City Attorney, General Counsel, County Counsel, etc.
 - Included as part of financing team due to special expertise with state and local bond authorization statutes and rules
 - Review disclosure, bond sale, and other legal documents associated with transactions
 - Usually in concert with recognized bond counsel

- ### Bond Counsel

- <https://www.gfoa.org/selecting-bond-counsel>
 - Role before and during bond issuance process
 - Important member of financing team but represents interests of the bondholders
 - Bond Counsel provides a legal opinion that:
 - Issuer is authorized to issue proposed municipal securities and has met all legal and procedural requirements necessary for issuance.
 - If applicable, interest on the proposed securities will be excluded from gross income of the bondholders (Federal and/or State and/or local)
 - Role following bond issuance process
 - May also assist with post-issuance compliance policies procedures, audit or inquiries from IRS or SEC, and corrective actions

- **Types of Counsel Addressed**

- **Underwriter's Counsel**

- <https://www.gfoa.org/issuers-role-selection-underwriters-counsel>
- Involved in negotiated sales, private placements, or direct purchases
- Assists underwriter (or placement agent or purchaser) in meeting its legal responsibilities in a bond transaction

- **Disclosure Counsel**

- Role before and during bond issuance process
 - Sometimes retain by issuer to assist with federal securities law and disclosure documents related to public bond issuance
- Role following bond issuance process
 - May be retained for periods following issuance of bonds to coordinate annual filings with the issuer
 - Confirms content and timeliness of the filings satisfy requirements of the CDAs

- **Special Tax Counsel**

- Provide expertise with respect to tax law on a bond transactions

- **Bank Counsel**

- Bank often retains their own counsel to prepare various legal documents associated with private placements, direct purchases, and letter of credit or standby agreements



Dee Wisor

Attorney, Butler Snow Law Firm

President, National Association of Bond Lawyers (NABL)

ROLES OF COUNSEL IN BOND TRANSACTION

- Bond Counsel
 - Usually represents issuer
 - Drafts most bond documents
 - Gives unqualified opinion as to validity of the bonds and (for tax-exempt bonds) that interest will not be subject to federal income taxation and, in some cases, state income taxation
 - Sometimes advises on post-issuance tax compliance



ROLES OF COUNSEL IN BOND TRANSACTION

- Issuers Counsel
 - Represents issuer in transaction
 - Maybe in-house or outside counsel
 - Reviews and comments on documents
 - May give opinion on litigation and other matters

ROLES OF COUNSEL IN BOND TRANSACTION

- Disclosure Counsel
 - Represents issuer
 - Drafts official statement
 - Delivers letter that official statement does not include any material misstatement or omission of material information
 - Sometimes advises issuer on continuing disclosure compliance post-issuance

ROLES OF COUNSEL IN BOND TRANSACTION

- Underwriters Counsel
 - Represents underwriter
 - Sometimes drafts official statement
 - Sometimes delivers letter that official statement does not include any material misstatement or omission of material information
 - Usually not present in competitive sale

ROLES OF COUNSEL IN BOND TRANSACTION

- Special Tax Counsel
 - Usually represents issuer
 - Gives unqualified opinion that interest will not be subject to federal income taxation and, in some cases, state income taxation
 - Sometimes advises on post-issuance tax compliance



ROLES OF COUNSEL IN BOND TRANSACTION

- Trustee's Counsel
 - Represents trustee
 - Reviews and comments on documents
 - Sometimes delivers opinion



ROLES OF COUNSEL IN BOND TRANSACTION

- Bank Counsel
 - Represents bank or other financial institution in private placement
 - Either drafts loan agreement or reviews and comments on documents
 - Rarely delivers opinion



ROLES OF COUNSEL IN BOND TRANSACTION

- Credit Enhancer Counsel
 - Represents bond insurer or financial institution providing credit enhancement
 - Reviews and comments on documents
 - Delivers opinion about validity of credit enhancement



ROLES OF COUNSEL IN BOND TRANSACTION

- Borrowers Counsel
 - Represents borrower in conduit transaction
 - Gives opinion regarding validity of loan agreement and other agreements to which borrower is a party



ROLES OF COUNSEL IN BOND TRANSACTION

- Developers Counsel
 - Represents developer in development or redevelopment transaction
 - Reviews and comments on documents
 - May give opinion regarding validity of agreements to which developer is a party



Dave Angelo Sanchez

Senior Counsel

Norton Rose Fullbright US LLP

Reliance on Professionals by Issuers (Disclosure)

- **City of Miami.** Required elements:
 - (i) Did you make complete disclosure to the professional regarding the issue,
 - (ii) Did you explicitly seek professional advice as to the appropriateness of the conduct (mere participation in the transaction is not enough),
 - (iii) Did you receive advice that the conduct was appropriate and
 - (iv) Did you rely on that advice in good faith.
- **Allen Park, Michigan.** In response to concern by the judge that only issuer officials in this small town were charged in connection with disclosure failings, the SEC submitted an affidavit explaining why it had not charged bond counsel, the underwriters or the municipal advisor in connection with misstatements made in the offering document.
 - Financial advisor drafted OS but was supplied with inaccurate information
 - Bond counsel retained for the limited purpose of providing validity and tax opinion
 - Competitive bid so lower threshold of due diligence for underwriters
 - No disclosure counsel
 - Obligation of hired professionals to verify information provided by the issuer?



PANEL DISCUSSION TOPICS

- Evolution of Bond Counsel
- Tips and Practical Experience
 - Engagement Letters
 - MSRB Resources
- Assembling the Financing Team
 - Regional Differences
 - Rated v. Non-Rate Deals
 - Frequent v. Infrequent Issuers
 - Timeline for Developing Team



Questions

GFOA

Los Angeles 2019

113th Annual Conference

May 19-22, 2019 • Los Angeles, California

Types of Legal Counsel Available to Issuers

Wednesday, May 22, 2019

Los Angeles, California



Government Finance Officers Association

Learn more by visiting us at gfoa.org • #GFOA2019