

# THE BOND LAWYER®

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## PRESIDENT SCHAKEL'S REMARKS

*Editor's Note: The following remarks were delivered on September 17, 2003, by Linda B. Schakel, as she assumed the presidency of the Association.*

We are beginning the celebration of our 25<sup>th</sup> anniversary. That is 25 years of service to the municipal bond industry for NABL as an organization. For many of our members, that is 25 years of service to NABL and the municipal bond industry. For others of us, practicing as a bond lawyer or a tax lawyer was just a gleam in the eye or a calling that had not yet been recognized 25 years ago. When I turned 25, I was feeling relatively enthusiastic and optimistic, until my father pointed out that I was now a quarter of a century old. During our silver anniversary year, I hope that all members of NABL will feel the vigor and optimism of being 25 years old and the wisdom of having a quarter century of experience.

Helen has mentioned the opportunity the current Board had to meet with eighteen of the past presidents at the July meeting. I hope you will take the opportunity to read through their comments that are being printed in *The Bond Lawyer*®. While reading something is never quite the same as being there, I am sure you will also come away with what I will call the “vigorous wisdom” of these past presidents. I believe this is only the tip of the iceberg, as my past several years on NABL educational programs, comment projects and Board membership have convinced me that vigorous wisdom is one of the benefits of involvement in NABL.

In my former life, I was a classroom teacher of gifted students. The students I taught were in elementary school, certainly at a very impressionable age. Teaching to me was a rather awesome responsibility — you had the opportunity to be one of the most important people in a child's life or to totally screw them up for life. I usually moved away from the area and lost contact with the students, so I have often wondered what my impact was. Some of you may know my former student Ernie Lanza, who is now Associate Deputy Counsel for the MSRB. Now, Ernie

claims to remember some of the science experiments we did, but he obviously did not go on to be a scientist. In the same way I may wonder whether any of those insightful points made in the comment project on the proposed regulations on enterprise zone facility bonds I worked on in 1994 had an impact. Listening to the past presidents this summer again reinforced for me that every project and every contribution has an impact.

[Schakel photo]

NABL's mission is to educate its members and others in the law relating to public finance, to improve the state of the art in public finance practice, and to provide advice and comment at the federal and state levels and to courts with regard to matters affecting public finance. We go into the 25<sup>th</sup> year hoping that there will not be dramatic changes or cataclysmic events that we must deal with. Instead, I hope we can build on the 25 years of wisdom as we steadily seek to further each of those three goals. We do not have a Tax Reform Act of 1986 to deal with as Sharon Stanton White and Jim Perkins did, but we do have the opportunity to work with Treasury and the Joint Committee on Taxation to achieve simplification in the tax area. We do not have the major new rules of 15c2-12, as Ted Hester and Drew Kintzinger did, or the pay-to-play controversy that Neil Arkuss through Howard Zucker faced, but we do have the opportunity to provide advice and counsel on how to improve the documents and disclosure to meet the Rule 2a-7 requirements and to work with many of the constituent groups on the many issues associated with derivative products.

NABL works toward accomplishing its mission mainly through its committee members and its educational program faculties. If you will

indulge me for a moment and, at the risk of losing people to the cocktail party, I would like anyone who was a member of a NABL committee, task force or served as faculty on one of our educational programs over this past year to raise their hand to be recognized. I know you may not receive recognition in your firm for the nonbillable hours you spent preparing comments, debating the opinion standard, or preparing the outline on hot topics in secondary disclosure for BAW, but the Board and the members of NABL are appreciative of your efforts.

The NABL staff has been working hard to put a number of our records and documents in electronic format so that we can readily access a number of important pieces of information about our organization. They recently printed out for me a list of current members and what positions they have held within NABL, what committees they have been on, and what educational seminars they have chaired. It shows, page after page, that this is a member-driven association.

Some of our members have numerous checkmarks next to their names and it is the usual case that involvement begins with working on a committee project or being a panelist here at BAW. Doug Rollow reminds me that when he was chair of BAW, almost one quarter of the 1,000 people attending the conference were panelists. From there, many of our members move to Vice-Chair and Chair of a committee, an educational seminar, then to Board membership. It was remarkable to me how many past presidents continue to be active in the organization.

Sometimes they need a bit of a respite, but then they are tanned, ready and rested to pitch in. Last year, the Board created the Distinguished Service Award of the Association for the purpose of recognizing the extraordinary service individuals have provided to NABL over an extended period of time. Fred Kiel is the first recipient. In addition to being one of the founders and a past president, Fred has single-handedly published NABL's quarterly newsletter, now graduated to a magazine. Through Fred's persistence, this publication has become another way to educate members, but it needs people willing to commit their thoughts to paper, suffer under Fred's editorial pen, and make a contribution to NABL that way. Recent issues have become a forum for regulators and other

market participants to share their concerns, or "visit" with us, as we would say in Iowa.

You can see where I am going with this — "She's going to call on me." You are correct. I am going to call on you to get more involved in NABL. We need your talents and your opinions and criticism. NABL's Guide to Committee Operations provides guidance on recruiting members and states that Committee membership should reflect geographic and law firm diversity and should include Association members who have not previously been active in NABL activities. Whether you have been practicing for three years or for twenty, I would like to invite you to become active in a committee or educational program. I am convinced that NABL will benefit from your participation and I believe you will find this personally and professionally valuable. The NABL members are a diverse and interesting bunch and committee work can only expand your list of contacts off of whom to bounce ideas. NABL should be proud that several of our active members have gone on to government service, including Martha Haines, Mary Simpkin, Steve Watson, Bruce Serchuk, Sunita Lough, and Vicky Tsilas, just to name a few of the current ones. Hopefully, NABL's credibility and impact is strengthened through their prior involvement.

NABL's Committee guidelines suggest that Committees consider several different kinds of projects when they set their agenda — with emphasis on "their agenda." NABL is a member-driven organization. Committee projects may come from its Board of Directors, all of whom have been active members, but most projects stem from the committee's agenda. Projects include monitoring and summarizing current legal developments; preparing an in-depth analysis of an important legal issue; drafting suggested legislation or regulations; and drafting suggested legal forms or model documents and position papers. We have seen these projects communicated as pamphlets such as the Model Opinion Report, as articles in *The Bond Lawyer*®, such as the article on indemnification from the Professional Responsibility Committee, NABLNET reports such as the *Amicus* Review Committee's report on the *Holmes Harbor* case, or as the June teleconference by the General Tax

Committee on the refunding regulations. Whatever your talents, I would invite you to take an active part in NABL's 25<sup>th</sup> year.

I have some thoughts about what can be on NABL's agenda this year. I believe that there are several factors and events converging that give us the opportunity to take some big and little steps forward. The convergence may not be the Perfect Storm, but it is a convergence nonetheless. Some of these events are in the securities law area, some in tax.

Let me start with NABL's legislative proposal to give issuers and bondholders the right to more directly challenge IRS positions in an audit. I have been on the Task Force on Alternate Dispute Resolution since Howard Zucker established it several years ago. The Task Force did not start out with the idea of a legislative solution, but as we discussed the issues it became apparent that to truly give issuers and conduit borrowers the complete protections afforded a taxpayer, the statute had to be changed. The IRS audit people are to be commended for writing their procedures to involve the issuer in the face of a contrary legislative scheme, but the statute ultimately makes the bondholder liable. In 1999, NABL was presented with the Hatch Amendment that would permit issuers to take audit disputes to the Tax Court, but the right of bondholder intervention presented obstacles and we ended up with the right to go to IRS Appeals. The conference report stated that this was an issue that should be monitored to see if further legislative action was necessary.

The Task Force took this language to heart and responded to issuer's concern about the impact audits had on their bond issues. Bondholder liability brought up difficult disclosure issues which we are still struggling with — at what point does an audit become a material event that must be disclosed? If 99.9% of the audits are settled without the bondholder having any liability, what is the tail and what is the dog in disclosure?

The legislative proposal was released as a discussion draft and it continues to be a discussion draft. In particular, GFOA has asked to work with us on making the provision optional so that they

can elect whether to try to shift the burden. They have also asked us to draft more specific provisions on the penalty. The legislative proposal takes the view that bondholder exposure should be the penalty amount only in abusive cases. The general premise should be that the penalty is appropriate to the violation, and the draft statutory language lays out several factors that Treasury and the IRS are to take into account in regulations that set out penalties. It is this "intermediate sanctions" piece of the legislative proposal that I believe is coming into its own and that we have a real opportunity here.

I spent some time recently reviewing the GAO Report from 1993 which really started the tax-exempt bond audit program. That report includes a NABL policy statement adopted in 1989 in which NABL both supported even-handed and rigorous enforcement of existing tax laws and urged prompt adoption of clear understandable regulations. It was NABL's position that this was the best and most effective method of assuring compliance with the tax laws, of preventing abusive practices, and in containing costs of issuance. NABL urged Congress to appropriate sufficient funds to enable vigorous enforcement and issuance of regulations on a timely basis.

The GAO report certainly called on the IRS to develop an audit program to determine the level of compliance with the tax laws, but it also suggested that intermediate sanctions might be an area the IRS should also explore. The IRS audit team has a rigorous enforcement program, but they have also heeded the suggestion that there be intermediate sanctions. The VCAP initiative that they announced two years ago is in keeping with GAO's suggestion, and I would suggest that NABL should seize this opportunity to take a serious look at intermediate sanctions. Richard Chirls made intermediate sanctions a keystone of his address as president of NABL in 1990. Richard was before his time, but he is a member of the ADR Task Force and we again have a perfect opportunity to move forward.

Last month John Cross, Bill Larsen and I went over to the Joint Committee on Taxation — at their invitation, I might add. John and the General Tax Committee had put together a very insightful and comprehensive simplification proposal, which

was originally submitted to Treasury and the IRS in response to Assistant Secretary Pam Olsen's announcement that Treasury was taking simplification seriously. This report was forwarded on to Joint Tax and most of you may know that Ben Hartley, the bond person for years on Joint Tax, has retired, but not before contributing to the Joint Committee's simplification report released a year or so ago. Ben's replacement, Deidre James, requested that we come over to speak with her on our proposals. The meeting also included George Yin, the new head of Joint Tax, along with veterans Joe Nega and Tom Barthold. The meeting was only an hour, but it opened the door for further discussion. Joint Tax is serious about simplification and invited further discussion on the Cliff problem and the extent to which intermediate sanctions might also be appropriate. This is another golden opportunity.

Turning back to Treasury and the IRS, they recently announced that they completed thirteen of the seventeen projects on their business plan last year. The willingness to add business plan items as the year progresses, and to give quarterly updates, is a great step forward. Willis Ritter has pointed out to me that I will be the first NABL president who has held a position at Treasury. I describe that as having seen both the sausage and the casing being made. I have a much better understanding of the whole process and a real appreciation for the effort it took to complete thirteen of seventeen projects this past year. This moves us along the way to clarifying what the rules are and fosters better compliance by the tax lawyers. My stint at Treasury convinced me of the value of the comment process, and NABL has an obligation to assist the guidance process by continuing to comment on regulations. NABL had far more items on its business plan recommendations than what the IRS may have resources for, but I am hopeful that we can continue to be proactive in analyzing legal issues and submitting comments whether the issues are on the business plan or not.

On the enforcement side, I am intrigued by the new initiative to mediate issues that arise on audits. This has the potential to give issuers the opportunity to have outside review of questions and we welcome that opportunity. It may not be access to the Tax Court, but it is a step in the right

direction. I am also hopeful that some of our members will become trained mediators, particularly retired members with their rigorous wisdom.

NABL continues to benefit from participating in the Muni Council. The Muni Council is a consortium of a variety of players in the municipal marketplace. It is important for us to be there to understand the issues, concerns and viewpoints of these different players. It gives us the opportunity to educate our members about these issues and concerns and to provide advice and counsel to the players, on securities and other issues. Several of our current projects have begun as a result of issues raised at the meetings, such as the Rule 2a-7 project. The contacts made at these meetings have diversified our educational programs. For example, our inaugural Tax and Securities Law Institute had speakers from the buy side, the MSRB, and the GFOA Debt Committee, in addition to regulators from the SEC and IRS. I would expect to see more incremental improvements, such as the model cover sheet and better access to CUSIP numbers, from our participation in the Muni Council.

All of these events represent an opportunity to pull together many projects NABL has been working over the years. With your efforts, I think we can make significant progress.

## **PRESIDENT                      ATKESON'S REPORT**

*Editor's Note: The following report was provided by outgoing President Helen C. Atkeson at the Association's 25th annual meeting on September 17, 2003.*

In my remarks at this meeting last year, I took the opportunity to review and reflect on NABL's activities since its formation almost 25 years ago. I observed that over these years, NABL activities had held steady to its mission of education, improving the state of the art in the public finance practice, and providing advice and comment. I now get the chance to "bring down" that review to include the past year's activities. My conclusion is the same. NABL has forged ahead since last

September in all three of these core areas of its mission, due to the hard work of its committed volunteers and an increasingly professional staff to support its efforts.

## Education

Let me start with education, where we broke new ground in many respects under the guidance of Education Committee Chair **Scott Lilienthal** and Vice-Chair **Mary Wilson**. The year started off with a great Bond Attorneys' Workshop with **Mark Mamantov** at the helm. **Kristin Franceschi** seems to have everything under control this year for our last Palmer House BAW (few of us will miss those elevators). Don't forget to mark your calendars for an early September BAW next year at a new location. It will be a great chance to celebrate the start of NABL's next quarter-century.

Last February, the former Tax Seminar morphed into the new Tax and Securities Law Institute. **David Miller** and **Jeff Nave**, as Co-Chairs, and **John Swendseid**, as Vice-Chair, were asked to think creatively with this inaugural event, and they did. Member-only sessions, voting machines, and box lunch sessions were among the experiments all viewed as successful. Those of us who are securities lawyers were pleased to be invited to join the tax lawyers for this midwinter gathering (in the hardship location of south Florida) and look forward to year two in Las Vegas next February.

The Fundamentals Seminar was by all accounts a great success. **Chuck Shimer** as Chair and **Erin Bartholomy** as Vice-Chair strived for further excellence in this already well-received program. Continued efforts were made to maintain the balance between large and small general sessions and breakout sessions, with particular focus this year on the legal assistants' program.

NABL has also offered several teleconferences during the past year to provide timely advice in a format more amenable to our busy schedules. Almost 400 telephone lines dialed in for the October teleconference on the "basics of derivatives" (held free of charge to members).

**Larry Stromfeld** and **John Bove** did an excellent job of distilling this complicated topic to a three-hour "primer" that even I could understand. In November, timely topics including the Sarbanes-Oxley Act and the proposed SEC lawyer conduct rule were addressed by faculty at the fourth annual Ethics Teleconference chaired by **Ed Lucas**, with **Vicky Tsilas** as Vice-Chair. In December and January, **Steve Gerdes** presented a two-part teleconference for legal assistants covering basic tax rules. (I can only conclude, based on the numerous requests for additional sessions, that either Steve is incredible at explaining tax law or the legal assistants are gluttons for punishment.) Finally, in June, a teleconference (again free for members) was held on the recently issued IRS proposed regulations relating to the private activity bond test for refunding issues. **John Cross**, **Patti Wu** and **Ed Oswald** participated as NABL faculty, with Steve Watson and Bruce Serchuk representing the Department of Treasury. Again the response was remarkable, with over 350 telephone lines dialing into the call.

*The Federal Taxation of Municipal Bonds* has continued to be an invaluable resource for tax practitioners. The Editorial Board during this past year, chaired by **Tony Martini**, continued to improve the second edition while also updating it on a regular basis. *The Federal Securities Law of Municipal Bonds Deskbook*, launched early this year, serves as a very useful resource for securities practitioners as well as others, such as in-house lawyers with involvement in bond financings. The Editorial Board, chaired by **Drew Kintzinger**, is to be commended for its efforts, in particular the excellent work in drafting annotations to many of the items. This is a "must have," an excellent stocking stuffer for your favorite partner, associate or client. Finally, the Task Force on Rule 2a-7 Documents, chaired by **Paul Maco**, has spent the past year preparing a comprehensive report, to be released shortly, which will serve as an important reference for bond lawyers and others in the municipal markets.

## State of the Art

Several projects have been completed this year, and others continue forward, in an effort to

improve the state of the art in the public finance practice. Of particular note, the Association released the 2003 edition of its Model Bond Opinion Report in February of this year. The Report came after two years of effort by the NABL Opinions and Documents Committee, eleven NABL members who brought diverse views and critical thinking to the Report. The Committee benefited from the effective leadership of its initial chair, **Kristin Franceschi**, and the "closers," **Foster Clark**, as Chair, and **Linda D'Onofrio**, as Vice-Chair. **Jack Williams** acted as liaison to the Board and provided valuable assistance throughout the preparation of the Report.

After a significant effort by the Legal Assistants Committee with **Ann Atkinson** as Chair and Board liaison **Kristin Franceschi**, the Legal Assistants Handbook (now posted on the NABL website) was completed, with a glossary of terms and several chapters intended to provide basic information relating to the municipal finance practice. Another contribution to professionalism in our practice completed this year was the article entitled *Lawyer Indemnification of Clients: Ethical Implications* prepared by **Buddy Downs** as Chair of NABL's Committee on Professional Responsibility. This provocative article was published in the June 1 edition of *The Bond Lawyer*® and is worthy of your review.

As a questionable "reward" for his impressive work on that article, Buddy has recently been asked by the Board to chair another significant effort by the Committee on Professional Responsibility. The Committee has begun a process to revise the 1995 Edition of *The Function and Professional Responsibilities of Bond Counsel*. Among other items, *Function* is expected to be updated as appropriate to reflect the Sarbanes-Oxley Act, the American Bar Association Task Force proposed rules and the Model Bond Opinion Report. Also underway this past year has been the continuing effort by the Task Force on Alternative Dispute Resolution, chaired by Past President **Hobby Presley**, to educate our members and others in the municipal bond community about the legislation proposed by NABL to solve perceived inadequacies in the current tax enforcement penalty scheme.

## Advice and Comment

Several projects over the past year represent NABL efforts to provide the technical advice and comment we have traditionally offered in connection with federal regulations and rules. The NABL Securities Law and Disclosure Committee, with **Ken Artin** as Chair and **Doug Rollow** as Vice-Chair, rallied the troops to develop comments (on a short timeline during the December "crunch") to the SEC's proposed regulations regarding standards of professional conduct for attorneys. The NABL Tax Committee, chaired by **Mitch Rapaport** with **John Cross** as Board liaison, submitted its "top ten" letter suggesting matters for inclusion in the Treasury/IRS priority guidance plan for 2003-2004. Our *Amicus* Review Committee, through the efforts of **Jamie Pitney** as Chair and Past President **Bill Conner** as Vice-Chair, considered requests to file *amicus* briefs in the United Airlines bankruptcy and the Holmes Harbor Sewer District bond litigation. They determined that it would be inappropriate for NABL to file a brief in either case at this time, based on our guidelines, but will continue to monitor the cases. Comments spearheaded by **Patti Wu**, as Vice-Chair of the Tax Committee, are being prepared for submission to the IRS in response to the proposed private activity bond refunding regulations.

Other efforts have been undertaken by NABL representatives in order to bring expertise or provide the bond lawyer perspective to enhance industry projects. The NABL Securities Law and Disclosure Committee, coordinating with Board liaison **Walter St. Onge**, provided comments to the generic coversheet distributed by The Bond Market Association and to the GFOA's "Recommended Practice For Use of Derivative Products and the Development of a Derivative Policy." **Bill Hirata** ably represented the Association to the Governmental Accounting Standards Advisory Council, and kept the Board and NABL membership informed of GASB and GASAC initiatives, including Technical Bulletin 2003-1 issued this past spring setting forth disclosure requirements for derivatives. NABL representatives participated throughout the year in meetings of numerous industry groups, among

them the Muni Council, the National Federation of Municipal Analysts, the Government Finance Officers Association, the National Association of State Auditors, Comptrollers and Treasurers, and the Municipal Securities Rulemaking Board.

### Organizational Growth

Our success in all of these activities stems from the strength of NABL as an organization, particularly in areas such as accountability, communication, coordination and responsiveness. The Board and staff have made efforts over the past year in connection with three projects significant to NABL's growth in these areas. First, at the initiative of Treasurer **Monty Humble**, the Board undertook a full-year project to study the Association's reserves, adopted a comprehensive investment policy, and formed a Finance Committee. Based on the efforts of Board members **Bill Holby** and **Kristin Franceschi**, the Association has in place an updated policy regarding intellectual property rights which I think appropriately balances the interests of volunteer authors and NABL's ownership needs to carry out its activities. Finally, we have begun a very significant technology project for the Association, with initial phases of the project benefiting from the involvement of Board Member **Carol Lew** and of **Cynthia Weed**, Chair of the NABL Special Committee on Technology. You will be hearing more about this project during the upcoming year.

NABL relies on its volunteers to carry out the many activities I have described, but the dedicated and professional staffs in both Chicago and DC serve as our backbone. **Ken Luurs** has continued to strengthen the Association with his strategic focus and able management of a great group here in the Chicago office. He has also been the force behind our new NABL "look;" few of us will miss the old eagle logo. **Bill Larsen** in DC has played a significant role this year in the Association's outreach efforts. He has served as our link to the Public Finance Network, and has organized and participated in numerous industry group gatherings. He and Ben Ashmore in the DC office have done a wonderful job this past year of maintaining the NABL website with its

new members-only section and distributing NABLNET Alerts to members on a timely basis.

We are now well into the 25th year, with our celebration kicked off by a gathering in July of the Association's Past Presidents. Board member **Meredith Hathorn** and **Bill Tonkin**, Chair of NABL's Special Committee on Membership, have great plans for further celebration and recognition.

Your September 1st issue of *The Bond Lawyer*® contains the first set (with more to come) of "reflections" prepared by NABL's early leaders and edited by Fred Kiel.

### On a Personal Note

Speaking of **Fred Kiel**, what can I say about a guy who has spent over twenty years as editor for NABL of a superb publication, was the first recipient last year of the Association's Distinguished Service Award, and is still hard at work for NABL? Although it is impossible for us to adequately thank him, we can tolerate the occasional imponderable limerick as an expression of our appreciation.

I must also express my gratitude to the members of the 2002-03 Board for the energy each of them has given to Board discussions and decisions; for the leadership each of them has provided in connection with particular projects; and, most importantly, for making my job so much easier. I was uncertain at first whether I could effectively manage a group 25% from Vanderbilt Law School and 50% lefthanded. Then there was the one Board member who could only express ideas in groups of three. Despite these hurdles, the Board has worked tirelessly — only occasionally without enthusiasm — and I thank them for putting up with my obsessive schedule.

I would like particularly to recognize retiring Board member **Jack Williams** for his thoughtful input to discussion, which I have valued through the year. **John Overdorff** is also retiring from the Board this year and has made many contributions during his short tenure. I must also thank Immediate Past-President **Bill Noth** for standing by — always available — to provide his views and share the benefits of his experience. I am delighted that he will stay involved in the *Function* project and know that he will always be a

committed NABL volunteer. Finally, I would like to express my sincere appreciation to President-Elect **Linda Schakel** for her support of my efforts this year and wish her the best of luck next year.

On a personal note, while I cannot say that I have loved every minute of this past year, I have loved most. The rapport we have in the public finance bar is unparalleled, and this professional organization is a remarkable resource to us all. I am proud to have served as NABL President, and thank you for the incredible personal growth opportunity of the past year.

## THE 25<sup>TH</sup> ANNUAL MEETING

President Helen C. Atkeson opened the Association's twenty-fifth annual meeting on September 17, 2003, at 6:00 p.m., at the Palmer House Hilton in Chicago. She then called on Treasurer Monty G. Humble to present a brief financial report; Mr. Humble reported that the Association continues on a sound financial footing.

President Atkeson then reported on the primary events of the year just completed; her remarks are reprinted *supra*. President Atkeson then introduced Immediate Past President William J. Noth, who presented the report of the 2003 Nominating Committee. The Nominating Committee had nominated Monty G. Humble as President-Elect, Meredith L. Hathorn as Secretary, and Walter J. St. Onge III as Treasurer. In addition, the Committee nominated, as Directors, Kristin H.R. Franceschi for a term ending in 2004, and J. Foster Clark and Cynthia M. Weed for terms ending in 2006. The nominees were approved by the unanimous vote of the members present and voting, and thereupon assumed their new positions. In addition, Linda B. Schakel automatically became President of the Association upon the election of Mr. Humble as President-Elect; Kathleen Crum McKinney, as Chair of the 2004 Bond Attorneys' Workshop, became an *ex officio* member of the Board of Directors for a one-year term; and Ms. Atkeson, as Immediate Past President, continues as a Director pursuant to Section 5.02 of the By-Laws.

Ms. Atkeson then turned the meeting over to Ms. Schakel, who delivered the remarks reprinted *supra*.

## THE NEW OFFICERS AND DIRECTORS

**Linda B. Schakel**, a partner in the Tax Department of Ballard Spahr Andrews & Ingersoll, LLP, in the firm's Washington, D.C., office, was elected President of the Association. Ms. Schakel previously served as President-Elect, as Treasurer, as a Director, and as Chair of the Tax Seminar. She has also served as Vice-Chair of the Education Committee; on the Steering Committee for the Bond Attorneys' Workshop; and was a faculty member at the Tax and Securities Law Institute. In 1998, Ms. Schakel was awarded The Carlson Prize for her report on Qualified Zone Academy Bonds.

**Monty G. Humble**, a partner at Vinson & Elkins L.L.P., Dallas, was elected President-Elect. Mr. Humble was previously Treasurer and a Director. Mr. Humble served two terms on the Steering Committee for the Bond Attorneys' Workshop, chaired the Securities Law panel for the Washington Seminar, was a faculty member at the Tax and Securities Law Institute, served on the Nominating Committee, chaired a subcommittee of the Securities Law Committee, and chaired the Professional Responsibility Committee.

**Meredith L. Hathorn**, of Foley & Judell, L.L.P., New Orleans, was elected Secretary. She previously served as a Director and as a member of the Steering Committee for the Bond Attorneys' Workshop in 1996, 1997, and 1998; chaired the Committee on Professional Responsibility from 1998 to 2000; was a faculty member at the Tax and Securities Law Institute; and has served as a faculty member at several Association seminars and Workshops.

**Walter J. St. Onge III**, a partner at Palmer & Dodge, LLP, Boston, was elected Treasurer. He has served as a Director, as Chair of the Securities Law and Disclosure Committee, as Vice-Chair of that Committee, and as a member of the Nominating Committee. He has also served

on the Steering Committee and as a panelist for the Bond Attorneys' Workshop for several years, as faculty and a panelist at the Washington Seminar, as faculty at the Tax and Securities Law Institute, and as a panelist at the seminar on implementing SEC Rule 15c2-12.

## **FRIEL MEDAL PRESENTED TO JEFFREY S. GREEN**

*Editor's Note: The following remarks were delivered by former Director John M. Gardner, of Hogan & Hartson L.L.P., on September 18, 2003, on the occasion of presentation of the Association's Bernard P. Friel Medal to Jeffrey S. Green:*

It gives me great pleasure to announce that the NABL Board of Directors has awarded the Bernard P. Friel Medal for distinguished service in public finance to Jeffrey S. Green.

Jeff is the General Counsel of The Port Authority of New York and New Jersey. He was nominated for this honor by two prior Friel Medal honorees, Amy Dunbar and Dean Pope; by two prior NABL Presidents, Ted Hester and Dean Pope; and by two prior NABL Directors and Chairs of the NABL Securities Law and Disclosure Committee, Paul Maco and yours truly.

Jeff Green has been with the Port Authority for 38 years, and he now heads that Authority's staff of 75 lawyers. In that capacity, he serves as the chief bond and disclosure counsel for one of the largest, most sophisticated issuers of billions of dollars of municipal securities. Over those years, he — like all other Friel Medal honorees — has made significant and continuous contributions to the municipal finance industry.

Jeff has:

Led the efforts of the Government Finance Officers Association to improve disclosure practices in the municipal securities industry, serving as the Chairman of the GFOA's Disclosure Task Force responsible for the Second and Third Editions of the *Disclosure Guidelines for State and Local Government*

*Securities* and Chairman of the GFOA Debt Committee for seven years;

Served as a leading member and one of three principal drafters of the Report of the Anthony Commission on Public Finance;

Taken an active role in the planning, discussion, drafting and editing of both editions of NABL's own *Disclosure Roles of Counsel* project;

Led the "Group of Twelve" and the "Group of Ten" commenting on proposals to amend the SEC's Rule 15c2-12;

Jeff even served as Chair of a NABL Washington Workshop when critical issues of tax and securities law drew much attention to the discussions held in that forum.

Those who have worked with him admire not only his knowledge and dedication, but also his ability to provide leadership and to lend perspective, practicality, wisdom, humor, and a spirit of cooperation. In the formative days of the modern securities regulatory framework and practices in our industry, he provided a strong voice for regulatory common sense. Much of this came from his work with the Port Authority, where large and complex securities transactions are commonplace. But just as important to Jeff's perspective have been his own community activities. He's served as a member of his local School Board for 9 years, on the Board of his local Library for 11 years, and as President of his Temple for two years. Jeff now serves as President of the Greater New York Chapter of the American Corporate Counsel Association, a position he accepted on September 10, 2001.

In Paul Maco's words: "His remarkable qualities have never been more evident than in the period since September 11, 2001, a time of profound tragedy for our nation and, of course, for the Port Authority and for Jeff."

*Mr. Green responded (in absentia) as follows:*

Please convey to all how flattered and grateful I am to NABL for honoring me with this year's

Bernard Friel Medal. As you know, only my son's wedding in London, England, could have kept me from being in Chicago with you for the Bond Attorneys' Workshop.

I have been a member of NABL since shortly after its founding and watched it grow from a small organization into one of the preeminent bar associations in the country. NABL positions are listened to and sought by members of Congress, the SEC, Treasury and the IRS because of the dedicated volunteer efforts of bond counsel from around the country. The Friel Medal is a great honor; it recognizes those who have worked unselfishly to support and promote sound practices in the municipal bond market, and I am greatly honored that NABL is recognizing my efforts to promote sound practices by all market participants.

Over the years I have sat in the audience and watched the presentation of the Friel Medal to some of the real giants of our industry and never thought that NABL would honor me. As somewhat of a rarity in municipal finance, an in-house counsel who could talk to issuers as an issuer and to bond attorneys as a bond counsel, I have always tried to balance my two roles to bring issuers, bond counsel and investment bankers together for the common good. That philosophy led to the well-received Anthony Commission Report, the collaborative effort that forestalled invasive SEC regulation, the adoption and modification of the GFOA Disclosure Guidelines, and the NABL *Disclosure Roles of Counsel*.

Now, as the Port Authority and its staff begin the rebuilding of downtown Manhattan in the aftermath of the terrorist attacks of September 11, working for the common good has taken on new meaning for me. As we remember our 84 friends and colleagues who perished on that terrible day two years ago, we are working to build a fitting memorial to them and the almost 3,000 others whose lives were tragically cut short. That memorial will be not only the officially designated memorial in the area where the two Towers once stood, but will also be the brand new grand terminal for the PATH Railroad, the iconic 1776 foot Freedom Tower, and four other commercial office buildings that will provide a lasting testimonial to the resilience of the spirit of New York and the United States.

I am deeply flattered and honored that NABL has added my name to a long list of my friends and colleagues that includes such distinguished people as Dan Goldberg, Manly Mumford, Dean Pope, Amy Dunbar and Cathy Spain.

I hope to see you all soon.

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*The National Association of Bond Lawyers is the bar association for those engaged in the practice of the law of municipal finance. Only NABL nurtures that practice. NABL was invented by and for bond lawyers. Member-driven — not staff-driven — it faithfully serves bond lawyers in all 50 states and the territories via The Bond Lawyer® and NABLNET Alerts.*

## **FRIEL MEDAL PRESENTED TO HENRY S. KLAIMAN**

*Editor's Note: The following remarks were delivered by Director Carol L. Lew, of Stradling Yocca Carlson & Rauth, on September 18, 2003, on the occasion of presentation by her of the Association's Bernard P. Friel Medal to Henry S. Klaiman:*

I take great pleasure today in presenting the Bernard P. Friel Medal to Henry S. Klaiman. The Friel Medal is to be presented based upon an individual's distinguished service in public finance. Hank, who after over forty years of law practice, retired a few months ago, is being presented this medal because he represents the "gold standard" for a tax lawyer. It is hard to find an area of the tax law relating to municipal finance that Hank has not affected in some way. A few highlights of his career include assisting in the structuring of one of the first TIGRs deals, being instrumental in the formation of policy relating to the application of the private security or payment test, assisting with respect to the Florida Hurricane Catastrophe Finance Corporation, his various enforcement cases, and assisting in the aftermath of September 11<sup>th</sup>.

Many of us remember Hank's tireless contributions to the public finance community through organizations such as NABL, the American Bar Association, the Practising Law Institute, and others. His hard work and keen insight have been valued regarding the appropriate direction for tax policy. Hank's input on the direction of the application of the private activity bond tests and, more recently, the structure of the enforcement program and intermediate sanctions, has helped shape current law and practice. Hank has been a frequent speaker for numerous organizations and has contributed substantially regarding practitioner education. There are educational materials prepared by Hank that are almost twenty years old that are still extremely valuable for practitioners.

Hank's good judgment touched everyone around him. He is famous for mentoring young tax lawyers, and passing along his good judgment.

But what sets Hank apart, and personifies him as the gold standard for a tax lawyer, is, in addition to his vast substantive knowledge and intelligence, a rare ability to foresee where tax policy is heading and what the proper decision should be in both client matters and in recommending legislation or administrative policy.

So with a great deal of pleasure I present the Friel Medal to Hank Klaiman.

## **RITA J. CARLSON RECEIVES ASSOCIATION'S DISTINGUISHED SERVICE AWARD**

*The following remarks were delivered by first President Bernard P. Friel on September 18, 2003, in presenting the Association's Distinguished Service Award to Rita J. Carlson:*

NABL's Distinguished Service Award was created for the purpose of recognizing extraordinary service provided to NABL over an extended period of time.

This year, it is my pleasure to present the Association's second ever Distinguished Service Award to a person who was present when the Bond Attorneys' Workshop was founded in 1976, and who was also present when the Association was founded in 1978. This person was absolutely instrumental in the success of both entities, which are now fully merged. This person, as the first Executive Director of both organizations, burned the midnight oil, with a part-time crew of housewives from Hinsdale, to make the Workshop and the Association what they are today — incomparable.

Without Rita Carlson, there would have been no Bond Attorneys' Workshop as we know it now, and no National Association of Bond Lawyers as we know it now. She was the mother of us all. We owe Rita a debt — a profound debt — for her service to NABL and this award is a token of our appreciation.

Rita retired from her executive directorships after the 1994 Workshop. Members were invited to write to her on that occasion, and hundreds of letters of tribute and remembrance arrived. I'd like to share a few lines from those letters with you today:

This can't be! NABL without Rita is like Lewis without Clark, Ben without Jerry . . .

For most of us, you have been the embodiment of NABL . . .

If I had to name the single attribute that you demonstrated over the past years that has meant the most to the Association and to me, it would be your strong feeling that NABL must always be a member-dominated organization and not a staff-dominated one.

Your contribution to NABL is very significant, but we will remember you most for the kind attention you gave to every detail and every member.

I'm sure we'll survive without you. That too is your achievement: to give us organization and continuity enough to survive even your own departure.

You have managed to coordinate the Association's numerous activities as a true artist — in a way that seems effortless to most, yet to those paying close attention to detail (which we all know is an important aspect of the art of bond lawyering), demonstrates the finesse and ability that only the gifted possess.

You have been the linchpin of NABL's success and, apparently, made a friend of everyone you touched in the process.

You have been our heart and soul and there is no one who thinks of NABL who does not think of you in the same moment.

I feel honored to be the one to present this award to Rita. It is another opportunity for me to

say thank you for all the support you gave to me during NABL's first year and for your unfailing optimism about and confidence in NABL's becoming the success that it is.

## **PAST PRESIDENTS REFLECT**

*Editor's Note: There follows the second installment of the remarks delivered at the behest of President Helen C. Atkeson by former presidents of the Association at the Beaver Creek (Colorado) conclave held on July 10 and 11 in conjunction with the congruent Board of Directors meeting. Most were delivered in person.*

### **ROBERT DEAN POPE (1987 – 1988)**

What did we worry about in 1987 and 1988?

Our concerns included Pyramid Bonds, Deerfield Bonds, the Bank South case, and the nasty penchant of certain Congressmen for introducing retroactively effective legislation.

During the 1987 and 1988 year, the National Association of Bond Lawyers continued and completed a number of projects, several of which were initiated under Sharon White's presidency. We were particularly gratified by the paper on lawyer proliferation in public finance, the product of a committee headed by Joe Johnson and a report that makes excellent reading today. We were also pleased with the pamphlet produced on the selection of bond counsel under the leadership of Mary Anne Braymer.

But as reflected by the memories listed above, not all of them happy, the year was one of focus on Washington, D.C. As President I had the honor in early 1988 of announcing that the Association had employed Amy Dunbar as its first Director of Governmental Affairs. Shortly thereafter, Amy produced for our newsletter the first "Washington Update."

Amy's superb efforts established the foundation for NABL's influence in Washington, which, while not as powerful and pervasive as it

would be in a perfect world, has nevertheless been — and continues to be — significant and positive.

NABL's influence in Washington represents one of the greatest benefits that the Association brings to our profession, to our clients, and to the entire public finance world.

But how was it that the NABL Board was smart enough to hire Amy and to set the NABL Washington presence down the road it traveled? In previous years, the Board had considered at length if and how NABL should go to Washington.

It commissioned a particularly motley crew — Chas Mulcahy, Sam Stone, and me — to travel to Washington. We talked to other organizations about how to establish influence in that benighted city and what it would take to get things done. The Board deliberated — and chose wisely. It concluded that the Association had neither the money nor the membership to turn itself into a traditional lobbying powerhouse. We would never rival the trial lawyers, the home builders, The Bond Market Association, or the Government Finance Officers Association in our ability to have direct political influence with lawmakers.

Instead a decision was made to build a reputation based on probity, technical expertise, and avoidance of hyperbole.

The Association had gotten its feet wet in Washington in 1985 and 1986, when Jim Perkins enhanced his own superman-like efforts by persuading his law firm, Palmer & Dodge, to donate the time of Amy Dunbar, then an associate at Palmer & Dodge, to our efforts.

Our original plan immediately after 1986 was to hire a young "legislative intern," but the Board quite properly jumped at the opportunity to hire Amy in 1987.

Amy's efforts and the efforts that have continued over the years reflect what I believe were very sound decisions about what the Association could — and could not — do in Washington. These decisions have stood the test of time, as NABL continues to enjoy great influence, not because of its political clout, but because legislators, regulators, and lobbyists recognize NABL's expertise and its careful

statements whenever the Association promotes or criticizes legislation, regulation, or enforcement.

In 1987 and 1988 we also encountered the perils of activism. In particular we entered into the fray both on "Pyramid Bonds" and "Deerfield Bonds." Our actions in that area generated scattered criticism from our own members. But again experience proved us right. In both cases, a new type of financing was being undertaken that, in the opinion of the Board, was dangerous and created a substantial risk of regulatory response that might in fact harm legitimate transactions. The Association played a major role in ensuring that when the inevitable regulatory correction came, it was an appropriately limited one.

The judicial event of the year was the United States Supreme Court's decision in *South Carolina v. Baker*. I do not believe that the members of the Board were surprised by the result, but it was a sweeping decision, broadly upholding the right of Congress to restrict or even eliminate the Federal tax exemption on state and local government bonds. It told state and local government issuers — and their lawyers — that they must look to the political process in Washington to protect their interests and to prevent foolish restrictions. Thus the NABL decision to go to Washington seemed all the more important.

Not unrelated to this message from the U.S. Supreme Court was the creation of the Anthony Commission on Public Finance, proposed and led by then-Congressman Beryl Anthony of Arkansas. The Commission's mission was to educate Congress on the importance of ensuring that state and local governments had access to tax exempt financing without undue restrictions and burdens.

Ted Hester and I were members of the Anthony Commission, and Richard Chirls served as one of its advisors. Of course we all were excited to attend a meeting that year in Little Rock hosted by our fellow Anthony Commissioner, William Jefferson Clinton, who, at the same time as NABL, was beginning to concentrate his attention on Washington.

The Anthony Commission ultimately produced an excellent report on the importance of tax

exempt bonds. It engaged the difficult question of public purpose and private use, a question that still needs careful analysis today in considering the proper role of tax exempt financing in a world full of joint ventures and public-private partnerships. Alas, there is no particular reason to believe that the Anthony Commission produced any substantial change in attitude in Washington, but it did prevent further damage and helped produce a political environment in which further sweeping restrictions were avoided.

But the Anthony Commission was an important experience in another respect that continues to affect the Association's role in national affairs. As we worked with the Anthony Commission, we became acutely aware that the public finance world is united over very little, except a desire to preserve tax exemption generally and minimize regulation. The tensions and conflicts in the public finance world are real, important, and continuing. These include tensions between traditional issuers and conduit issuers, between bankers and issuers, between financial advisors and underwriters, and increasingly between issuers and institutional investors.

NABL has navigated these difficult waters with considerable skill over the last fifteen years. This was true in the processes that produced both the first and the second round of SEC Rule 15c2-12 and most recently in the initiatives of the Muni Council. Institutionally, NABL has become quite adept in dealing with the difficult — and never ending — tensions caused by the fact that the clients we serve have many diverse and sometimes conflicting views. The leadership of the Association in recent years has done a particularly good job in maintaining NABL's credibility and ensuring that its reputation for objective advice and technical expertise has not been tainted by becoming too much associated with one or more of the several distinctive viewpoints within the public finance world.

The recollections of other former Presidents as to their own years as heads of the Association remind all of us of the things that have not changed very much over the last twenty-five years. First and most disturbing is the gap between our own view of ourselves, as highly ethical professionals serving our clients, and the

view of many that we are simply self-serving lawyers whose pronouncements on any number of subject merely reflect our own self-interest. When we made highly pertinent criticism of proposed legislation in 1988, its author harshly described us as greedy reprobates attempting to feather our own nests. Comments like that have been made regularly over the last fifteen years, including one politician's promise to go after "the bond lawyers and the dead-beat dads," a grating and illogical juxtaposition. So we still face a major challenge in defending the reputation of our Association and our profession.

We still labor under the difficulties created by the fact that many of our clients do not understand what we do and why it is important that we have the expertise and prudence that characterize good bond lawyers. This unfortunate state of circumstances continues to have an adverse effect on how bond lawyers are selected, evaluated, and compensated. This remains a most serious problem for the profession.

In looking back over the last twenty-five years, I also am struck by how little we were affected fifteen to twenty years ago by securities laws concerns. Today we are all much more aware of first, the need for good disclosure, and second, the risks to all parties, including ourselves, created by securities law claims. An important part of our response to this is a continuation of the things that the Association has always done well in terms of clarifying the role of bond counsel and distinguishing it from the role of other parties.

There can be no doubt that the Association will face challenges in these areas in the future years, and those challenges may be difficult. But based on its record over the last twenty-five years, the Association will, I am sure, respond vigorously. I can think of no national lawyer organization that has done more to promote both expertise and high ethical standards in its area of practice.

I remain confident that the Association will continue to earn the gratitude of its members and the respect and appreciation of the entire public finance world.

**THEODORE M. HESTER (1989 – 1990)**

The fact that I was President in 1989-1990 reflects the attention that NABL had been forced to pay to Washington during the years leading up to my election. I had moved from Atlanta to DC in 1983. I had been drifting away from writing bond opinions day-by-day, but had continued to be heavily engaged in the bond world by virtue of the significant time I spent working with the Public Interest Groups lobbying on bond provisions. Happily, by the time I became President, NABL had recognized the need for a full-time Director of Governmental Affairs and Amy Dunbar was capably representing bond lawyers in Washington.

It is a tribute to NABL that by 1989, we were self-sustaining due to the great work of my predecessors. We had a full platter of carry-over projects, a great Board, great committee chairs, and a terrific staff.

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NABL activities in 1989-1990 were largely a response to several circumstances:

- (1) The 1986 Tax Act had fully matured and arbitrage rebate was a huge issue. Karen Hedlund (Skadden Arps) was a Board member and led an effort to prepare comments on the then proposed rebate regulations. This included a grassroots effort to reach out to NABL members to gather examples of bad experiences with rebate that we provided to the IRS.
- (2) Rule 15c2-12 had just been adopted. Fred Rosenfeld of Gust, Rosenfeld in Phoenix, and Helen Atkeson, devoted considerable time working with industry groups to develop voluntary trustee disclosure guidelines. Stan Keller (Palmer & Dodge) chaired the Committee on Securities Law and Disclosure, which had a busy year. Stan provided a series of comments to the MSRB and the SEC on proposed rules dealing with establishing central repositories for disclosure documents.
- (3) Black box deals and extravagant closing costs were being reported by the financial press and were attracting the attention of Congress. It was critical for NABL to support efforts to mobilize state and local governments and the bond industry in an effort to support tax exempt finance. We (especially Amy Dunbar) worked closely with the recently created Public Finance Network. NABL provided substantive support to the effort and also rallied its members to provide political support.

Additionally, there were significant initiatives undertaken during the year:

- Drew Kintzinger chaired the Education Committee, with Neil Arkuss providing Board oversight. Drew evaluated and surveyed NABL members and produced a report on our educational programs.

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*Do you receive NABLNET Alerts?*

- Bruce Johnson of Morrison & Foerster produced a new Blue Sky Survey edition in 1990.
- Paul Schilling (Mulcahy & Wherry) responded to a perceived need at that time to create a “job bank” to match bond lawyers with potential employers.

I have completed my drift away from bonds and am now spending full time representing clients that are being investigated by congressional committees or the General Accounting Office. I reflect back with great pride on my years as a bond lawyer and on the opportunity to serve as President of NABL.

### **FREDRIC A. WEBER (1991 – 1992)**

Regrettably, I wasn’t able to attend this past summer’s conclave of NABL’s past presidents. I asked Helen Atkeson (who now holds the position to which all presidents aspire — Immediate Past President) whether my inability to attend excused me from summarizing my term as President. She said that it did not, and I’m glad she did. Reviewing old records (and issues of *The Quarterly Newsletter*, as this publication was then known) to prepare this piece turned out to be a pleasant trip down memory lane.

Not surprisingly, in the five years that I served on the NABL Board (1988–1993) in general, and during the year that I served as President in particular, NABL’s principal activities continued to center around its two most important functions: (1) providing educational services to members and (2) improving public finance law, principally by commenting on proposed legislation and regulations. These were years in which the “founders” passed the baton to a second generation of NABL leaders, and in which several organizational initiatives were undertaken to preserve and enhance NABL’s function following the rapid growth of the public finance bar and NABL membership in the mid-1980s.

***Education Initiatives.*** From the beginning (and even before that, given the history of the

Bond Attorneys' Workshop), NABL’s continuing education programs have been marked by an open faculty and interaction with and among participants. After NABL’s first decade, though, it became apparent that these characteristics would not persist without conscious support. Consequently, with the support of the Board, the Education Committee instituted term limits for faculty and strongly encouraged faculty to develop faculty outlines to ensure that discussion focused on topical issues and that a dialogue among panelists and with participants was encouraged.

The Board also initiated measures to control the cost of educational programs. It explored ways for preparing course materials in-house through desktop publishing. At the same time NABL’s financial statements were reorganized to group together revenues and expenses for each educational event in order to make sure that they were being fairly priced. Among other results, this exercise called into question our prior practice of reprinting arbitrage materials each year as part of tax seminar materials. As a result, a task force was appointed to look into the separate publication of tax materials, which eventually gave birth to the subsequent publication of the handy *Federal Taxation of Municipal Bonds* and accompanying deskbook, followed a decade later by a similar securities law deskbook.

The real success of NABL’s education mission is, of course, attributable to the chairs, vice-chairs, and faculty for each workshop or seminar. NABL was lucky to have a cadre of capable, energetic volunteers to mount its seminars while I served on the Board. They made the Board look good.

During the year I served as President, the Opinions Committee was reconstituted to address the ABA “Silverado” report on legal opinions. The Silverado report had recommended a change in opinion practice that resembles today’s ISDA swap forms: a one-page opinion consisting largely of defined terms that could be understood only by close reading of an accompanying pamphlet. The committee produced an interim report that urged against this approach for bond opinions (which must be understood by unrepresented investors), even if the approach gained favor in corporate transactions. This issue turned out to be moot,

since the approach recommended in the Silverado report never took hold, even in the corporate sector, but the report highlighted the special function served by bond opinions and the peculiar responsibilities that we exercise in rendering them.

**Regulatory Comment Letters.** During the year I served as President, NABL submitted important comment letters on three proposed tax regulations (on arbitrage accounting, the two-year expenditure exception from arbitrage rebate, and transferred proceeds) and on the MSRB continuing disclosure initiative. These were important regulatory projects that desperately needed our advice and counsel.

In contrast to legislative activity in the mid-1980s, the tax regulatory process invited input from the bar and genuinely took that input into account in promulgating final regulations (and sometimes even before proposing regulations). Thanks to tireless, prompt work by our tax committees, NABL submitted thoughtful, succinct comment letters that (unlike those sometimes prepared by other bar associations) were submitted before the regulators had made up their minds. Consequently, I believe that our comment letters were influential and effective.

These years witnessed initial demands for continuing disclosure commitments from issuers, which culminated in amendments to SEC Rule 15c2-12 to effectively require commitments from most issuers as a condition to market access. Before those amendments, the buy-side tried to induce continuing disclosure through jawboning (rather than providing price incentives), and bond counsel were lambasted as being obstacles to voluntary disclosure. As NABL President, I spent some time defending the public finance bar for giving candid advice to our issuer clients and permitting them to reach their own conclusions in the interests of their constituents. It was one of the more satisfying aspects of the job.

**Organizational Initiatives.** The Board approved committee guidelines for use in organizing committees and their activities. Developed under my predecessor, Richard Chirls, they were first used while I served as President. The guidelines were intended to provide a process for continually enlisting and evaluating new volun-

teer members and providing leadership succession while maintaining continuity and access to experience and expertise. The Board also mounted an initiative to enlist more NABL members to avoid the “free ride” enjoyed by non-member lawyers in the public finance bar. I wrote to many lawyers and law firms who did not want to hear from me, but with little success. In retrospect, these initiatives were not very important. It is true that non-members enjoy some benefits of membership, *e.g.*, the benefit of NABL comment letters. But they miss the greater benefits that can be derived from our education programs (unless they pay substantially higher tuition), NABLNET Alerts, and other member services.

While I was on the Board (as today), NABL was fueled by the energy and wit of its volunteers. And it is the volunteers, more so than other members, who derive the most from membership. Those who give the most also get the most. The faculty who prepare course outlines, and the committee members who contribute to comment letters, grow greatly from the process. It is by giving so many of our members an opportunity to participate in productive, meaningful professional activities that NABL enjoys its greatest success.

As is true of my predecessors and successors, being NABL President took a big chunk of time out of my practice. Nevertheless, for many reasons (not the least of which are the great Board, faculty, committee, and other fellow volunteers with whom I got to interact), I feel richer for having served.

### **M. JANE DICKEY (1992 – 1993)**

The first meeting of each new Board of Directors is traditionally held during the Bond Attorneys’ Workshop, and the agenda is short but significant — the new president’s suggestions as to committees and their leadership. The Section 103 Compilation Editorial Board, consisting of Perry Israel, Jeanette Bond, and Lisa Soeder, was created in November, 1992. Sharon Stanton White prepared the last update to her *Section 103 Handbook* in the spring of 1993, and on March 16, 1993, I signed a contract for the publication of what is today known as *Federal Taxation of Municipal Bonds*, now published by

LexisNexis in nine loose-leaf volumes, together with the related Deskbook and CD-ROM.

Reading the minutes from just 10 years ago highlighted many changes in technology and culture. The Board lamented low interest rates of only 7 to 9%. All of the NABL publications were moved from typesetting to desktop publishing at considerable initial expense and effort. "After thorough discussion," the Board instituted a no-smoking policy at Board meetings, seminars, and all NABL-sponsored social events. Given the evident opposition to the policy by an honorary director, the no-smoking policy necessitated a change in the By-Laws to exempt ex-officio and honorary directors from expulsion from the Board for three consecutive absences. First class airfare was approved for Board members after the Treasurer estimated that this would cause only a 3 to 5% increase in travel expenses.

The legal issues faced that year included new arbitrage regulations, revisions to MSRB Rule G-36, and the *Cottage Savings* case. The Committee on Opinions was busy contemplating the Association's response to the ABA's Silverado Accord and examining the standards for tax opinions (sound familiar?).

The Association faced its most serious jolt when Rita Carlson announced that she would retire after the 1994 Bond Attorneys' Workshop. For most of us then, Rita personified NABL, and it was hard to imagine preserving the organization's member-driven ethic without her.

Committees undertook several big projects during the year. *Disclosure Roles of Counsel in State and Local Government Securities*, a joint project of NABL and the ABA, had last been revised in 1983. Jack Gardner, Paul Maco, and Amy Dunbar worked together to rewrite the entire book, which was then edited by Helen Atkeson and Fred Kiel and published during Neil Arkuss's tenure.

*The Function and Professional Responsibilities of Bond Counsel* was another work that had not been revised since 1983 — the same year the American Bar Association adopted the Model Rules of Professional Conduct, and the notion of bond lawyers as "counsel to the

transaction" persisted. The big issues that needed addressing were the absolute necessity that bond counsel identify a client, multiple representations, confidentiality, and conflicts of interests. This project was not concluded until Drew Kintzinger was president.

NABL submitted an *amicus curiae* brief in *Carbone vs. the Town of Clarkston*, a case holding a flow control ordinance to be an unreasonable restraint on interstate commerce.

Wally McBride asked to head up a special task force to investigate the delivery of notices to beneficial owners of bonds held by The Depository Trust Company. Wally was representing trustees on several defaulted bond issues and his problems with bondholder communications were legend. He also proposed drafting model indenture provisions for uncertificated securities, which were a fairly new concept at that time.

The Education Committee conducted a survey of all of the Association's seminars, critiqued seminar chairs, drafted timelines and guidelines for the conduct of the seminars, and recommended to the Board the adoption of a faculty rotation policy that set a maximum of three consecutive years for service on seminar faculty.

During the year membership increased from 2,700 to 2,988 and seminar attendance (excluding the Bond Attorneys' Workshop) from 948 to 1,030.

Board meetings were held at the Ritz Carlton in Naples, Denver's Brown Palace, Couchwood (a family-run compound on Lake Catherine, near Hot Springs National Park, Arkansas), and Vancouver. Some of the sleeping arrangements at Couchwood were bunkhouse style; Board members threatened to make reimbursement requests for pajamas.

## **ACTIONS BY THE BOARD OF DIRECTORS ON SEPTEMBER 18, 2003**

The Board of Directors of the Association met at 8:00 a.m., Chicago time, on Thursday, September 18, 2003, at the Palmer House Hilton in Chicago. President Linda B. Schakel presided.

Also present were Monty G. Humble, President-Elect; Meredith L. Hathorn, Secretary; Walter J. St. Onge III, Treasurer; Directors J. Foster Clark, John J. Cross III, Kristin H.R. Franceschi, William A. Holby, Carol L. Lew, Kathleen Crum McKinney and Cynthia M. Weed; Immediate Past President, Helen C. Atkeson; Kenneth J. Luurs, Executive Director; and William L. Larsen, Director of Governmental Affairs.

President Schakel welcomed the new Board members and then reviewed the schedule of forthcoming Board and committee meetings and educational programs. Other background materials that were provided to Board members were also reviewed.

### **NABL Committees and Task Forces**

President Schakel then presented her recommendations for Chair, Vice-Chair and Board Liaison/Advisor for each of NABL's committees and special task forces. It was noted that two Vice-Chair positions were open and that those would be approved at a subsequent meeting. Discussion followed regarding the recommendations and it was moved by Secretary Hathorn, seconded by Immediate Past President Helen C. Atkeson and unanimously approved by the Board that those persons named below be appointed to serve as Chair, Vice-Chair, Board Liaison/Advisor or members, as the case may be, of the respective committees and special task forces:

#### **Bond Attorneys' Workshop\***

Kathleen Crum McKinney, Chair  
Thomas G. Havener, First Vice-Chair  
Thomas V. Yates, Second Vice-Chair

#### **Education**

Scott R. Lilienthal, Chair  
Mary G. Wilson, Vice-Chair  
Kristin H.R. Franceschi, Advisor

#### **General Tax**

Patti T. Wu, Chair  
John J. Cross III, Advisor

#### **Opinions and Documents**

Linda D'Onofrio, Chair  
Kathleen Crum McKinney, Advisor

#### **UCC Article 9 Revisions Subcommittee**

Joan N. Stern, Chair  
William A. Holby, Advisor

#### **Model Indenture Subcommittee**

Charles H. Waters, Jr., Chair  
Georgeann Becker, Vice-Chair  
Helen C. Atkeson, Advisor

#### **Professional Responsibility**

Thomas K. Downs, Chair  
Andrew R. Kintzinger, Vice-Chair  
William A. Holby, Advisor

#### **Securities Law and Disclosure**

Kenneth R. Artin, Chair  
J. Douglas Rollow, Vice-Chair  
J. Foster Clark, Advisor

#### **Task Force on**

##### **Alternative Dispute Resolution**

J. Hobson Presley, Jr., Chair  
Carol L. Lew, Advisor

##### **Task Force on Rule 2a-7 Documents**

Paul S. Maco, Chair  
Monty G. Humble, Advisor

#### **Special Committee on Membership**

William G. Tonkin, Chair  
F.B. Webster Day, Vice-Chair  
Meredith L. Hathorn, Advisor

#### **Special Committee on Technology**

Gary L. Duescher, Chair  
Brant A. Freer, Vice-Chair  
Carol L. Lew, Advisor

#### **The Bond Lawyer® Editorial Board**

Scott R. Lilienthal  
John M. McNally  
Karen S. Neal  
Julianna Ebert  
Jeffrey D. Peelen  
Thomas N. Harding  
Frederick O. Kiel, Advisor

#### **Section 103 Editorial Board**

Michael G. Bailey, Chair  
Edwin G. Oswald, First Vice-Chair  
John O. Swendseid, Second Vice-Chair

John J. Cross III, Advisor

### **Securities Law Editorial Board**

Andrew R. Kintzinger

Paul S. Maco

John M. McNally

Thomas N. Harding

Walter J. St. Onge III, Advisor

### **Amicus Review**

James C. Pitney, Jr., Chair

William H. Conner, Vice-Chair

Cynthia M. Weed, Advisor

### **Bankruptcy**

James A. Spiotto, Chair

Frank D'Ercole, Vice-Chair

Cynthia M. Weed, Advisor

### **Legal Assistants**

Nancy Mendenhall, Chair

Joetta M. Bowie, Vice-Chair

Kristin H.R. Franceschi, Advisor

### **GASAC Representative**

William L. Hirata

J. Foster Clark, Advisor

\*Included for convenience of reference.

President Schakel encouraged Board members to be "activists" with their committees and to continue to look for new committee members as a way of improving and broadening the participation in NABL. Staff was also requested to determine a better way of soliciting more participation in committees.

Meredith L. Hathorn, Secretary

## **ACTIONS BY THE BOARD OF DIRECTORS ON SEPTEMBER 17, 2003**

The Board of Directors of the Association met at 8:30 a.m. local time on September 17, 2003, in Chicago. President Helen C. Atkeson presided. Also present for the meeting were Linda B. Schakel, President-Elect; W. Jackson Williams, Secretary; Monty G. Humble, Treasurer; Directors John J. Cross III, Kristin H.R.

Franceschi, Meredith L. Hathorn, William A. Holby, Carol L. Lew, and Walter J. St. Onge III; Immediate Past President William J. Noth; Honorary Director Frederick O. Kiel; Kenneth J. Luurs, Executive Director; and William L. Larsen, Director of Governmental Affairs.

### **Bond Attorneys' Workshop**

Director Franceschi, Chair of the 2003 Bond Attorneys' Workshop, made the following report to the Board:

Plans for the 2003 Workshop are now complete and the Steering Committee and panelists are looking forward to another successful Bond Attorneys' Workshop. Due to Hurricane Isabel, Doug Rollow will be unable to make the presentation on securities law during the general session. He obtained the services of Martha Mahan Haines of the Securities Exchange Commission to substitute in his behalf. Registration is in the 900s, which is similar to the Workshop last year.

### **Education Committee**

Director Hathorn, Liaison to the Education Committee, made the following report:

*Ethics Teleconference.* The Education Committee recommended Marc Oberdorff as Chair and Linda D'Onofrio as Vice-Chair to present this teleconference. Upon motion by Director Hathorn, seconded by President-Elect Schakel, their election as Chair and Vice-Chair of the ethics teleconference was unanimously approved by the Board.

*Tax and Securities Law Institute.* Planning has now started for the 2004 Tax and Securities Law Institute; a further report on the plans for the Institute will be provided subsequently. The Board approved raising the registration limit for 2004 to 350 registrants.

*2004 Fundamentals Seminar.* The plans for the 2004 Fundamentals Seminar have just begun.

### **Executive Director's Report**

Executive Director Kenneth J. Luurs made the following report to the Board:

*Membership.* As of this date, the total membership is 3,214, compared to 3,091 at this time last year. Mr. Luurs believes that this is the highest the Association's membership has been. By category, membership is as follows:

	<u>2003</u>	<u>2002</u>
Members	2,758	
2,661		
Associates	246	
237		
Legal Assistants	200	
182		
Retired	10	
11		

*Bond Attorneys' Workshop.* Director Luurs confirmed that current enrollment for the 2003 Bond Attorneys' Workshop was above 900 and said that last minute registrations could push this figure even further.

*New Logo.* Implementation of the new logo has begun. Its first appearance is in some of the signage at the 2003 Bond Attorneys' Workshop. Plans are underway to begin using the new logo with all Association material, from letterhead and business cards to publications, commencing this fall.

*Board Minutes.* The staff is accumulating all of the past minutes of the Board of Directors' meetings since the inception of NABL and intends to place them on a CD Rom.

*Miscellaneous.* Plans for the 2004 Budget are underway and will be made available at a subsequent meeting of the Board. Steps are underway to engage the services of a financial advisor, as will be reported by the Treasurer.

### **Special Committee on Technology**

Director Lew made the following report of the Special Committee on Technology:

Director Lew reviewed with the Board the contract documents necessary for the Association to effect the implementation of software improve-

ments, and the pricing of the implementation of this software and the timetable for its implementation. At the conclusion of this review, Director Lew moved, seconded by Director St. Onge, the passage of a resolution authorizing execution of the necessary license and consulting contracts. The motion was unanimously adopted.

The Board commended Director Lew for her diligent work in bringing these contract documents to completion.

### **Treasurer's Report**

Treasurer Humble made the following report to the Board:

The newly formed Finance Committee had met on August 20, 2003 and September 16, 2003, Treasurer Humble presiding.

*August, 2003, Financials.* The Finance Committee had reviewed the August financials for the Association and determined that they were favorable for the budget; revenues were slightly less than last year at this same time.

*Financial Advisor.* The Finance Committee reported its selection of Olcott Consulting Group, and would be meeting with its representatives to discuss financial objectives and details of the engagement. The Board ratified the engagement of Olcott Consulting Group as the Association's financial advisor, subject to the Finance Committee's approval of its contract.

*Review of Operations.* The Committee will undertake a focused assessment in particular areas of the Association's operations. The purpose of the project is to enable the Finance Committee on behalf of the Board to confirm that major areas of responsibility have been reviewed and compliance with legal internal control standards have been confirmed.

*Outside Auditor.* The Finance Committee, after a review of proposals and oral presentations of the short list, has selected the firm of Blackman Kallick Bartelstein LLP, Chicago, Illinois, as the firm's outside auditor for the coming year.

*Seminar Fees.* The Finance Committee will undertake a review of seminar fees for the coming year and will make a report and recommendation to the Board.

## **Governmental Affairs**

Director of Governmental Affairs William L. Larsen made the following report to the Board:

*NASACT.* The National Association of State Auditors, Comptrollers, and Treasurers (NASACT) will hold another disclosure meeting in Washington on September 25, 2003. The Board suggested that Treasurer Humble attend this meeting with Mr. Larsen.

*Tax Simplification.* On August 21, 2003, Director Cross, President-Elect Schakel, and Mr. Larsen met with the Joint Tax Committee staff to review the Association's paper and recommendations on tax simplification. The Joint Tax Committee staff seemed particularly interested in suggestions for how to offset the cost of proposed simplification measures, which suggests the current budget deficit situation will definitely have an impact on whether the Joint Committee on Taxation will support tax simplification in the tax exempt bond area.

*Public Finance Network.* Susan Gaffney and Mr. Larsen met to discuss the Public Finance Network's plan to develop a catch-all bill for tax exempt bond provisions. Further meetings with Ms. Gaffney and others of the Public Finance Network will determine whether in fact such an overall Public Finance Network proposal will be made.

*Municipal Securities Rulemaking Board.* The MSRB might invite various trade associations to get together in January to compare agendas. Mr. Taylor of the MSRB suggested a dinner in New York. Association attendees would be President Atkeson, President-Elect Schakel, Treasurer Humble, and Director St. Onge.

*Governmental Accounting Standards Advisory Council (GASAC).* The GASAC staff has prepared a survey entitled "Fund Balance Survey" to assess user needs regarding reporting of information on net assets and fund balances, and

to consider changes in existing reporting requirements. At Mr. Larsen's suggestion, the Board approved the posting of GASAC's survey on the Association website.

*Rule 2a-7 Task Force.* The Task Force has produced and circulated the first draft of its paper for comment.

## **Committee on Professional Responsibility Report**

Director Holby, Liaison to the Committee on Professional Responsibility, made the following report to the Board:

The Committee held a conference call on August 15, and as a result of that call, revision of the 1995 Edition of the Association's *The Function and Professional Responsibilities of Bond Counsel* is underway. Areas of responsibility have been identified and assignments have been made for respective portions of the report. The Committee expects to hold a meeting in connection with the Bond Attorneys' Workshop.

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*On which NABL committee do you serve?*

## **General Tax Committee**

Director Cross, Liaison to the General Tax Committee, made the following report to the Board:

Ms. Patti Wu is working on comments on the recently issued Internal Revenue Service Proposed Regulations relating to application of the private activity bond test to refunding issues. Work on the project is continuing and should be submitted to the Internal Revenue Service in the next two weeks. The Service has determined not to have a hearing in connection with these Proposed Regulations. Ms. Wu's comments will be circulated to the Board as they near completion.

W. Jackson Williams, Secretary

## **ACTIONS BY THE BOARD OF DIRECTORS ON JULY 10 AND 11, 2003**

The Board of Directors met at 8:30 a.m. local time on July 10, 2003, in Avon, Colorado. President Helen C. Atkeson presided. Also present for the meeting were Linda B. Schakel, President-Elect; W. Jackson Williams, Secretary; Monty G. Humble, Treasurer; Directors John J. Cross III, Kristin H.R. Franceschi, Meredith L. Hathorn, William A. Holby, Carol L. Lew, Walter J. St. Onge III, John S. Overdorff; Immediate Past President William J. Noth; Honorary Director Frederick O. Kiel; Kenneth J. Luurs, Executive Director; and William L. Larsen, Director of Governmental Affairs.

### **Past Presidents' Reports**

In attendance at the Board of Directors' meeting were 19 of the 23 former Presidents of the Association. The Past Presidents, chronologically in order of their presidency, each made reports to the Board of events and developments during their tenure and summarized the principal projects then undertaken. Those making reports were: Bernie Friel (1979-80); Don Howell (1981-82); Fred Kiel (1982-83) and Pope McIntire (1983-84) (delivered by Sharon White); Harold Judell (1984-85); Jim Perkins (1985-86); Sharon

White (1986-87); Dean Pope (1987-88); Joe Johnson (1988-89); Ted Hester (1989-90); Richard Chirls (1990-91); Jane Dickey (1992-93); Neil Arkuss (1993-94); Drew Kintzinger (1994-95); Wally McBride (1995-96); Floyd Newton (1998-99); Howard Zucker (1999-2000); Hobby Presley (2000-01); and Bill Noth (2001-02).

The Past Presidents are to provide written versions of their comments, which will be published subsequently in *The Bond Lawyer*®. Also present was Amy Dunbar, former Director of Governmental Affairs. She gave a report of legislative and regulatory activities during her tenure in office. The Board commended all the Past Presidents and Ms. Dunbar for their reports and the historical record that they were providing. The Board was very grateful for their appearance and their consideration in making the trip to attend the Board meeting and in demonstrating their continued support of the Association.

### **Executive Director's Report**

Executive Director Kenneth J. Luurs made the following report to the Board:

*Membership.* Total Association membership is 3,147, compared to 3,098 for this same time last year, and is slightly better than the last four years.

*Logo.* The Board reviewed several proposed new logos for the Association. After discussion and comment on each of them, the Board directed the Executive Director to make the choice after consulting and reviewing his proposal with the Executive Committee. The final recommended logo will be reported to the Board at its September meeting.

*Dues.* After a review of the dues history of the Association and a discussion of present resources, the Board, upon motion by Treasurer Humble, seconded by Director Cross, moved that no dues increase be implemented for 2003-2004.

## **Governmental Affairs**

Director of Governmental Affairs William L. Larsen made the following report to the Board:

*Muni Council.* The Muni Council met in Washington on May 28, 2003. President Atkeson attended as the Association's representative, and Director St. Onge and Mr. Larsen attended as observers. At this meeting, the Muni Council considered structural and funding issues related to forming a central post office/NRMSIR facility. The Council generally agreed that its next step should be to consider formation of an entity separate from the Muni Council to handle contractual and operational arrangements for any central post office/NRMSIR facility that may be formed. This separate entity would also select the outside contractor for providing the central post office/NRMSIR facility. Discussions regarding funding of any facility and any continuing advisory role to be played by the Muni Council are ongoing within the Council. The Bond Market Association is taking the lead in developing a proposal for the formation of a separate entity. The Association is continuing to work with a small group of attorneys within the Muni Council to consider various issues in connection with formation of a separate entity. The Association is in line later this year to share hosting duties for a meeting of the Muni Council along with other industry advisor groups.

*NASACT.* The National Association of State Auditors, Comptrollers and Treasurers ("NASACT") recently hosted an informational meeting on issuer interim disclosure of financial and operational information on a basis more frequent than annually. A diverse group of market participants attended the meeting, including, among others, representatives from government agencies that compile economic data from state and local governments, market analysts and various issuers. Treasurer Humble and Mr. Larsen attended for the Association. While information users such as analysts

applauded the concept of more frequent disclosure, concerns were raised whether there is a market demand for interim disclosures; whether many issuers have the resources or the real need to provide such disclosure; and the importance of distinguishing between the legal obligation to disclose and voluntary disclosure. The meeting resulted in no consensus or recommendations on the issue of interim disclosure. NASACT plans to prepare a paper summarizing the meeting and the views expressed for participant comment later in the year.

*Tax Simplification.* Director Cross and Mr. Larsen have submitted the Association's paper on tax simplification to members of the House of Ways and Means and Senate Finance Committees as well as the staff of the Joint Committee on Taxation. They have urged congressional tax writers to consider the Association's simplification recommendations in connection with pending tax legislation as a low-cost effective means of helping state and local governments to cope with the rising costs of maintaining their traditional programs and services to citizens in the face of deficits and declining revenues.

Mr. Larsen reported that the Association's representatives had been invited to appear before a meeting in mid-August with members of the staff of the Joint Committee on Taxation and Internal Revenue Service personnel to discuss the Association's recommendations.

## **Special Committee on Technology**

Director Lew made the following report of the Special Committee on Technology:

The Committee along with Mr. Luurs and members of its staff had prepared a Request for Proposal for the purpose of selecting the Association's software provider. Eight firms have been selected to receive the Request, and the Association received responses from six. From these responses, two firms were selected for final review. Demonstrations of their respective software have been scheduled for July 17 and 18, 2003. After these demonstrations, the Committee should know which provider it prefers and the cost. The Committee will review its recommendation with President Atkeson. It will

then be reviewed by the Executive Committee before the recommendation is presented to the Board, which is anticipated to be at its September meeting.

### **Bond Attorneys' Workshop**

Director Franceschi, Chair of the 2003 Bond Attorneys' Workshop, made the following report to the Board:

Plans for the 2003 Workshop are basically completed and the Steering Committee is also completing all the necessary work for the presentation of each workshop. In evaluating new developments, the Steering Committee for the Workshop has given consideration to a special session on technology aspects of the practice. The Steering Committee has determined a final list of Securities and Exchange Commission and Internal Revenue personnel to be invited as panelists and Mr. Larsen is coordinating invitations.

### **Legal Assistants Committee**

Director Franceschi, liaison to the Legal Assistants Committee, made the following report to the Board:

Director Franceschi reported that the Legal Assistants Handbook was essentially complete, the last comments being obtained from Honorary Director Kiel. Upon motion by Secretary Williams, seconded by Director Overdorff, the Board authorized the Legal Assistants Handbook to be made available to the membership via the Association's website.

### **Education Committee**

Director Hathorn, liaison to the Education Committee, made the following report:

*Tax Regulations Teleconference.* On June 20, 2003, a free teleconference for members was held on the recently issued Internal Revenue Service Proposed Regulations relating to the application of the private activity bond test to refunding issues. Two of the principal authors of the proposed regulations presented the federal government's perspective, Steve Watson and

Bruce Serchuck, both of the Office of Tax Legislative Counsel, Department of the Treasury. The other panelists were Association members Director Cross, Mr. Ed Oswald and Ms. Patti Wu. Interest in the topic was high, with over 330 participants registering for the teleconference. Response has been positive, with many expressing support for the Association's continued use of these teleconferences to help keep members informed on important developments. The Board expresses its appreciation to Mr. Watson and Mr. Serchuck for their appearance and to Director Cross, Mr. Oswald and Ms. Wu for their work and participation in making this teleconference a success.

*Tax and Securities Law Institute.* Planning is underway by the Committee for the 2004 Tax and Securities Law Institute to be held in Las Vegas, Nevada. Mr. John Swendseid and Mr. Paul Maco are the Chair and Vice-Chair, respectively for the 2004 Institute. Overall, the 2003 format was felt to be a success and will be largely replicated in 2004. The session on Thursday will be open to all participants including government officials, and the sessions on Friday will be closed to all but Association members. The handheld devices used in the Friday sessions have been deemed a success and will be retained. The 300 person limit on registration will also be retained.

### **Special Committee on Membership**

Director Hathorn, liaison to the Special Committee on Membership, made the following report to the Board:

Plans for the 25<sup>th</sup> anniversary of the Association are underway, which include recognition of the founding members of the Association. Other acknowledgments of the Association's milestones are also under consideration.

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*Would you like to serve on a NABL committee? Contact Ken Luurs at 312/648-9590 (or e-mail [kluurs@nabl.org](mailto:kluurs@nabl.org)).*

## **Securities Law and Disclosure Committee**

Director St. Onge, liaison to the Securities Law and Disclosure Committee, made the following report to the Board:

*2a-7 Task Force Project.* Members of the committee continue to work with Mr. Maco and others of the 2a-7 Task Force, a conference call on the work of the Task Force having been held in late June, 2003.

*Securities Law Deskbook.* Some 180 subscriptions to the Securities Law Deskbook have been sold and another direct mail for the Securities Law Deskbook, which will also include the Tax Law Deskbook, is being prepared. The Committee would consider the use of a CD-ROM for the Securities Law Deskbook when more subscriptions are sold. The Committee will consider what updates to include in the Securities Law Deskbook in 2004.

## **GASAC Project**

Director Overdorff, liaison to the Association's representative to GASAC, made the following report:

*Technical Bulletin 2003-1.* The Government Accounting Standards Board has issued Technical Bulletin 2003-1, "Disclosure Requirements for Derivatives Not Reported at Fair Value on the Statement of Net Assets." The Technical Bulletin was the subject of an Association NABLNET Alert upon its publication and a synopsis of a preliminary draft appeared in the June 1, 2003, issue of *The Bond Lawyer*®. The Technical Bulletin was to be effective for financial statements as of the end of 2003. The Government Finance Officers Association expressed opposition to this timing. The GASAC staff reported that it would be soliciting contributions from the 200 largest cities and 100 largest counties towards the cost of this project. The Board discussed whether the Association should make any contribution toward this effort and determined that since the report was not the initiative of the Association, the Association would not contribute to the cost of this project. It asked Director Overdorff to communicate this decision

to Bill Hirata, the Association's representative to GASAC.

## **Amicus Review Committee**

Director Overdorff, liaison to the Amicus Review Committee, made the following report to the Board:

The Committee and Director Overdorff had received requests that the Association file *amicus* briefs in the United Airlines bankruptcy case (special facility lease litigation) and in the Holmes Harbor Sewer District bond litigation. The Committee reviewed these cases with President Atkeson and President-Elect Schakel. The Board determined that it was not the policy of the Association to do so at this time as the cases were not at the appellate level.

## **Committee on Professional Responsibility**

Director Holby, liaison to the Committee on Professional Responsibility, made the following report to the Board:

Following the Board's decision to revise and update *The Function and Professional Responsibilities of Bond Counsel*, the Committee had been working to put a group of Association members together to implement the project. Organization efforts will be continuing during the next few weeks. The Committee expects to have a progress report to make at the September meeting of the Board.

## **General Tax Committee**

Director Cross, liaison to the General Tax Committee, made the following report to the Board:

(a) The Association had submitted its "top ten" letter of suggested matters for inclusion in the U. S. Treasury/Internal Revenue Service Priority Guidance Plan for the year beginning July 1, 2003.

(b) Patti Wu is working on comments on the recently issued Internal Revenue Service Proposed Regulations relating to application of the private activity bond test to refunding issues.

Work on the project is expected to be completed by August when comments are due to be filed.

(c) The Committee is considering a record keeping for municipal bonds project.

(d) Director Cross met with staff of the Tax Legislative Council, Department of Treasury, to consider a project on mixed use and will endeavor to get a working draft to the Tax Legislative Counsel within the next two or three weeks.

(e) The Section 103 Editorial Board continues its work on making incremental improvements to *Federal Taxation of Municipal Bonds*, including the identification of minor post-production errors and formatting enhancements. It also plans to turn its attention to the general question of the organizational materials and subject matters within *Federal Tax of Municipal Bonds*, with a view towards enhancing the rationalization and ordering of presentation in the books.

### **Policy Regarding Intellectual Property**

Director Holby, at the request of President Atkeson, led a further discussion with respect to the Association's policy regarding written materials and other intellectual property, which policy was adopted at the May meeting of the Board of Directors. Under the policy, all authors of Association material must assign to the Association all rights of copyright in the material. Authors contributing to certain key Association publications, including *Federal Taxation of Municipal Bonds*, the Securities Law Handbook, and the Fundamentals of Municipal Bond Law workbook, must execute an outright assignment, with no rights reserved by the author/contributor. Otherwise, the Association will permit the author to retain certain rights with respect to contributed material. In particular, authors of material for the Bond Attorneys' Workshop, Tax and Securities Law Institute, or any other of the periodic Association teleconferences as well as contributors to *The Bond Lawyer*®, may retain the right to use those materials for internal/professional purposes that are non-competitive with the Association.

At the May meeting of the Board, Director Franceschi was asked to review the current form

of Author's or Contributor's Assignment in an effort to generate alternative forms, depending on the reservations of rights being retained by the author. A matrix or grid setting forth each Association publication, the proper form to use, and a brief summary of the underlying considerations was presented to the Board for its consideration. Due to concerns regarding authors who might want to retain the right to use the material for various other purposes, the matrix and compilation of forms provide alternative forms or license agreements, for use in appropriate circumstances. After a review of the submitted matrix or grid and the respective forms, upon motion by Secretary Williams, seconded by Director Immediate Past President Noth, the Board unanimously approved the use of the matrix/grid and the forms which had been presented at the meeting. The Board further resolved that the matrix/grid and forms would be considered part of the policy adopted at the May meeting of the Board.

### **Treasurer's Report**

Treasurer Humble made the following report to the Board:

*Second Quarter Numbers.* The Board reviewed the Statement of Financial Position of the Association as of June 30, 2003, covering the second quarter. Both expenses and revenues continue to be in line with reasonable expectations, and the Board was either within or close to its budget plan for the year.

*RFP for Auditors.* The Board reviewed the proposed Request for Proposal for new auditors. Treasurer Humble advised that he expected that the RFP would be out in a week or so, with responses to be reviewed by the Finance Committee, and a short list then to be interviewed by the Finance Committee. The Finance Committee will complete its evaluation of proposed auditors and will recommend a selection which will be made by the Board at its September meeting. Upon motion by Treasurer Humble, seconded by Director Hathorn, the Board approved the use of the proposed RFP and the plans of the Finance Committee to review responses and make a recommendation to the Board.

*Finance Committee.* The Board reviewed the resolution establishing the Finance Committee which had been made a part of the minutes of the May meeting and approved at that time. Pursuant to the resolution, President Atkeson reported that she had appointed Director St. Onge to the Finance Committee.

*Investment and Spending Policy.* The Board reviewed again the proposed Investment and Spending Policy. Changes were made to reflect the Finance Committee's new duties and responsibilities.

Director Humble called to the attention of the Board that the Investment Policy as proposed did not permit investment of Operating Reserve funds in checking accounts in excess of the federal deposit insurance limit, and that it has been the policy of the Association to allow balances in excess of \$100,000 in circumstances where either there are checks written and outstanding in an amount in excess of \$100,000, or there are items that have been deposited for collection that are not yet collected and available to be transferred to the Association's investment accounts. It is the policy of the FDIC to ignore checks outstanding when determining the insured amount, and to count funds in process of collection when determining the insured amount. Mr. Luurs explained to the Board that this policy permits the Association to avoid substantial charges associated with dishonored checks or alternative arrangements that would be complex to administer. After full discussion of the alternatives, and with the understanding that the occasions when the balances exceed \$100,000 are very infrequent, the Board determined that the proposed investment policy should be amended to permit balances in excess of \$100,000 in the circumstances described so long as the depository bank maintained a credit rating in the investment grade category.

This determination of the Board was effected by a motion by Treasurer Humble, seconded by Immediate Past President Noth, and unanimously approved, and the Investment Policy as reported was amended accordingly.

*Financial Consultant.* The Board reviewed letters received from firms expressing interest in being the financial consultant to the Association.

After deliberation, the Board delegated to the Finance Committee the authority to make a selection of a financial consultant, with the Finance Committee to come back to the Board in September with a report of its decision and action. This delegation of authority to the Finance Committee was moved by Treasurer Humble, seconded by Director Overdorff and unanimously approved by the Board.

### **Awards**

The Board of Directors, after a review of recommendations received and due deliberation of all relevant factors, upon motion made and seconded, unanimously approved recipients for awards of the Association as follows:

Distinguished Service Award to Rita J. Carlson; and

Bernard P. Friel Medal to Jeffrey S. Green and to Henry S. Klaiman.

The Board expressed its appreciation to the recipients of the respective awards of the Association for their dedicated service.

### **Task Force on Alternate Dispute Resolution**

Immediate Past President Noth, liaison to the Task Force on Alternate Dispute Resolution, reported that the Task Force is working on a final report of its activities and the status of its work to the Board and to the Association, but that it would not be available at the 2003 Bond Attorneys' Workshop.

W. Jackson Williams, Secretary

## WASHINGTON SAGA

Greetings from Washington.

Hoping to make it out of town before Thanksgiving, Congress is hard at work this week. Topping the agenda are major energy and Medicare bills, along with spending bills for the current fiscal year. The success and productivity of the first session of the 108<sup>th</sup> Congress probably will be judged on whether the controversial energy and Medicare measures make it to President Bush's desk before yearend.

Republican lawmakers hammered out the final forms of the bills largely without Democratic input. Not surprisingly, given the importance and contentiousness of this legislation, Democratic protests about being excluded from the legislative process have resounded, accompanied by threats to derail both proposals. Unfairly kept in the dark or not, however, Democrats are in a tricky position. They might be able to stop these bills in a closely divided Senate — but they risk being labeled as obstructionists and could face some backlash from voters. Last summer's extensive power blackout, combined with continuing concerns about dependence on foreign energy sources, have increased public pressure for energy legislation. Medicare reform also is a hot button issue as both parties vie for the all-important seniors' vote in next year's elections.

Just to make it harder on the Democrats, Republicans cleverly crafted the bills to make them at least somewhat attractive to bipartisan support, and in particular local and regional instances, very attractive. Thus Republican conferees dropped the Arctic National Wildlife Refuge drilling provision from the energy bill, but included language that would double the use of ethanol, a popular agriculturally-oriented proposal that appeals to farm-state legislators of both parties. As for the Medicare bill, while Democrats may believe that the prescription drug provisions undermine the Medicare program, they cannot ignore that the Republicans managed to make the bill attractive enough to secure the endorsement of the AARP, the nation's most influential seniors group and traditionally a Democratic ally. Adding insult to injury, the AARP has launched a \$7

million advertising campaign this week to promote the Republican Medicare bill.

[Larsen photo]

Outweighing concerns about voter backlash, the major advantage that would flow to Democrats if they defeat the Medicare and energy bills is that it keeps the issues alive for the 2004 elections. Medicare is an issue the Democrats have used to punish Republicans in the past and they would doubtless like to use it again to criticize Republican inability to fix the system. Similarly, if Congress does not pass an energy bill this year, the Democrats can hammer away at the Bush administration's failure to address the nation's energy problems. On the other hand, if the Republicans win on these bills, they can point to tangible legislative achievements while Democrats are left to fight a defensive battle on the issues in 2004.

Both the energy and Medicare bills appear to be going down to the wire, in as close to high drama as the Congressional legislative process can muster. The energy bill passed the House 246-180, but faces a tougher test in a divided Senate. Even though they are not unified in opposition to the bill, Senate Democrats are considering a filibuster to prevent passage. A filibuster would require 41 votes to sustain, and would almost certainly require some Republican votes against the energy bill if farm-state Democrats decide to support it.

Amidst considerable indecision on both sides of the aisle, both House and Senate are poised to take up the Medicare bill. Among other concerns, conservatives of both parties criticize insufficient private sector involvement and liberals question whether there is too much. Passage of the bill remains a close call.

Not to be overlooked as Congress rushes to leave town are the several remaining appropriations bills, which provide funding for government operations for the current fiscal year. Lawmakers have crafted a \$284 billion omnibus spending package covering the agencies and programs that remain technically unfunded for FY 2004. The appropriators' goal is to enact the omnibus bill and avoid having to pass another continuing resolution carrying over the appropriations process into next year, as happened in FY 2003. The big sticking point for the omnibus appropriations bill may be a Senate amendment to the appropriation for Labor and Health and Human Services that would prevent the Labor Department from enforcing rules making it easier for employers to deny overtime pay to white-collar workers.

### **Muni Aspects of the Energy Bill**

The pending energy bill is the most comprehensive energy legislation since 1992. Amidst billions of dollars worth of far-reaching provisions aimed at the oil, gas, and coal industries, renewable energy sources, and coastline remediation, the energy bill contains several provisions applicable to municipal bonds. The bill provides added flexibility for municipal utilities that issue bonds to prepay long-term contracts for natural gas. The bill's language expands on existing IRS regulations to allow public gas utilities to base the size of a prepayment contract on the average amount of gas used over the previous five years. Using this provision, a utility would not have to defease its bonds if it sold less than 90%

### **PHOTOGRAPHED AT THE BOND ATTORNEYS' WORKSHOP**

The Association's new contract photographer was *particularly* active at the 28th Bond Attorneys' Workshop. There follows a more or less random selection of his handiwork; supply your own captions.









of the prepaid gas to retail customers in its service areas. The bill clarifies that issuers can issue tax-exempt bonds to purchase prepaid gas contracts of privately owned gas or electric companies without violating private activity bond restrictions. Another provision of the energy bill creates a brownfields demonstration program that allows aggregate issuance of up to two billion dollars of "green bonds" to finance environmentally efficient buildings in areas that include designated brownfield sites. The bill's ethanol tax credit provisions would add up to two billion dollars to the highway trust fund, which could be used to back bonds to finance road and transit projects.

### **QZAB and D.C. Enterprise Zone Program Extension**

The House has approved and the Senate is considering measures to extend the qualified zone academy bond program and District of Columbia tax-exempt enterprise zone bonds. Both programs currently expire on December 31, 2003. The House bill would extend the programs for one year and the Senate's for six months. Congress consistently has extended the QZAB program during its six-year history.

### **Internet Tax Moratorium**

State and local government advocacy groups stepped into the political limelight this fall to wage a high profile campaign against pending legislation to permanently extend the Internet tax moratorium, which expired on November 1. So far their efforts have succeeded despite sometimes acrimonious debate and tech industry stealth attack infomercials warning against greedy State and local officials who would tax citizens' right to surf the Internet. Until the State and local groups mobilized, a permanent Internet tax moratorium appeared destined for easy passage. The Internet Tax Nondiscrimination Act (H.R. 49), introduced by Representative Cox (R.-CA), passed the House with little resistance or fanfare in September. Shortly afterwards, the Senate Commerce Committee reported out S. 150, a permanent moratorium bill sponsored by George Allen (R.-VA). While State and local groups recognized that permanent extension of the Internet tax moratorium could complicate their efforts to expand the ability to tax remote sellers, it

was language of the extension bills that arguably created a loophole for exemption from taxation for an array of communication services broader than just internet access that galvanized the groups into action. They got the attention of Senators, such as former Tennessee governor Lamar Alexander (R.-TN), who are sympathetic to the fiscal needs of State and local governments. Senator Alexander was persuaded that the Internet tax moratorium extension bill would cause a significant loss in tax revenue — effectively constituting an unfunded Federal mandate — and agreed to put a hold on S. 150. Several other Senators joined Mr. Alexander and placed additional holds. Moratorium extension proponents, particularly Senator Wyden (D.-OR), vigorously protested the "eleventh hour" efforts to defeat the bill, charging that failing to extend the ban amounted to a tax increase. Notwithstanding, S. 150 stalled.

There have been attempts to broker a compromise. Senate Finance Committee Chairman Grassley (R.-IA) offered language to clarify that telecommunications services would only be exempt from taxation to the extent that such services provide internet access. State and local groups rejected this approach as not going far enough to cure what they deem an unacceptably broad tax exemption. State and local groups have signaled support for a two-year extension of the moratorium proposed by Senators Alexander and Carper (D.-DE) to provide supporters and opponents an opportunity to work out their differences on Internet taxation issues. Permanent extension proponents have been slow to accept another temporary moratorium and assert that the door must be closed on Internet access taxation before States and localities enact new taxes now that the moratorium has expired. Senator Carper predicts the Senate will take action to temporarily extend the moratorium before adjournment, but the length of any extension is still an open question. Regardless, by slowing or stopping permanent extension of the Internet tax moratorium, State and local advocacy groups have demonstrated their lobbying clout on this issue.

### **Qualified Small Issue Bonds**

There was some recent Senate activity in the effort to expand the qualified small issue bond program. On October 1, the Senate Finance

Committee approved S. 1637, the “Jumpstart Our Business Strength (\_JOBS\_) Act,” which eliminates an export tax subsidy ruled illegal by the World Trade Organization in 2002, but also adds more international tax relief and expands manufacturing tax benefits. One of the domestic relief provisions of S. 1637 expands the qualified small issue bond program. This provision would increase the maximum allowable amount of total capital expenditures by a business in the same municipality or county during the applicable six-year period from \$10 million to \$20 million. The provision would not change the present law requirement that no more than \$1 million of small issue bond financing may be outstanding at any time for property of a business (including related parties) located in the same municipality or county. As under present law, this \$1 million limit may be increased to \$10 million if all other capital expenditures of the business in the same municipality or county over a six-year period are counted toward the total capital expenditures limit.

The next stop for S. 1637 is the Senate floor. However, Senate Finance Committee Chairman Grassley (R.-IA) recently predicted that if Congress were not in session in December, there would be no action on the bill until next year, despite the considerable pressure that the Administration and Congress have been under to pass an export tax repeal bill and thereby avoid trade sanctions threatened by the European Union.

If S. 1637 passes the Senate, the expansion in the qualified small issue bond program may see passage as part of an export tax repeal package, depending on what happens in the House. In late October, the House Ways and Means Committee also approved an export tax repeal bill (H.R. 2896), but it did not include any expansion in the qualified small issue bond program.

S. 756 (introduced by Sen. Thomas, R.-WY) and H.R. 882 (introduced by Rep. English, R.-PA) are companion freestanding bills that would raise the \$10 million limit on qualified small issue bonds to \$20 million, adjust the limit annually for inflation, and expand the definition of eligible manufacturing facilities. Mr. English’s bill also would make small IDB issues bank-qualified. So far, these bills have not progressed independently. Senator Thomas was unsuccessful in attaching the

language of S. 756 to the President's tax cut bill last spring.

## **Muni Council Update**

NABL has participated in the Muni Council, an informal coalition of a number of representative industry groups looking into ways to improve secondary market disclosure, since the Council's formation two years ago. From the outset, the Council has consulted with the SEC regarding its actions. Last year, in an effort to improve disclosure under the Nationally Recognized Securities Information Repository (NRMSIR) system established under Rule 15c2-12, the Muni Council agreed to develop a request for proposals to determine the cost and mechanics of establishing a centralized “post office” (CPO) where all issuers could file their disclosure documents for electronic distribution to the NRMSIRs and State Information Depositories (SIDs). The central post office would also create a filing index, as well as systems for acknowledging receipt of issuer filings and notifying issuers of when disclosure documents are due. As it evolved in early 2003, the RFP process envisioned the CPO also becoming a NRMSIR. Last spring, the Council selected five final bidders to submit proposals to create the CPO/NRMSIR facility. Continued Council discussions last summer resulted in a consensus shift in direction for the RFP process to implement a CPO-only proposal as a first step. In early October, 2003, the Council announced its proposal shift to the vendor finalists and the press, and requested that the vendors resubmit their bids to reflect a CPO-only project. Four vendors, including NRMSIR Bloomberg Municipal Repository, NRMSIR subsidiary Dissemination Partners, SID Municipal Advisory Council of Texas (Texas MAC), and Wall Street on Demand submitted final bids.

The Muni Council met in Washington, D.C., on November 12 to consider the bids. Based on consensus reached at the meeting, the Council announced its decision to recommend to the SEC that the Commission take regulatory action to enable creation of a single CPO; make filings at the CPO satisfy current 15c2-12 filing requirements; ultimately mandate that all such disclosure filings be made through the single CPO; and mandate that disclosure filings use a cover sheet

with CUSIP numbers and other information to facilitate accurate indexing and identification of filed documents. Based on its consideration of the final RFP bids, the Council recommended to the SEC that the Commission designate Texas MAC as the single CPO. The winning Texas MAC bid offered a zero cost alternative for electronic filings and a nominal cost alternative for transitional paper filings. The Muni Council expects to have a continuing advisory role with the CPO to ensure that the CPO meets the needs of the overall municipal marketplace as well as individual market sectors. Council members agreed that their organizations would actively educate their members about the importance and effective utilization of the CPO and also committed to assisting the SEC in developing and supporting appropriate regulatory action.

NABL President Linda Schakel is NABL's current representative on the Muni Council. NABL Treasurer Walter St. Onge and I attend meetings as observers. The Muni Council includes, among other groups, the American Bankers Association, Government Finance Officers Association, Investment Company Institute, National Association of State Treasurers, National Council of State Housing Agencies, National Federation of Municipal Analysts, and The Bond Market Association.

### **NASACT Interim Disclosure Proposal**

The National Association of State Auditors, Comptrollers, and Treasurers (NASACT) held a meeting in Washington on September 25, 2003, to follow up on the voluntary interim disclosure meeting NASACT sponsored on May 22 and 23. NABL President-Elect Monty Humble and I attended the follow-up meeting. Discussion centered generally on the possible development of suggested voluntary quarterly disclosures along with cautionary information and disclaimers. NABL did not take a position on the interim disclosure proposals under discussion. NASACT may develop a white paper on the subject of interim disclosure. The NASACT initiative was on the disclosure/securities law hot topics panel agenda at the 2003 Bond Attorneys' Workshop.

### **Notes on the Regulators**

Pam Olsen, Treasury Department Assistant Secretary for Tax Policy, continues to advocate more guidance from the IRS as a way to encourage tax fairness, compliance, and simplicity. In an October speech to the American Law Institute-American Bar Association conference on consolidated tax returns, she acknowledged that "too often in the regulatory area, we have behaved as though we were having a monologue rather than a dialogue and we issue an announcement and just expect people to fall into line without having a discussion of whether or not it works." She noted that Treasury is trying to increase opportunities for communication with taxpayers and that issuing more guidance is an important part of that effort. Earlier in the fall, in a speech to the Federal Tax Committee of the Chicago Bar Association, Assistant Secretary Olsen also emphasized the "clear need" to simplify the tax code.

The IRS has published a request for nominations of a tax-exempt bond member to serve for a two-year term on the IRS Advisory Committee on Tax Exempt and Government Entities (ACT) beginning in May 2004 (68 F.R. 62660, November 5, 2003). The ACT is an organized 18-member public forum for discussion of relevant employee plans, exempt organizations, tax-exempt bonds, and state, local, and Indian tribal government issues between officials of the IRS and representatives of the tax-exempt and government entities community. The advisory committee term of former Association Board member Perry E. Israel, who currently serves as one of the ACT's two designated tax-exempt bond members, is scheduled to end next spring. The deadline for nominations is December 5, 2003.

### **Website/NABLNET Update**

Our recent NABLNET Alerts to members have included the General Tax Committee's Comments on IRS Proposed Regulations regarding the Application of Private Activity Bonds Tests to Refunding Issues; the GASB Survey of Users of Government Net Assets and Fund Balance Information; and the Report of the NABL *Amicus* Review Committee regarding the United Airlines bankruptcy and the Holmes Harbor Sewer District bond litigation. If you are not receiving the Alerts and you would like to, please send your e-mail

address to **governmentalaffairs@nabl.org** with NABLNET SUBSCRIBE in the subject line. Also, if you change e-mail addresses, please let us know so we can update our records.

We cordially invite you to visit the NABL website at **www.nabl.org**, where we frequently post legislative, regulatory, and other materials that are substantively pertinent to the bond law practice. In June, we introduced the new Members Only, password-protected, section of the NABL website. Documents available for reference or download in the Members Only section include Blue Sky Memoranda and Surveys; Form Indenture and Commentary; The Function and Professional Responsibilities

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*Volunteer to serve on a NABL committee;  
contact Bill Larsen at **wlarsen@nabl.org**.*

of Bond Counsel; Legal Assistant's Handbook; Model Bond Opinion Report; Model Engagement Letters; and a library of current and archived editions of *The Bond Lawyer*®. In the future, by way of emphasizing the value of Association membership, other important NABL special projects, publications, and committee reports will be reserved for member access and use in the password-protected area of the website. We welcome your feedback on the Members Only section, as well as on other aspects of the website.

### **Filibusters, Rawhide, Hooters, and Polluters**

Last week, Senate Republicans treated the citizenry to a veritable civics lesson in the use of filibusters.\* The Republicans decided to stage a marathon “reverse filibuster” to make a symbolic (and very long) statement of protest over Democratic use of the filibuster procedure to block four (out of 168) of President Bush’s judicial nominees. Not to be outdone, Democrats staged a counter-reverse-filibuster. When the dust settled, some 40 hours later, both sides thought they had made their points — the Republicans, that Democrats are unfairly abusing the system by preventing votes on administration judicial nominees, and the Democrats, that they are doing nothing more than using a tactic the Republicans used when they were in the minority to thwart the Clinton administration. Ironically, the symbolic filibuster ended with Democrats sustaining their filibusters of two more Republican judicial nominees.

The award for creative use of extraneous filibuster material goes to Senator Allen, who adapted the theme song from the venerable early sixties TV western *Rawhide* to criticize Democratic delaying tactics on judicial nominees. Instead of “movin’, movin’, movin’,” the Virginia Republican described the Democrats as “stallin’, stallin’, stallin’....”

Though it was in debate on the energy bill and not in a filibuster, the last word of this column goes to Senator John McCain (R.-AZ). Noting that the energy bill would provide financing assistance for a mall in Shreveport that will house, among other things, a Hooters restaurant, McCain said the bill would subsidize “Hooters and polluters.”

Bill Larsen  
Washington, D.C.  
November 21, 2003

\* As a quick aside, the word *filibuster* derives from Dutch and Spanish terms for freebooters and military adventurers, was first used in a legislative context in 1853, and subsequently came to mean a delaying action on the floor of Congress. Glamorized in the 1939 movie *Mr. Smith Goes to Washington*, filibusters are usually thought of as extended speeches, but actually encompass parliamentary delaying tactics as well. Under Senate rules, it takes a 3/5 (60 votes) majority vote to invoke cloture and shut off a filibuster.

## NATIONAL OFFICE NEWS

While I oversee NABL staff at our National Office, I also serve on the board of another organization. Recently, a bit of a governance crisis developed for that organization; the legal counsel had reviewed the bylaws and rendered an

[Luurs photo]

opinion that suggested we were headed down a slippery slope to a crisis. Only a couple of officers were aware of the issue and when I was informed of the problem, I reviewed the bylaws and suggested that as I read them, there was not a problem at all. I contacted the legal counsel who had rendered the opinion and with just a moment of thought, he agreed. Crisis averted.

Afterwards, feeling a bit of glow that we had averted a dreaded succession crisis, I joked with one of the officers, "My NABL members would never have missed that definition in the bylaws. They can catch a misplaced comma on a flea's wing 100 yards out."

I have now had the privilege of working for and with many of you for the past three years. And I am very proud to be associated with this group of professionals. I hope that as we move forward, NABL will continue to be a compelling resource and forum for the exchange of viewpoints and ideas, and that we will not lose sight of the cause of our success: involved and dedicated professionals such as yourself.

NABL depends on its members. I am continually amazed at the professionalism and dedication of our members who spend countless hours researching and preparing materials for seminars, articles and books for their colleagues. That is inspiring.

In February, we will be celebrating NABL's 25<sup>th</sup> anniversary. As we approach that date, I would like you to take a moment and let us know if there is a colleague you would like to recommend for membership. A strong membership ensures our continued vitality. If you know of someone who is not a member and should be, please take a moment and drop me an e-mail at [kluurs@nabl.org](mailto:kluurs@nabl.org) or send me a fax with their contact information at 312/648-9588. We will send a tasteful invitation to join us. To those of you who have already forwarded such recommendations, thank you. Your help is greatly appreciated.

As you are filling in new calendar information for 2004, be sure to mark down the dates of NABL's seminars (see the Membership Services page at the back of this issue).

This year's Tax and Securities Law Institute will be held February 19-20, 2004, at the Venetian Resort Hotel and Casino in Las Vegas. This is a unique, members-only program that was developed based on input from members which suggested that they wanted a format that encouraged frank discussion of tax and securities issues. To keep a sharp focus for discussions, the attendance is limited and early registration encouraged.

The Fundamentals of Municipal Bond Law seminar has provided a gate to the profession for many over the past few years. This year's program will be held in Chicago at the Palmer

House Hilton Hotel from April 21-23, 2004. In addition to a well-designed program taught by seasoned faculty, Fundamentals provides excellent handouts and a huge reference book for review and research.

Finally, this year's Bond Attorneys' Workshop will be held at the Sheraton Chicago Hotel and Towers from September 8-10, 2004. Because of scheduling issues, we had to move this meeting to slightly earlier dates than in past years. The Sheraton will be a great showcase for our annual meeting. I have been assured that the Sheraton has "the fastest elevators in the city." I do hope you come and evaluate that claim as you head to the 29<sup>th</sup> Bond Attorneys' Workshop and help us conclude our organization's 25<sup>th</sup> anniversary festivities.

As we close out the year, I want to thank you once again for the privilege of working for and with you. I hope you and those you love have a wonderful holiday season and trust that we can all look forward to a peaceful and blessed new year.

Kenneth J. Luurs  
Executive Director  
November 14, 2003

## **MARTHA HAINES' GENERAL SESSION REMARKS<sup>1</sup>**

*Editor's Note: The following remarks were delivered at the Bond Attorneys' Workshop's General Session on September 18, 2003. Martha Mahan Haines is the Chief of the Securities and Exchange Commission's Office of Municipal Securities.*

Doug Rollow, who was scheduled to update you on the securities law developments of the past year, is not able to be here today. He lives on the Eastern Shore of Maryland and is busy trying to keep his waterfront home and earthly belongings from being swept away by Hurricane Isabel. Doug and I have consulted at length and I will try to give you his views. Usually I must warn you that I am not speaking for the Commission (and of course, as usual, I am not); instead, today I must warn you that I *am* speaking for Doug!<sup>2</sup>

## *Rulemaking*

During the last year the Commission has positively been gushing new rules and studies, many of them mandated by the Sarbanes-Oxley Act. They have covered almost every sector of the securities markets: corporate issuers, corporate officers, auditors and accountants, securities analysts, mutual funds, lawyers, rating agencies and on and on. As usual the Commission did not adopt any rules specifically directed at the municipal securities industry. However, some of those new rules apply to municipal market participants indirectly or under limited circumstances. Furthermore, the policies underlying some of the new rules may apply in the muni world too and supply good food for thought.

For example, last January the Commission adopted a final Rule implementing standards of professional conduct for attorneys who appear and practice before the Commission in the representation of registered or reporting companies.<sup>3</sup> If such a lawyer becomes aware of evidence of a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law by the company or by any officer, director, employee, or agent of the company, he or she is required to report it to the company's chief legal officer or to both the chief legal officer and chief executive officer forthwith. Bond lawyers should take note that

under the Rule, “appearing and practicing before the Commission” includes advising a client whether or not an issue of securities is required to be registered with the Commission.<sup>4</sup> This is most likely to apply to bond lawyers who are representing a conduit borrower that is a registered or reporting company or representing an underwriter that is, or is an affiliate of, a registered or reporting company.

The Rule states: “By communicating such information to the issuer’s officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney’s representation of an issuer.” This is consistent with existing ethical standards regarding the representation of organizations.<sup>5</sup> The standards established in the Rule supplement applicable standards of any jurisdiction where an attorney is admitted or practices. Furthermore, where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with the Rule, the Rule governs. This last portion of the Rule has created a storm of controversy as has the Commission’s original proposal to require “noisy withdrawal” by lawyers in the face of intransigent clients. The Commission extended the comment period for the “noisy withdrawal” proposal until April 7, 2003, and is still considering it. This topic is sure to be discussed in various conference workshops.

The Commission’s new rules regarding corporate governance, together with the publicity about alleged fraud by a number of major corporations over the last year, has heightened the interest of investors in corporate governance issues, such as the existence of independent audit committees. As a result, bond lawyers may want to consider adding corporate governance to their due diligence checklists in some transactions, even for non-registered or reporting entities.

Doug has suggested some food for thought regarding Reg G, which requires reconciliation of non-GAAP measures of financial performance to GAAP.<sup>6</sup> Reg G does not apply to issuers of municipal securities, but was adopted under the Commission’s authority to adopt rules designed to prevent misleading reports. Query: If a municipal issuer uses non-standard accounting, doesn’t the

principle underlying Reg G suggest that there be reconciliation to the GASB measure? Note that this is Doug’s comment. I can only say that the Commission encourages clarity in all disclosure documents.

### *Enforcement*

The SEC’s Division of Enforcement maintains an active interest in municipal securities. I am personally aware of at least 10 investigations involving municipal securities underway at the Commission right now. Two actions that received the considerable press over the last year are interesting because they involved disclosure fraud without proof that specific financial harm to investors had occurred: City of Miami and Big Dig.

The Commission issued an opinion in the appeal by the City of Miami from the decision of the administrative law judge imposing a cease and desist order for the City’s willful violation of Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Rule 10b-5 with respect to its offer and sale of three municipal bond issues.<sup>7</sup> It found that the City made material misstatements regarding its financial condition in official statements and in financial statements that were filed with NRMSIRs and otherwise released to the public. The message of this decision should be old news to you: “Issuers of municipal securities are primarily responsible for the content of their disclosure documents and may be held liable under the federal securities laws for misleading disclosure.... A city does not discharge this obligation by the employment of independent public accountants or other professionals... Municipal issuers have an affirmative obligation to know the contents of their securities disclosure documents, including their financial statements.”<sup>8</sup>

Miami argued that its conduct did not result in harm to either public investors or the market place. In response, the Commission stated “*This is not true. Because Miami failed to make full and accurate disclosures about its financial condition, investors purchased the City’s debt without full information.*”<sup>9</sup> In other words, inadequate disclosure itself is harmful to investors.

On July 31, 2003, the Massachusetts Turnpike Authority and James Kerasiotes, its former Executive Director, entered into a settlement with the Commission as to which they neither admitted or denied the findings in a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act.<sup>10</sup> This action involved misrepresentations resulting from the delay in disclosing cost increases at the Massachusetts Central Artery/Ted Williams Tunnel Project (the "Big Dig") by the Turnpike Authority and Kerasiotes in connection with three municipal bond offerings during 1999. The offerings were by the Turnpike Authority in March, 1999, the Commonwealth of Massachusetts in September, 1999, and the Massachusetts Bay Transportation Authority in December, 1999. At the time of each of these offerings, the project staff had projected cost increases exceeding \$1 billion, which should have been disclosed to the public, including potential bondholders, underwriters, and credit rating agencies in connection with the bond offerings. However, because the cost increases had not been quantified or confirmed with exactitude, the respondents deemed that they were speculative and did not disclose them. Instead, beginning in the spring of 1999, the project staff embarked upon an effort to quantify and confirm the specific amount of any cost increases, including a "bottom-up" review of every project contract. The offering materials accompanying each of the bond offerings indicated that the project was on budget and that it would cost only \$5.5 billion to complete. The cost increases were ultimately disclosed to the public in February 2000. Even if respondents' approach to dealing with projected cost increases was part of an effort to control project costs, their failure to disclose such cost increases did not take into account their obligations under the federal securities laws. As a result, the Commission held that by their negligent conduct, the Turnpike Authority committed and Kerasiotes committed and caused violations of Sections 17(a)(2) and (3) of the Securities Act. Cease and desist orders were issued against both respondents. (When ultimately quantified by the successor executive director, the cost overruns exceeded \$2 billion.) Luckily, according to various press reports, Massachusetts was in the best financial shape it had seen in many years when news of the cost overrun became public. As a result, the rating agencies did not downgrade the Commonwealth and there was no

apparent change in the market price for Commonwealth-backed bonds.

The City of Miami and Big Dig actions have three points that may be of interest to you:

1. It is possible for issuers and issuer officials to commit disclosure fraud by providing material misstatements and omissions for use in the official statements of other issuers. (Two of the three bond issues in the Big Dig situation were not issued by the Turnpike Authority.)
2. Contrary to popular belief among some lawyers, there is not a "no harm, no foul" rule for actions by the Commission. Unlike private litigants whose lawsuits are primarily motivated by a desire to be made financially whole, the Commission has multiple motivations. The first, obviously, is a desire to protect investors and punish those who bring them harm by violating the securities laws. However, the Commission has also been charged by Congress with responsibility for maintaining the integrity of the marketplace. This is an obligation that the Commission takes very seriously. It does not look kindly on material misstatements and omissions that harm investors *or* undermine market integrity.
3. Good politics may not be good disclosure. The securities laws are violated when material misstatements and omissions are made to investors, *even with the best of motives*. Doug has provided more food for thought about this: In the local government world where stock options don't exist, is aggressive politics the functional equivalent of greed in the corporate world?

There were two more Commission actions during the past year that you may find interesting: The first, Holmes Harbor, involves allegations against lawyers. On August 28<sup>th</sup>, the Securities and Exchange Commission filed civil charges relating to the fraudulent sale of \$20 million in municipal bonds for the Holmes Harbor Sewer District, a small sewer district located on Whidbey

Island, approximately 60 miles north of Seattle, Washington.<sup>11</sup> The bonds were intended to finance the building of certain public purpose portions of a private office-building complex. However, according to documents filed in court, the developer and others lied to investors about how bond proceeds would be used to acquire land for the project; falsely claimed that a prominent investment bank was involved in providing additional private financing for the project; falsely claimed that the project was already fully leased to a "Triple A" credit-rated company; and failed to disclose kickbacks to several of the offering participants.

Named in the Commission's complaint were the controlling shareholder of the project's developer; the developer's attorney; two people who were involved in arranging private financing for the project; a mortgage broker; two bond lawyers who represented Holmes Harbor Sewer District in the bond offering (as bond counsel and disclosure counsel); the underwriter of the bonds; and principals of the underwriting firm. In a separate action, the Office of the U.S. Attorney for the Western District of Washington also announced the filing of criminal charges against four individuals for their roles in the bond offering.

Holmes Harbor is evidence that the Commission will not hesitate to go after lawyers engaged in fraudulent transactions.

Recently the Commission issued an opinion in an appeal by Mark David Anderson, an associated person of a registered broker-dealer who was found to have charged customers excessive markups and markdowns in connection with municipal securities and other bond transactions.<sup>12</sup>

It's my personal nominee for the most amusing case of the year because of Anderson's testimony that, at some point in time, he owned a bond yield calculator, but it broke and he never replaced it.

#### *Pay to Play*

MSRB Rule G-37 was recently amended in some substantive, but relatively minor ways. For example, in some cases the look back and look forward periods have been shortened. I recommend that you take a look at it. The amendments also permit the NASD more flexibility when considering requests for exemptive

relief. However, this does not mean that exemptions will become easy to get. They will still be available in only highly unusual circumstances.

Unhappily, staff of the MSRB, NASD and SEC are receiving reports of indirect violations of the Rule. In fact, the NASD recently announced charging Sisung Securities Corp. of New Orleans, La., and its owner, Lawrence J. Sisung, Jr., with violating securities rules by participating in 21 municipal bond offerings in which the firm was not eligible to participate due to political contributions to members of the Louisiana State Bond Commission.<sup>13</sup> According to its press release, the NASD complaint alleges that from 1998 through 2001, Sisung made 14 political contributions, through entities that he controlled, of almost \$17,000 to members of the Louisiana State Bond Commission. It further alleges that Rule G-37 prohibited Sisung's brokerage firm from participating in any municipal business approved by the Louisiana State Bond Commission for two years from the date of each contribution. However, Sisung Securities failed to follow this restriction and improperly participated in 21 Louisiana bond issues, earning more than \$2.1 million in municipal underwriting fees. In addition, NASD charged that Sisung Securities failed to report political contributions of over \$44,000, which includes the \$17,000, as required by MSRB rules, and failed to keep required records of such contributions.<sup>14</sup> Indirect violations of Rule G-37 are of considerable interest to the Commission's Division of Enforcement too. Please remind your broker-dealer clients that they are prohibited from doing indirectly those things that are directly prohibited.

#### *College Savings Programs*

As many of you know, college savings programs, also known as 529 plans, issue a type of municipal security that the MSRB has dubbed "municipal fund securities." Although they look like mutual funds, because they are issued by states and state agencies and instrumentalities, 529 plans are exempt from regulation under the Investment Company Act. However, 529 plans often invest heavily in mutual funds, hire mutual fund companies as plan administrators, and are sold through broker-dealers. As a result, NASD and/or MSRB rules may apply depending on the

circumstances. Both regulators have added guidance regarding 529 plans to their web sites. In addition, an MSRB interpretation about marketing 529 plans in the workplace has been published for comment and is awaiting Commission action.

### *Recent Civil Litigation of Interest*

There are a number of recent civil cases that Doug would have discussed in an elegant and articulate manner. Unfortunately, you got me instead. I have to warn you that I read them for the first time to prepare for this presentation and am passing along Doug's comments to me. Let's hope I got them right.

The assault on *Central Bank of Denver*<sup>15</sup> continues in a recent decision adopting the recommendation of the magistrate in the CFS-Related Securities Fraud Litigation and denying defendants' motions to dismiss.<sup>16</sup> This case involves a legal opinion in the form of a negative assurance letter that was allegedly given to investors to induce them to purchase securities. The question to watch as the case develops is the degree to which the law firm's involvement in the alleged Ponzi scheme makes it a "primary actor" and thus not entitled to escape liability as a "mere" aider and abettor. This should be of special interest to bond lawyers because a bond counsel opinion is clearly circulated to investors with the intention that they rely on it.

In the Enron Corporation securities litigation,<sup>17</sup> the motion of one of the law firms involved to dismiss was denied, while the motion of another to dismiss was granted. The facts pled caused the court for purposes of the motion, in 307 pages of deathless legal prose, to find the first firm a primary violator of Rule 10b-5 on three grounds: (1) false and misleading disclosures that it "drafted and approved...for inclusion in Enron's reports on Form 10-Q," (2) participation in the scheme by allegedly fudging true sale opinions "essential to effect the fraudulent transactions" and (3) speaking to the market. The court determined that the firm "spoke through Enron's SEC filings..." which it had prepared. The other firm participated in the transactions but did not "speak" to investors.

Essentially, the court adopted the primary violator test urged by the SEC. In Doug's words:

If one writes something untrue, even if the idea for it came from someone else, you are a primary violator because you have scienter. If, on the other hand, you prepare a truthful portion of a document, you will not be held liable even if you know of misrepresentations elsewhere in the document because you did not create them. This should be a relief to bond counsel who are not participants in a fraud and contribute accurate information to an official statement that is later found to be deficient in some other respect.

In my opinion, this would be too fine a line for a bond lawyer to rely on in practice, although it may be useful as a defense once you're in litigation. Keep in mind that your involvement in a transaction may not look as innocent to third parties in retrospect after a deal has hit the fan. You should also keep in mind how easy it is to lose perspective in the middle of a deal, particularly about your own actions. In my personal opinion, if you discover that you have been associated with a fraudulent deal — get the disclosure fixed or quit the engagement.

Finally, the states are increasing their involvement in securities enforcement cases. Elliot Spitzer in New York and the Oklahoma Attorney General are not shy about entering the securities fray and there is no reason to think that they will be the only two.

Well, thank you for bearing with me today. I only hope that Doug Rollow will still speak to me when he hears the words I put into his mouth!

1. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.
2. Nevertheless, these comments were prepared by the author and may not accurately reflect Mr. Rollow's views.
3. Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 CFR

Part 205, Release Nos. 33-8185; 34-47276; IC-25919; File No. S7-45-02.

4. §205.2 (a) Appearing and practicing before the Commission (1) Means: (i) Transacting any business with the Commission, including communications in any form; (ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena; (iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations hereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or (iv) *Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission;* but (2) Does not include an attorney who: (i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or (ii) Is a non-appearing foreign attorney (emphasis added).
5. See, American Bar Association Model Rules of Professional Conduct (2001 edition), Rule 1.13 Organization as Client.
6. Conditions for Use of Non-GAAP Financial Measures, 17 CFR PARTS 228, 229, 244 and 249, Release No. 33-8176; 34-47226; FR-65; FILE NO. S7-43-02 (January 22, 2003).
7. In The Matter Of The City Of Miami, Florida, Rel. No. 33-8213, 34-7552, Admin. Proc. File No. 3-10022 (March 21, 2003).

8. *Id.*
9. *Id.* (emphasis added)
10. In The Matter Of The Massachusetts Turnpike Authority And James J. Kerasiotes, Order Instituting Cease-And-Desist Proceedings, Making Findings, And Imposing Cease-And-Desist Order Pursuant To Section 8a Of The Securities Act Of 1933, Release No. 33-8260, Administrative Proceeding File No. 3-11198, July 31, 2003.
11. Securities and Exchange Commission v. Terry Richard Martin, Silver Legacy Corporation, Silver Sound LLC, Jonas David Smith, Michael W. McCall, Charles J. Tull, Ibis Securities LLC, Kenneth R. Martin, George Tamura, Goldman Sig, Inc., Edward L. Tezak, Signal Mortgage Inc., and John H. White, United States District Court for the Western District of Washington, Civil Action No. C 03-2646 C, Litigation Release No. 18315 (August 28, 2003).
12. In the Matter of Mark David Anderson, Rel. No. 33-8265, 34-48352, Admin. Proc. File No. 3-9499 (August 15, 2003).
13. [http://www.nasdr.com/news/pr2003/release\\_03\\_029.html](http://www.nasdr.com/news/pr2003/release_03_029.html) (July 21, 2003)
14. *Id.*
15. Central Bank of Denver v. First Interstate Bank of Denver, N.A. and Jack K. Naber, 511 U.S. 164 (April 19, 1994).
16. Pioneer Ins. Co. v. Chase Securities, 2002 U.S. Dist. Lexis 7562 (March 28, 2002).
17. In Re Enron Corporation Securities, Derivative & ERISA Litigation, 235 F. Supp. 2d 549; 2002 U.S. Dist. LEXIS 25211; Fed. Sec. L. Rep. (CCH) P92,239 (So. Dist. Texas; December 19, 2002).

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*Do you receive NABLNET Alerts?*

## SEEN AND HEARD AT THE BOND ATTORNEYS' WORKSHOP

More than nine hundred attendees descended upon the Palmer House Hilton on September 17 for the 28th Bond Attorneys' Workshop. They were able to select from a menu of thirty separate workshops, and enjoyed General Session remarks delivered by Clay Gillette (state law issues), John Cross (tax retrospective), and Martha Mahan Haines, standing in for Doug Rollow (securities law retrospective). Ms. Haines' remarks are printed *supra*.

At the traditional Thursday luncheon, after the Friel Medal and Distinguished Service Award presentations (reported *supra*), the multitude was

[Maco photo]

both entertained and alarmed by "The Passing Zone" — jugglers John and Owen — who juggled a bowling ball, Indian clubs (7!), sickles (around Jack Kraft), and (in tutus) roaring chainsaws. And, Director Meredith L. Hathorn delivered the following remarks:

It is with great pleasure that I have been asked to introduce this next group of distinguished individuals to you. As you may have heard several times already or read in *The Bond Lawyer*®, NABL will be celebrating its 25th anniversary this year and we are delighted to kick off the celebration today.

The precursor to NABL is the Bond Attorneys' Workshop and we want to recognize our members who served on the Steering Committee or were involved in the logistics of the planning of the first BAW in 1976. Without the support and efforts of these individuals and others who

will be recognized during our year-long celebration of NABL's founding, this organization would not exist.

On behalf of NABL, I would like to thank you for your many contributions and I ask that the following individuals stand and be recognized: Chuck Carlson, Phil Dorweiler, Bernie Friel, Don Howell, Fred Kiel, Jack Kraft, George Mack, Willis Ritter, Ruth West and Rita Carlson. Again, thank you.

We look forward to seeing everybody at next year's BAW celebration of NABL's founding.

Next year, the Bond Attorneys' Workshop will move to the new Sheraton Chicago Hotel and Towers at 301 E. North Water Street, hard by the Magnificent Mile (think shopping), and will be held in an earlier timeframe — September 8 to 10.

## FEDERAL SECURITIES LAW

### *Civil and Criminal Disclosure Fraud Allegations*

While much public attention is on the Securities and Exchange Commission's actions in regulating investment companies and advisers, the SEC's Division of Enforcement and the Department of Justice continue to give a portion of their attention to the municipal securities market. In late August, the SEC filed civil charges alleging fraud in the offer and sale of \$20 million in municipal bonds for the Holmes Harbor Sewer District of Whidbey Island, Washington.<sup>1</sup> In February, 2003, the Superior Court of the State of Washington for Island County ruled that the Sewer District lacked the authority under Washington law to issue the bonds, that the bond offering was illegal, and the bonds were void.<sup>2</sup> The proceedings are particularly interesting because of the SEC's charges against bond counsel and other lawyers participating in the transaction.

In the complaint, the SEC named the controlling shareholder of the project's developer

(the "Controlling Shareholder"); the developer's attorney (the "Developer's Attorney"); two individuals who were involved in arranging private financing for the project (the "Mortgage Broker V.P." and the "Director Attorney"); a mortgage broker (the "Mortgage Broker") of which one of the named parties involved in arranging private financing was a vice president and part owner; the attorneys who represented Holmes Harbor Sewer District in the bond sale (the "Bond Counsel"); and the underwriter of the bonds (the "Underwriter"), as well as two of its principals (the "Underwriter Principals"). The SEC's complaint charges the Controlling Shareholder and two of his corporate entities, as well as the Developer's Attorney, the Bond Counsel, and the Underwriter Principals with fraud in the offer and sale of securities, in violation of Section 17(a) of the Securities Act of 1933 (the "Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder. In addition, the complaint charges that the Controlling Shareholder, the Developer's Attorney, and the Mortgage Broker violated Section 17(a) of the Securities Act and violated or aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Finally, the complaint charges that the Underwriter violated Section 17(a) of the Securities Act, and Municipal Securities Rulemaking Board Rule G-17, and Sections 10(b) and 15B(c)(1) of the Exchange Act and Rule 10b-5 thereunder. The SEC seeks permanent injunctions prohibiting future violations against each defendant, as well as the return of all monies received as a result of the fraud, plus pre-judgment interest and civil money penalties.

The same day, the U.S. Attorney for the Western District of Washington also announced the filing of criminal charges against the developer's Controlling Shareholder, the Developer's Attorney, and the two individuals involved in arranging private financing for their roles in the bond offering. Neither the Sewer District nor the Trustee for the bonds was named in either the SEC complaint or the Department of Justice action.

According to the SEC, the bonds were intended to finance the building of certain public purpose portions of a private office-building complex. However, the SEC alleges the

developer and others lied to investors about how bond proceeds would be used to acquire land for the project; falsely claimed that a prominent investment bank was involved in providing additional private financing for the project; falsely claimed that the project was already fully leased to a "Triple A" credit-rated company; and failed to disclose kickbacks to several of the offering participants. The SEC states that the bonds are in default and no substantial work has taken place on the project. When the bonds were sold to investors in October, 2000, approximately half of the proceeds were used to acquire land and for professional fees. The balance of the proceeds remains in escrow.

According to the SEC's complaint, the bonds were sold to investors based on an Official Statement that contained several material misrepresentations and omissions, including those relating to:

*Use of Proceeds to Acquire Land:* According to the Official Statement, \$6.2 million in bond proceeds would be used to acquire 15 acres of land for certain public purpose portions of the project; however, the developer used \$6.2 million in bond proceeds to acquire a total of 39.9 acres, which included land for both the public and private purpose portions of the project.

*Involvement of Prominent Investment Bank:* The Official Statement represented that an entity called Goldman/Sig LLC had agreed to be a participating mortgage lender for the project and that Goldman/Sig LLC was formed by Goldman Sachs Private Client Services, along with Signal Mortgage; however, Goldman Sachs Private Client Services had no involvement with the bonds or the project, and did not participate in the formation of Goldman/Sig LLC.

*Existence of Construction Financing for Project:* The Official Statement represented that the developer had entered into an agreement with Goldman/Sig to "fund infrastructure construction and office building construction through completion and provide long-term mortgage financing;" however Goldman/Sig had no ability to provide the

nearly \$65 million in financing required to complete the project.

*Value of, and Existence of Lease Agreement for, the Project.* According to an appraisal contained in the Official Statement, at the time the bonds were sold the developer had entered into a lease agreement covering the entire property with a single, unidentified tenant with a "Triple A (corporate) credit rating." Based on this information, the appraisal concluded that the project when built would have a value of \$90 million. In fact, the developer had entered into an agreement with a small firm with a total of six employees, annual revenues of approximately \$600,000, and no capacity to meet the projected monthly lease payments for the six buildings to be constructed in the project. Moreover, the Official Statement failed to disclose that the developer had entered into a side agreement that allowed the lessee to cancel the lease at any time.

*Undisclosed Payments to Offering Participants:*

The Official Statement disclosed that bond proceeds would be used to pay \$100,000 to the law firm of one of the Bond Counsel and \$140,000 to the law firm of the other Bond Counsel for their work in providing legal opinions on the bond offering. However, the Official Statement failed to disclose that on the day the bond offering closed, the developer used bond proceeds to make additional payments of \$60,000 to the first Bond Counsel and \$45,000 to the second Bond Counsel. The Official Statement also failed to disclose that shortly after closing the developer used bond proceeds to make a \$200,000 payment to the Underwriter and a \$50,000 payment to one of the parties allegedly involved in obtaining private financing for the project.

The SEC's action was brought out of the San Francisco District Office, the same office that had earlier successfully litigated the *Pacific Genesis* matter.

*Pay-to-Play, Civil and Criminal*

The SEC announced in late October that on September 24, 2003, the Connecticut federal district court entered a final judgment against a

former consultant for an investment firm headquartered in Boston, Massachusetts, permanently enjoining her from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940.<sup>3</sup> The SEC's complaint alleged that the consultant aided and abetted other defendants' violations of the federal securities laws. The consultant, without admitting or denying the allegations contained in the SEC's complaint, consented to the entry of final judgment. The SEC's charges against the consultant arose out of an alleged fraudulent scheme involving the former Connecticut State Treasurer's investment of state pension fund money with private equity firms, including the investment firm headquartered in Boston, in exchange for the firms' agreement to pay lucrative fees to the Treasurer's friends and associates. In a complaint filed against eleven defendants in the United States District Court for the District of Connecticut on October 10, 2000, the SEC alleged that Paul J. Silvester, the former Treasurer of the State of Connecticut, agreed to invest \$200 million of state pension funds with the investment firm in November, 1998. The complaint alleged that in return, the investment firm agreed to provide \$1 million consulting contracts to Silvester's friends, the consultant, and an individual who then funneled part of his consulting fees to Silvester through another intermediary, and that Silvester also requested and expected to receive part of the consultant's fees from the investment firm. The Commission also permanently barred the consultant from associating with any investment adviser.

On September 4, 2003, the consultant pleaded guilty to one charge of corruptly aiding and abetting a public official in accepting a reward. Under the plea agreement, the U.S. Attorney may seek up to \$1 million in criminal penalties from her, subject to her ability to pay, and she may be sentenced to between 10-16 months in prison. Sentencing is at a later date.

Silvester, the individual, and two other parties previously settled with the SEC. The SEC's case remains pending against certain additional defendants.

Paul S. Maco  
Vinson & Elkins, LLP  
Washington, DC  
November 19, 2003

1. *Securities and Exchange Commission v. Terry Richard Martin, Silver Legacy Corporation, Silver Sound LLC, Jonas David Smith, Michael W. McCall, Charles J. Tull, Ibis Securities LLC, Kenneth R. Martin, George Tamura, Goldman Sig, Inc., Edward L. Tezak, Signal Mortgage Inc., and John H White*, United States District Court for the Western District of Washington, Civil Action No. C 03-2646 C (August 27, 2003). SEC Lit. Rel. 18315 (August 28, 2003).
2. *Trimble v. Holmes Harbor Sewer District, et al.*
3. Litigation Release No. 18436 / October 30, 2003; *SEC v. Paul J. Silvester et al.* (United States District Court for the District of Connecticut, Civil Action No. 3:00 CV 1941 (SRU)); *United States v. Triumph Capital Group et al.* (United States District Court for the District of Connecticut, Criminal Action No. 3:00 CR 217 (EBB)).

## **GASB PROPOSES TECHNICAL BULLETIN TO ADDRESS TOBACCO SETTLEMENT PAYMENTS**

*Editor's Note: The author, William L. Hirata, of Parker, Poe, Adams & Bernstein L.L.P., Charlotte, N.C., is the Association's current representative to the Governmental Accounting Standards Advisory Council.*

In November, 1998, the major tobacco companies and 46 state governments entered into the Master Settlement Agreement ("MSA") with respect to litigation involving health care costs recovery claims of the settling states. Tobacco settlement revenue ("TSR") payments under the MSA are estimated to total \$206 billion over the next 25 years. Only the first five years of TSR

payments are guaranteed, with the remaining payments based on a formula which includes an annual adjustment based on fluctuations in domestic cigarette sales.<sup>1</sup>

In order to leverage the stream of TSR payments, states, and in some cases local governments, either issued bonds or created legally separate special purpose entities ("SPEs") to issue bonds secured by the projected TSR payments. In some cases, these TSR payment-backed bonds also pledged additional revenues or a governmental entity's faith and credit to payment of the bonds.

### ***Why Propose a Technical Bulletin Now?***

The Governmental Accounting Standards Board ("GASB") did not immediately include the treatment of SPEs and asset and revenue recognition in its agenda, in part because these transactions involved only state governments and a few local governments. However, due to state and local government budget pressures and concerns about the tobacco industry, the creation of SPEs and securitizations of future TSR payments increased markedly in 2002 and early 2003, and the enormity and high visibility of these transactions caused GASB and its staff to rethink its earlier position.

### ***The Three Issues***

In order to provide financial statement users with consistent display and disclosure information regarding the events and transactions associated with tobacco settlements, GASB has begun drafting a Technical Bulletin<sup>2</sup> which would address three specific issues:

1. *Reporting Entity*: If an SPE is created only to issue bonds to purchase the settlement rights from the government that established it, is the SPE a component unit of that government? If so, does the SPE meet the criteria for blending, or should it be discretely presented? Finally, would answers to these questions be different if there were a guarantee of the debt by the primary government?

2. *Asset Recognition*: Does the MSA result in a reportable asset to the settling states (as well as the California and New York local

governments)? Also, does the purchase by the SPEs of the “right” to future revenues result in an asset reportable by the SPE?

3. *Revenue Recognition*: Should revenues from the MSA be recognized as similar to revenues arising from a structured settlement, or should they be recognized (as is mostly the case now) as revenues arising from an exchange transaction? Also, should the proceeds received from the SPEs (in exchange for future years’ tobacco revenues) be recognized as revenue when received, or is there a basis for deferral in future years?

### ***Tentative GASB Conclusions***

In order to answer these questions, in the early part of the summer of 2003, GASB staff began reviewing the MSA and the current financial reporting practices by the governments and the SPEs that have securitized their future tobacco settlement revenues. At its August, 2003, meeting, GASB discussed the “Reporting Entity” issues and tentatively agreed with staff recommendations that (1) SPEs generally meet the component unit criteria<sup>3</sup> (as set forth in GASB Statement No. 14, “The Financial Reporting Entity”), (2) whether the display presentation should be “blended” or “discrete” would have to be determined on a case-by-case basis, and (3) based on Statement No. 14,<sup>4</sup> whether the primary government backed an SPE’s debt with its full faith and credit would have no bearing on the reporting entity decision because the other criteria already merited inclusion of the SPE’s debt in the reporting entity.

At its September and October meetings, GASB then discussed the “Asset Recognition” and “Revenue Recognition” issues. GASB tentatively agreed with a staff recommendation that SPEs should not recognize an asset in their financial statements, reasoning that, inasmuch as the settling governments have not recognized an asset for their future TSR payments (because, under the terms of the MSA, the tobacco companies’ obligation to pay is directly dependent upon domestic shipment of tobacco products — *i.e.*, there is no liability until products are shipped — and governments generally do not recognize assets that are contingent based on the occurrence of a future event in their financial statements),

neither should SPEs recognize the purchase of a contingent asset.

GASB also tentatively agreed with a staff recommendation that bond proceeds received by governments from their SPEs should be recognized as revenue in their entirety (as is currently the practice) rather than there being a deferral of all or some of the revenue based on either a prepaid/unearned revenue notion or on an eligible expense reimbursement notion. GASB recognized that this revenue may be eliminated in those instances in which the SPE is blended with the activities of the primary government, and agreed that the proposed Technical Bulletin should mention the possibility of deferral if, for example, enhancements, conditions, and/or covenants create an ongoing obligation or duty of the primary government that could be construed as necessary to earn or otherwise be entitled to the proceeds.

### ***The Proposed Schedule***

Under the schedule approved by GASB, a draft of the proposed Technical Bulletin will have been prepared for review by GASB at its November meeting, followed by the issuance of the proposed Technical Bulletin, with a request for comments, in December. GASB will continue its deliberations at its November and December meetings, and some of its tentative decisions described above may be changed prior to the issuance of the proposed Technical Bulletin. In February, the GASB staff will review comments and prepare another draft for consideration by GASB at its March, 2004, meeting. The final form of the Technical Bulletin will be issued in April, 2004.

### ***Recent Events***

Shortly after GASB determined to prepare a Technical Bulletin, a series of cases which resulted in unexpected decisions against tobacco companies affected the ratings of the tobacco companies and outstanding TSR payment-backed bonds. The immediate reason was the decision in the *Miles* (or *Price*) case in Illinois, a class action suit which claimed that Philip Morris used deceptive marketing practices in the sale of “light” cigarettes to consumers, and sought a refund of the costs of the cigarettes. Not only was the initial

award of \$10.1 billion in compensatory and punitive damages unexpected, but under Illinois law, in order to appeal the decision, Philip Morris was required to post a \$12 billion bond. The trial judge reduced the amount of the bond (which was stated to be one of the reasons why Philip Morris was able to make its \$2.5 billion April 15 payment under the MSA), but on July 14, the Illinois Court of Appeals ruled that the trial judge had exceeded his authority in reducing the amount of the bond. On August 15, the *Miles* trial judge ordered Philip Morris to post the \$12 million bond, but stayed his order for 60 days in order to allow Philip Morris time to appeal his ruling to the Illinois Supreme Court. On September 16, the Illinois Supreme Court reduced the bond requirement to the amount originally set by the trial judge in April.

### ***Market/Rating Agency Reaction***

As was to be expected, both the bond market and rating agencies reacted negatively to the *Miles* case, causing industry analysts began to predict that the future supply of TSR-backed bonds, which had been projected to reach the \$15 billion level in 2003 issuances, would decrease. Supply exceeded demand, and increased yields, particularly for longer maturities, caused states to consider alternatives to a stand-alone SPE issues backed solely by TSR payments. For example, Oregon and New York issued “double-barreled” bonds that will be repaid with TSR payments, but which are also backed by their states’ respective appropriation credit. California and Virginia pulled planned TSR bond sales in order to assess alternatives.

Moody’s, Fitch and Standard & Poor’s have downgraded most TSR payment-backed bonds, partly in response to what one rating agency said was an “adverse litigation environment,”<sup>5</sup> in some cases ultimately by four notches.

### ***The Crystal Ball: Continuing Disclosure and Securitizations in General***

Under Securities and Exchange Commission Rule 15c2-12, the primary government or SPE, whether as issuer or obligated person, will have agreed to provide certain financial information on an annual basis and notices of material events (such as a rating downgrade). Many of the

outstanding TSR payment-backed bonds require this information only from the SPE. One unintended effect of the proposed Technical Bulletin and current market conditions could be to make moot separate accounting and continuing disclosure by SPEs, as they will be treated as component units for accounting purposes.

In addition, and as pointed out in a September 4, 2003, letter to GASB, some governmental accountants believe that the proposed Technical Bulletin should address not only tobacco bonds, but securitization in general:

We believe based upon the continuing evolution of the public finance markets methods of financing and the recent erosion of the market for new tobacco bonds that fully transfer collection risk to investors, the proposed technical bulletin would be more useful if it discussed securitization in general rather than just tobacco securitization exclusively...

[S]ecuritization is utilized as the latest financial structure designed to circumvent statutory limitations on the incurrence of debt, especially in the case of tobacco bonds where collection risk has been fully retained by the State. It is my further belief that tobacco securitization is just one of several types of securitizations that have occurred but is the one with the most significantly and recently impaired market for this type of borrowing in its purest form. I believe the technical bulletin would be more useful [if] it more broadly addressed securitization in all forms and required it to be reported as debt in the form of “other commitments”. I believe recognizing securitized transactions as debts of the government selling revenues provides the best method of disclosing the utilization of unrecognized and unreported future economic resources of the government. I further believe this is especially appropriate when the government uses the proceeds to finance or otherwise fund activities that do not generate the revenues sold. I believe any option that would allow for a sale to be recorded will impair comparability of financial

statements issued both before and after securitization and ultimately result in less disclosure to the detriment [sic] of financial statement users.<sup>6</sup>

While it is doubtful that the present schedule for this Technical Bulletin will be amended to expand its scope, it would not be surprising if accounting for securitizations in general were to become a topic for a future Statement or an Interpretation.

### ***For Further Information***

If you or your clients are interested in the accounting treatment of TSR payment-backed bonds, please contact GASB at (203) 956-5293, or visit the GASB website at [www.gasb.org](http://www.gasb.org).

William L. Hirata  
November 12, 2003

1. The introductory section and the sections through “The Proposed Schedule” are summarized from the GASB Technical Plans and Minutes of GASB meetings prepared by GASB staff.
2. Technical Bulletins (“TBs”) are issued to provide guidance for applying GASB Statements of Governmental Accounting Standards, GASB Statements of Governmental Accounting Concepts and Interpretations of these Statements, and also for resolving accounting issues not directly addressed by these Statements and Interpretations. Unlike Statements and Interpretations, TBs may be issued at any time at the discretion of GASB and with or without the appointment of task forces, research, notice, public hearings or public exposure. TBs generally are used to provide guidance if an accounting or reporting problem can be resolved within the following guidelines:
  - A. The guidance is not expected to cause a major change in accounting practice for a significant number of entities.
  - B. The administrative cost involved in implementing the guidance is not expected to be significant to most affected entities.

C. The guidance does not conflict with a broad fundamental principle or create a novel accounting practice.

If any one of these guidelines is not met, then a GASB Statement or Interpretation is considered to be the more appropriate means of resolving the issue.

3. Component units are legally separate organizations for which the elected officials of the primary government are financially accountable. In addition, component units can be other organizations for which the nature and significance of their relationship with a primary government are such that exclusion would cause the reporting entity’s financial statements to be misleading or incomplete. GASB Statement No. 14, paragraph 20.
4. Because of the closeness of their relationships with the primary government, some component units should be blended as though they are part of the primary government; however, most component units should be discretely presented. GASB Statement No. 14, paragraph 42.
5. “Ratings on Various Tobacco Settlement Revenue, Litigation Settlement Deals Lowered; On Watch,” Standard & Poor’s, April 18, 2003, report.
6. September 4, 2003, letter to Mr. Ken Schermann by William J. O’Reilly.

## **THE EFFECTS OF THE UNIFORM SECURITIES ACT OF 2002 ON BLUE SKY REQUIREMENTS APPLICABLE TO MUNICIPAL SECURITIES**

This article summarizes the effects of the Uniform Securities Act of 2002 (the “2002 Act”) on blue sky requirements applicable to municipal securities.<sup>1, 2</sup>

If enacted in all states, the District of Columbia and the Commonwealth of Puerto Rico, the 2002 Act will establish a general, across-the-board exemption from state blue sky registration and notice filings for *all* types of municipal securities.

Harding photo

As of November 5, 2003, the 2002 Act has been enacted in Missouri and Oklahoma and has been sent to Study Committee in Kansas.<sup>3</sup>

## I. THE 2002 ACT

### A. *Background*

The 2002 Act was promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The 2002 Act is the latest in a series of uniform blue sky laws promulgated by NCCUSL.

The Uniform Securities Act of 1956 (the “1956 Act”) provides the following general, across-the-board exemption from registration for all types of municipal securities:

any security (including a revenue obligation) issued or guaranteed by...any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing

The 1956 Act has been adopted, with some variations, in 37 jurisdictions.<sup>4</sup>

The Uniform Securities Act of 1985 and its 1988 amendments (“1985 Act”) expanded the municipal exemption by changing the phrase “issued or guaranteed” to “issued, *insured* or guaranteed” [emphasis added].

Section 402(a)(1) of the 1985 Act retains the 1956 Act exemption from registration for municipal securities, but also provides in bracketed text an optional exclusion from this exemption for any municipal security payable from revenues to be received from a nongovernmental industrial or commercial enterprise (“conduit bonds”), unless the payments are made, insured or guaranteed by certain entities whose securities enjoy a separate exemption from registration.<sup>5</sup>

Those entities vary from state to state but include, for example: Canada and Canadian provinces, territories and political subdivisions; depository institutions whose accounts are insured by the FDIC; insurance companies; certain railroads, common carriers and public utilities; and entities whose securities are listed or approved for listing on the certain stock exchanges, including the New York Stock Exchange.

Ten states have adopted the 1985 Act’s optional exclusion from registration for conduit bonds.<sup>6</sup> Another three states<sup>7</sup> have excluded “industrial bonds” or “industrial development bonds” from the municipal securities exemption from registration.

The National Securities Markets Improvement Act of 1996 (“NSMIA”), which became law on October 11, 1996, provides that states may not require registration of municipal securities that constitute “covered securities.” Under NSMIA, a municipal security qualifies as a covered security if it is exempt from registration under either Section 3(a)(2) of the Securities Act of 1933, as amended (the “Securities Act”), or Securities and Exchange Commission (“SEC”) Rule 506. Virtually all municipal securities qualify for an exemption from registration under Section 3(a)(2) of the Securities Act and, therefore, constitute covered securities under NSMIA.

NSMIA also provides that, in any given state, covered security status for a municipal security that qualifies under Section 3(a)(2) of the Securities Act does *not* extend to a municipal security that is issued by an issuer located within that state’s boundaries. Thus, a state which has excluded conduit bonds from its exemption from registration may still require registration of conduit bonds issued by issuers located within its

boundaries. NSMIA also permits states to impose notice filing requirements, including the payment of a filing fee, on municipal covered securities issued by issuers located outside their boundaries.<sup>8</sup> As of November 5, 2003, ten states have imposed notice filings on various types of municipal securities issued by out-of-state issuers.<sup>9</sup>

### **B. Major Changes Arising from the 2002 Act**

Section 201(1) of the 2002 Act provides:

The following securities are exempt from the requirements of Sections 301 through 306 [registration and notice filings contemplated by NSMIA]<sup>10</sup> and Section 504 [filing of sales and advertising literature]:

(1) a security, including a revenue obligation or a separate security as defined in Rule 131 (17 C.F.R. 230.131) adopted under the Securities Act of 1933, issued, insured or guaranteed by...a State; by a political subdivision of a State; by a public authority, agency, or instrumentality of one of more States; by a political subdivision of one or more States...

Section 201(1) of the 2002 Act abolishes all registration and notice filing requirements applicable to municipal securities.

This is significant because, notwithstanding NSMIA's partial pre-emption of state blue sky laws, thirteen states still require registration of certain conduit bonds issued by issuers located within their respective boundaries and ten states, in response to NSMIA, have imposed notice filing requirements, including the payment of filing fees, on various types of municipal securities issued by issuers located outside their respective boundaries.

### **C. Other Changes**

Other changes made by the 2002 Act include expanding the categories of institutional investors to whom sales may be made without registration or the taking of other action and expansion of the general scope of the municipal securities exemption from registration.

#### *1. Sales to Institutional Investors in an Exempt Transaction*

The 2002 Act expands the categories of institutional investors to whom sales may be made in an exempt transaction.<sup>11</sup>

The classes of institutional investors to whom sales may be made in exempt transactions varies widely from state to state. In jurisdictions which have adopted the 1956 Act, Section 402(b)(8) of the 1956 Act provides an exempt transaction exemption for:

an offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity

Section 202(13) of the 2002 Act provides an exemption from registration for a sale or offer to sell to "(A) an institutional investor; (B) a federal covered investment adviser; or (C) any other person exempted by rule adopted or order issued under this [Act]."

Under Section 102(11) of the 2002 Act, the definition of the term "institutional investor" includes the terms "bank," "depository institution" and "insurance company," each of which is also defined in Section 102 of the 2002 Act. Under these definitions, new categories of institutional investors include:

(a) accredited investors, other than individuals, under SEC Rule 501(a), provided that the minimum asset requirement for several categories of accredited investor has been increased from \$5,000,000 to \$10,000,000; and

(b) qualified institutional buyers under SEC Rule 144A.

## 2. *Expansion of the Scope of the Exemption from Registration for Municipal Securities*

Section 201(1) of the 2002 Act incorporates the 1985 Act expansion of the municipal securities exemption to include securities issued, *insured* or guaranteed by various state and municipal entities. Section 201(1) also expands the 1956 Act municipal securities exemption from registration to include political subdivisions and state agencies of *one or more States*.

The 2002 Act exemption from registration for municipal securities also includes any separate security as defined SEC Rule 131. The expansion of the exemption to include separate securities is helpful, but the reference to Rule 131 may turn out to be troublesome. Two commentators have separately pointed out that, in practice, several SEC no-action letters have developed the concept of “separate” separate securities that are independent of Rule 131, and, as such, must either be registered or qualify for their own separate exemptions from registration.<sup>12</sup> That being the case, what is the status under Section 401(a)(1) of such “separate” separate securities? Contrast this approach with the more inclusive, general approach of the Georgia and Louisiana blue sky laws, which include within their municipal securities exemptions from registration “*any underlying or separate security* which secures any of the foregoing securities”<sup>13</sup> [emphasis added].

## II. SOME REFLECTIONS ON THE 2002 ACT

If the 2002 Act is enacted into law in all jurisdictions, then all municipal securities will be exempt from state blue sky registration and notice filing requirements.

One result of universal enactment will be blue sky memoranda that consistently show that no action of any type needs to be taken anywhere. And, shortly thereafter, I think there would be a consensus among underwriter’s counsel that such memoranda are no longer necessary.

Notice filings for municipal securities include filing fees, which is a source of state revenue. State legislatures of revenue-hungry states that have enacted notice filing requirements may balk

at the 2002 Act’s elimination of notice filings for municipal securities.

Is the 2002 Act’s general, across-the-board exemption from registration for all types of municipal securities good policy?

Municipal securities that would be exempted from registration and notice filings under the 2002 Act include municipal securities that are not credit-enhanced, not rated by a national rating agency, and backed by a conduit borrower which may be thinly-capitalized and which may have little or no experience in operating the bond-financed facility.

My experience is that deals of this type often go into default. I have no qualms about such deals being offered and sold on an unfettered basis to institutional investors, but I am uneasy about unrestricted sales of such securities to the general public.

I am in favor of the 2002 Act’s expansion of the categories of institutional investors to whom sales may be made in an exempt transaction and of the 2002 Act’s other expansions of the exemption from registration, except that I prefer the broader Georgia and Louisiana approach of exempting “any underlying or separate security which secures any of the foregoing securities.”

We should consider whether the 2002 Act’s exemption from registration and notice filings for all types of municipal securities is too broad. Perhaps we still need something like the 1985 Act’s optional exclusion from registration for conduit bonds that are not backed by the resources of specified types of borrowers or guarantors. That exclusion may not have been perfect, but at least it was an attempt to put some limitations on the sale of junk bonds to the general public.

Thomas N. Harding;  
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Pugh, Jones & Johnson, P.C.  
Chicago

1. The author would like to acknowledge the helpful and prompt comments provided by Joel Seligman, Dean and Ethan A. H. Shepley University Professor, Washington University School of Law, St. Louis, Missouri, in the preparation of this article. Dean Seligman was the Reporter for the Uniform Securities Act of 2002.
2. The securities or “blue sky” laws of each state regulate the entities and individuals which or who offer and sell securities in that state, set forth the requirements for the registration (or exemption from registration) of the securities offered or sold therein, and establish anti-fraud protections for securities transactions. MARTIN R. MILLER ET AL., BLUE SKY REGULATION OF MUNICIPAL SECURITIES 1 (1995), published by the National Association of Bond Lawyers.
3. NCCUSL website, [www.nccusl.org/Securities Act](http://www.nccusl.org/Securities Act)
4. Prefatory Note to the Uniform Securities Act (2002), LEO V. ROINILA, J.D. AND JAY B. FISHMAN, LAW AND EXPLANATION: UNIFORM SECURITIES ACT OF 2002, page 155 (2003) [hereinafter ROINILA].
5. Section 402(b)(1) of the 1985 Act provides, in part: “...but this exemption does not apply to a security payable solely from revenues to be received from a nongovernmental industrial or commercial enterprise unless the payments are insured or guaranteed by a person whose securities are exempt from registration under paragraph (2), (3), (4), (5), (7), (9), or (13) or the revenues from which the payments are to be made are a direct obligation of such a person.” See ROINILA, note 4 *supra*, paragraph 3401.
6. The states are Iowa, Maine, Minnesota, Montana, New Mexico, North Dakota, Rhode Island, South Dakota, Washington and Wisconsin.
7. The states are Arizona, New Hampshire and Vermont.
8. See, generally, Thomas N. Harding, *The Effects of NSMIA on Blue Sky Requirements Applicable to Municipal Securities*, Discussion Draft dated August 15, 2003, available online at [www.nabl.org](http://www.nabl.org) under Resource Library\Securities Law Matters\Blue Sky.
9. The states are Arizona, Minnesota, New Hampshire, New Mexico, New York, North Dakota, South Dakota, Vermont, Washington and Wisconsin.
10. Section 302 of the 2002 Act covers notice filings for covered securities described in Sections 18(b)(2) and 18(b)(4)(D) of NSMIA. This may be a bit of overkill, since virtually all municipal securities derive their covered security status under Section 18(b)(4)(C) of NSMIA (which provides covered security status to municipal securities that are exempt from registration under Section 3(a)(2) of the Securities Act). Section 201(1) appears to be exempting municipal securities from a provision of the 2002 Act that is not applicable to municipal securities in the first place.
11. Counsel to the underwriter of an issue of municipal securities usually provides the underwriter with a “blue sky memorandum” at the time that the preliminary official statement is distributed to the public. Blue sky memoranda typically list: (1) the states in which the securities may be offered and sold to the public without the necessity of registration or other action, provided that the underwriter is registered as a broker or dealer therein; (2) the states in which registration or other action must be taken before the securities may be offered to the public; and (3) the states in which no action need be taken if the securities are offered and sold not to the public but, rather, to specified types of institutional investors in an “exempt transaction.” The exempt transactions section of a blue memorandum can be useful to an underwriter when the blue sky memorandum reveals that sales to the general public in a particular jurisdiction may be subject to registration, notice filing or

other action but sales to certain institutional investors are not.

12. See, generally, Stephen Bradford Lyons, *SEC Registration Requirements for Taxable Municipal Securities*, 21 THE URBAN LAWYER 223, pages 253 to 269, and ROBERT A. FIPPINGER, THE SECURITIES LAW OF PUBLIC FINANCE, SECOND EDITION, pages 2-6 to 2-17.
13. See Section 10-5-8, Official Code of Georgia, Annotated, as amended, and Section 51:708, Louisiana Revised Statutes of 1950, as amended, respectively.

## VOICE FROM THE PAST

### Chapter 29

The recollections of Bernie Friel about the founding of NABL published in the September 1 issue of *The Bond Lawyer*® reminded me of some of my own experiences.

Even before Chuck Carlson started *Bond Case Briefs*, a Section of the American Bar Association, variously called the Section on

[Mumford photo]

Municipal Law, the Section on Local Government Law, and the Section on Urban, State and Local Government Law, provided a forum for bond lawyers as members of a larger class. To join it you first had to join the ABA and then the Section, and pay dues to both.

The largest group of members comprised bond lawyers, but other areas were also represented, including those involved in zoning and land use and public labor law and city attorneys. The Port of New York Authority (now the Port Authority of New York and New Jersey) was well represented. By practice, offices were alternated between bond

lawyers and others, as did programs alternate more or less between those of interest to bond lawyers and to others.

The ABA had started as an association of state bar associations, and its conventions reflected that organization. The sections were added later, and served a useful purpose but were step-children for many years. In time the sections rebelled and were given greater importance in staffing and budgetary matters.

Although the quality of the programs for bond lawyers was good, the quantity was not great. To attend one you had to go to the annual meeting of the ABA, which was sometimes located in a city that was convenient to get to; sometimes it was in Honolulu or London. Seldom could young bond lawyers afford the time or the money to attend.

On one occasion I mentioned to several members of the Council of the Section the possibility that an organization of bond lawyers, whether within or without the ABA, might serve well. Some appeared shocked; others were encouraging. I decided to prepare a questionnaire to send to lawyers in *The Bond Buyer's Red Book*. One of the questions was whether such an organization, if formed, should be part of the ABA. I decided to try a first draft out on my partners at a lunch meeting of the municipal department of Chapman and Cutler. The result was unanimous: every single one of them told me to forget the entire idea. I got the impression that each had a different reason, but the general approach seemed to be that there should be no such organization. The phrase "educating the competition" was used more than once.

In my own view, helping others to learn the specialty would not significantly increase the number of firms trying to enter the field. If they could get the clients they could get the business and there was nothing we could do about it. But we could help newer bond lawyers avoid mistakes that might embarrass us all, and it might be possible that we could learn something from some of them.

Giving ten units of knowledge in exchange for one does not diminish, but increases, the donor's own store of knowledge. If such an organization should start without our participation in the leadership we

would have no influence on its direction or attitude toward the profession.

However, my partners would not be swayed, and I decided that with no support and with unanimous opposition from my own firm, I would not take the lead in any such venture. The need for such an organization was there, and sooner or later someone else would start it.

Chuck Carlson, with his *Bond Case Briefs*, was partly responsible for a sense of community among bond lawyers. Some of my more conservative partners refused to read it, still believing that we should learn about new case law by passing around copies of the advance sheets of the West Reporter series. Paul Cutler would note on the front of each one the page number of any cases significant to our practice. Of course, those of us who got the advance sheets six months late were more inclined to subscribe to Chuck's publication.

The founding of the Bond Attorneys' Workshop vastly increased that sense of community. I did not ask permission to attend it, and paid the costs myself. It was well worthwhile.

Bernie's reflections traced the evolution of NABL from the Workshop. As it was decided that the headquarters of the organization would be anchored by Rita Carlson in Chicago, the organizing committee determined that it should be an Illinois corporation and that I should take care of getting the articles of incorporation and initial by-laws prepared. I doubt that my municipal partners ever found out that one of the younger lawyers in our corporate department prepared these documents.

For a number of years NABL and the ABA Section existed side by side and had a number of members in common. Both Jim Perkins and Joe Johnson were chairmen of the Section before becoming president of NABL. I reversed the process and served as president of NABL the year before I became chairman of the Section. In time, however, the Section failed to draw many new members from the bond lawyer community, and its role for bond counsel diminished. The last meeting of the Section I attended was part of an ABA annual meeting in Honolulu; I was glad that

my family and I found plenty of other things to do in Hawaii.

Manly W. Mumford

## EMPLOYMENT OPPORTUNITIES

BRYANT MILLER & OLIVE P.A., TAMPA, is seeking to laterally hire an experienced public finance associate (minimum two years of public finance experience desired) or partner-level public finance lawyer for its Tampa office. The Florida-based firm, which primarily focuses on local government tax-exempt bond issues, has the largest, most diverse public finance practice in one of the nation's fastest growing states. Excellent front line opportunity, competitive salary and benefits, and a strong emphasis on mentoring and training. In addition, Tampa has very mild winters! Bryant Miller & Olive P.A. is an equal opportunity employer. If you are interested, please email your résumé to [ddraper@bmlaw.com](mailto:ddraper@bmlaw.com).

PUBLIC FINANCE ATTORNEY — McKennon Shelton & Henn LLP has an immediate opening for a mid-level public finance associate experienced in complex revenue and private activity bond financings. We are a collegial 10-attorney law firm located in Baltimore, Maryland, with an established, diversified municipal law and finance practice. Please send cover letter and résumé to [william.henn@mshllp.com](mailto:william.henn@mshllp.com).

CHICAGO TAX AND PUBLIC FINANCE PARTNER (willing to relocate) with 12 years of large law firm experience is looking for a lateral move. I have extensive experience in all aspects of federal, state and international taxation with specialization in public finance and financial products. Additionally, I am willing/desirous to broaden my practice to include ERISA or trust and estates. Given the market, I will consider various employment scenarios. The ideal position includes servicing a firm's existing clients and having the ability to develop my own business. This move is for the long term. Please contact [Greataxtaxattorney@aol.com](mailto:Greataxtaxattorney@aol.com).

## LEGAL ASSISTANTS' CORNER ARE WE REALLY SPECIAL?

Whether one voluntarily entered the municipal bond field or stumbled into this special world by chance, we are all connected through our involvement in this highly specialized profession. Our world includes, among others, lawyers, bankers, financial advisors, underwriters and legal assistants. Some may be remembering the adage about not desiring to become a member of any special group or club which would allow them to be a member, but this absolutely is not true if you are a part of the legal assistant membership of NABL.

After considerable time spent in exhaustive searches for local or state CLE seminars and college or technical courses relating to municipal bonds, the legal assistant many times finds it quite difficult to believe they are a part of anything special. Many are aware that law schools do not

[Mendenhall photo]

offer specialized courses to address municipal bond law, but the legal assistant really faces some closed doors when it comes to finding formal education on this topic from technical classes or legal assistant college degree programs.

General education for the legal assistant has progressed in the past 25 years and legal assistants are offered some excellent programs containing a balance of general law and many specialties, such as litigation, probate and other legal practice areas.

Currently, no college legal assistant program of which I am aware has found it necessary to offer a course in Municipal Bonds 101. We must not ignore the fact that many legal assistants working in our field have benefitted from excellent educational opportunities and quality instruction in the basics of the legal profession, but let's slow it down and remember we are the special ones.

Legal assistants have yet to receive from a local or state bar association a seminar flyer

announcing a seminar on such topics as "The Wonders of GO Bonds," "Exciting Innovations in the Official Statement," or what would be a great favorite, "Fun with 8038s." So, the point is that, even though educational opportunities are plentiful for the legal assistant and there have been great strides in continuing legal education, we, who are in this special group, still must seek help elsewhere.

Where can one go to explore such topics as the requirements of a bond sale, how to gather information for an official statement, how to work with the attorney to draft a financing schedule, or what do you do to coordinate a closing? Wait, you know that the answer is very close at hand — NABL. Legal assistants in the bond field, being the special people they are, have come to rely on the educational opportunities provided to them by NABL through the annual Fundamentals Seminar, various books and learning materials, a detailed website and the ability to have a working relationship with other legal assistants who are able to speak the same language.

The annual Fundamentals Seminar sponsored by NABL is an excellent vehicle for the legal assistant to achieve education in the basics of bond financings taught by a highly qualified faculty of lawyers, but also may learn many of the tricks-of-the-trade and specific tasks of the legal assistant taught by people who have first-hand knowledge — the Legal Assistant Faculty of NABL.

NABL continues to be on the cutting edge when it comes to offering participants educational opportunities to legal assistants. It is because of this that the legal assistant should really consider him or herself as being in a special group. NABL continues to offer the most current updates as to industry matters as well as providing the technical support for the legal assistant.

One reason NABL is able to offer the most up-to-date materials and information is due to the input of its members, which is also very true with respect to its legal assistant membership. The Education Committee of NABL works closely with the Legal Assistants Committee to achieve the highest quality of new information and skill-building training to offer its members. This brings us to the fact that each and every legal assistant

who is a member of NABL is also special because each one has specific knowledge and certain ways of making that closing successful, no matter where in the country they are located, where they work or what type of financing is involved. This diversity is yet another reason we are special, since, in municipal bond law, there are so very many types of financings and ways to accomplish the end results.

NABL and its Legal Assistants Committee urge each and every legal assistant member to offer their input in what they would consider helpful topics and instructional materials for use in the Fundamentals Seminar as well as assisting in other areas which are extremely important. Those other areas include assistance in the continued upkeep of and new ideas relating to the legal assistant portion of the NABL website ([www.nabl.org](http://www.nabl.org)), working together to suggest timely topics for and assist in coordination of teleconference calls for the legal assistant, and contributing their many-varied ideas through the Legal Assistants' Corner in *The Bond Lawyer*®.

These are just some of the openings available to a legal assistant who wishes to involve him or herself in the Legal Assistants Committee. Another very important opportunity for which many legal assistants are amply qualified and could make valuable contributions is serving on the Legal Assistant Teaching Faculty. Please allow this author to make a personal observation on this subject. We are an elite group with excellent training and skills. Through the years, I have met so many capable legal assistants who are involved in municipal bond law. Many of the NABL legal assistant members would be qualified to serve NABL by utilizing their talents and sharing what all of the legal assistants do best: municipal bonds.

This is not a far-fetched idea and many should look toward the future and take that step in contacting NABL to inquire as to how to share their knowledge. It must be remembered that many legal assistants will be entering our profession in coming years and be facing the same questions many of us have faced. Many will be looking for specific education in bonds and the most current tips and techniques used by legal assistants.

NABL President Linda Schakel has challenged all NABL members to volunteer and become active in the Association, and this includes the legal assistant members. You, as legal assistants, are urged to contact NABL or the following legal assistant contacts: Nancy Mendenhall ([nmendenhall@hinklaw.com](mailto:nmendenhall@hinklaw.com)), Joetta Bowie ([jbowie@velaw.com](mailto:jbowie@velaw.com)), Ann Atkinson ([ann.atkinson@kutakrock.com](mailto:ann.atkinson@kutakrock.com)), or Carol Caponigro ([carol.caponigro@piperrudnick.com](mailto:carol.caponigro@piperrudnick.com)) to check into many of these opportunities. Legal assistants out there need not be reminded that many of us interact with our peers at legal assistant functions and other state and national associations, and there are few who even know what we do in our profession. NABL has created a link for the municipal bond legal assistant where we are able to obtain the education needed and stopping short of calling it a special or elite club, we have the opportunity to interact with people who understand what we work with on a day-to-day basis. Please do not hesitate to contact NABL or the contacts listed above about getting involved.

Committee on  
Legal Assistants  
Nancy Mendenhall  
November 7, 2003

## BOOK REVIEW

*Pinstripes & Pearls*, by Judith Richards Hope (Scribner, 2003; 291 pages including appendices, notes, index, and bibliography). Ms. Hope, one of the fifteen women who graduated from Harvard Law School in 1964, and who married Tony, Bob Hope's son, in 1967, has provided a harrowing and heartening account of (some of) what it was like to be a woman lawyer — and a trial lawyer — in the 1960s and beyond. Included in her account are mini-biographies of her woman classmates from the class of 1964. Now divorced from Mr. Hope, and friendly with four Justices of the U.S. Supreme Court, she currently practices at the Paul, Hastings firm in Washington, and serves on several corporate boards, but this is not a conventional autobiography. (During her tenure at Williams & Connelly, she received lots of stolen lingerie as a gift from a gangster client, and had to

[Kiel photo]

decide whether to  
accept it and what  
to do with it.)  
Excellent reading.

Wrant Enrail

## EDITOR'S NOTES

I was delighted to see Rita Carlson receive the Association's second Distinguished Service Award. She should probably have received the Association's *first* Distinguished Service Award. I commend to your attention the remarks that Bernie Friel, our still-vital first President, delivered on that occasion (printed *supra*). They don't begin to tell you (if you've joined the Association since, say, 1990) what you need to know about Rita, but they tell you a lot. As Bernie said, Rita was the mother of us all. She was also adept, fly, meticulous, gifted, dedicated, warm, funny, inspirational, careful, keen, artful, supportive, and always to be missed.

Rita's style as Executive Director of the Association and of the Bond Attorneys' Workshop pretty much defined the word "spare." She pinched the pennies, making do with a part-time staff that consisted only of housewives from Hinsdale, where she lives. She fought off the raises we offered her, accepting only a few with great reluctance. She would say, "This is not a job, it's what I enjoy."

During her years as Executive Director of the Association and of the Bond Attorneys' Workshop, Rita personally answered virtually every telephone call and letter received from members. That methodology is now, alas, unthinkable. She attended every meeting of the Association's Board of Directors, and every meeting of the Steering Committee of the Bond Attorneys' Workshop.

It was particularly fun to see Rita *surprised*. In the good old days, it was hard to surprise Rita — one of her many fine qualities.

But as the Association grew from a few hundred members in Rita's earliest days to its current 3,000+, professional management began to make sense. Pat Appelhans brought us some of that, but she — although a lawyer — had most recently executive-directed an association of roofers. Our Ken Luurs — not a lawyer — spent some quality time at the American Bar

## QUARTERLY LIMERICK

(First presented at  
the September 17  
NABLHASBEENS  
dinner.)

There once was a  
lawyer named

Friel  
Who discerned a most earnest appeal.  
With Rita's fine help,  
Our NABL was whelped;  
Thereafter, we proceeded with zeal.

Orin Macgruder

## QUARTERLY NON-LIMERICKS

### I

Rita's distinguished —  
Got the Award —  
Fondly remembered, now  
Blessed by the Board.

### II

Haines, now that Martha  
(Martha's so cool)  
Tells of enforcement, but  
Swims in our pool.

Sweet-talks the laddies  
And lassies, says "boo,"  
Some now a-quiver  
(The recalcitrant few).

### III

All I want for Christmas is a wireless mouse  
Around the house, a wireless mouse,  
And non-contingent fees, please.

Association. We sure do appreciate Ken, but we will always and forever miss Rita.

There is something magical about the Bond Attorneys' Workshop: all those bond lawyers, in all shapes and sizes; all those workshops from which to choose; those half-hour breaks between workshops, so that you can get on the telephone and practice some law; the applause for the faculty after each workshop; the "free" continental breakfasts, receptions, and the Thursday luncheon; and more-than-efficient (if sleep-deprived) Association staffers who provide service with smiles. There is no other event in the legal world that compares.

We can grouse about (and have) the eccentric breakout rooms and elevators at the Palmer House. But next year we'll convene at the new Sheraton Chicago Hotel and Towers, by all accounts a superb venue for those of our ilk. Let us hope that nothing will be lost in the transition, and trust Ken to be sure about that (as if he had naught else to do).

Speaking of Ken, the Association's staff serves us splendidly, year in and out. When you call or e-mail another bar association with a question, or for help, you'll get it next week, or perhaps not at all. When you call or e-mail NABL, you'll get what you want *instantly*, or at worst the next day (that is part of Rita Carlson's legacy). I love it.

Members who do not hail from points East will wish to put their hands together for members who flew west to Chicago, not knowing whether rambunctious Isabel would spare their homes or offices. Greater love ... or the need for CLE hours ... or commitments to Board meetings or panels.... But whatever the motivation(s), those members put the Bond Attorneys' Workshop and the associated NABL events above personal cares, and we thank you, thank you.

About three dozen former officers and directors dragged their bony bodies to a dining room at the Palmer House Hilton on September 17 for the annual meeting of the NABLHASBEENS, a group founded by first President Bernard P. Friel (after whom the medal is named).

Since at least 1980, but not so much of late, the dinners that succeeded Association Board meetings have been followed by extended joke and pun-telling sessions. Eminent raconteurs have included former Treasurer Trudy Halla (Briggs and Morgan), who specialized in Scandinavian accents; former Presidents Pope McIntire (now retired from King & Spalding), who favored eccentric stories from the Old South; Harold Judell (Foley & Judell), who came with racy Cajun tales; Jim Perkins (retired from Palmer & Dodge), who gave us rib-slapping New England complexities; Sharon White, with her San Francisco drolleries; Dean Pope (Hunton & Williams), offering mid-east-coast concoctions; and Neil Arkuss (Palmer & Dodge), punning, to name a few of the malefactors.

This year, most of the usual suspects were in attendance, and a good time was had; even the photographer had a story to tell. You, too, can participate: just get elected to the Board of Directors, and then retire.

The always-interesting Bond Attorneys' Workshop luncheon (in addition to the awards described *supra*) included "The Passing Zone," contracted entertainers Owen and John, who juggled. They began by observing that only mimes are lower on the entertainment scale than jugglers, but went on to astonish us by juggling a bowling ball (with little rubber balls); seven Indian clubs in difficult configurations; a Garden Weasel™, a Chia Pet™, and "The Club," while one wore a Thighmaster™. They continued with a vignette that featured the redoubtable Jack Kraft wearing a helmet and other accoutrements that supported spinning plates and a rubber ball, whilst six sickles threatened him before and behind, and concluded (in balletic costumes) by juggling and flinging about three operating and furious chainsaws to the profound alarm of the audience. Whatever we paid, they were worth every penny. Oh, and they pattered incessantly.

This paragraph may be a little muzzy, because I write with tears in my eyes. Some folks of my era remember Hank Williams as the first country singer they knew. But I remember Johnny Cash ("I Walk the Line," "Ring of Fire"). He died on September 12. The television guys said he had sold more

records than did the Beatles. Despite having been a musical icon for nearly five decades, he was only 71. Johnny Cash was both soft and hard: the duets with June Carter, and the prison songs. She preceded him in death by just a few months — they were that close. Goodbye, Johnny and June.

Oral history lives (Oral History II)! Your editor hosted Messrs. Sam Stone of Tulsa and John Axe of Grosse Pointe Farms here on October 22 for a joint interview, on the model of the earlier Frank L. Watson/John F. Kelly, Robert Dean Pope/Harry Frazier III, and Ruth T. West/Barbara Mendel Mayden encounters. We hope to provide the transcript in the March, 2004, issue.

Sharon Stanton White, our original and former tax columnist ("Shared Tax Observations"), President of the Association from 1986 to 1987, and the 1993 recipient of the Bernard P. Friel Medal, has contracted with West Publishing Company to write and periodically update a book titled *Private Activities in Public Places: A Manual for Application of the Private Activities Bond Tests*. Consisting of twelve chapters covering the various segments of the private activity bond tests, their applications and exceptions, and remedial action matters, it will be rather like a hornbook (with lots of footnotes) and will include appendices with citation tables, definitions, and copies of many relevant official issuances such as regs and significant PLRs. The book should be available from West in late February.

Knowing Sharon as we do, this is almost certainly a book without which Association members cannot well do.

This issue of *The Bond Lawyer*® includes its first-ever color photographs, in aid of the Association's Twenty-Fifth Anniversary celebration. I hope you enjoy them as much as I did.

## MEMBERSHIP SERVICES

### Education Program

The Association conducts seminars and workshops dealing with matters of interest to the bond law community. Ahead in 2004:

February 19 and 20: **Tax and Securities Law Institute, Las Vegas** — addressing advanced federal tax and securities law topics, as well as discussions on practice management issues.

April 21, 22, and 23: **Fundamentals of Municipal Bond Law, Chicago** — intended for those with less than three years of experience in bond law.

September 8, 9, and 10: **Bond Attorneys' Workshop, Chicago** — for lawyers with more than three years of bond experience — the preeminent annual gathering of bond lawyers, covering virtually all aspects of municipal bond law.

These events offer members opportunities to exchange ideas about law and practice with fellow practitioners. For more information, call or e-mail Executive Director Kenneth J. Luurs at 312/648-9590 or [kluurs@nabl.org](mailto:kluurs@nabl.org).

### Law Reform: Committee Participation

Through its Committees on General Tax Matters and Securities Law and Disclosure, as well as *ad hoc* committees and task forces, the Association regularly testifies and files written comments about proposed tax, securities, and other federal legislation and regulations, and acts as an *amicus curiae* in judicial and administrative proceedings of general interest to the membership. (*Amicus curiae* guidelines are available from the Executive Director.) NABL members are invited to participate in committee activities. The Association also works closely with public interest groups and industry organizations on matters of mutual interest.

### Office of Governmental Affairs

In Washington, Director of Governmental Affairs William L. Larsen represents the Association in federal regulatory and legislative matters. The Director cooperates with state and local government groups, congressional and regulatory staffs, the Association's substantive committees, and individual members to help inform and educate Congress and federal regulatory agencies about public finance issues. Members may contact the Director at 202/682-1498 (e-mail [wlarsen@nabl.org](mailto:wlarsen@nabl.org)), or at 601 Thirteenth Street, N.W., Suite 800 South, Washington, DC 20005-3875, to discuss legislative and regulatory issues, request copies of current public finance proposals before Congress or regulatory agencies, and obtain NABL comments on proposed securities and tax regulations. He also maintains — via NABLNET Alerts — e-mail contact with members on timely issues.

### Other Membership Services and Benefits

- Subscription to *The Bond Lawyer*®;

The move, known as "acceleration," means the bond in question must be paid immediately, but in practice it is unlikely that Venezuela would do so and could require years of litigation before investors recoup their money. The group has not yet taken their claim to courts in New York which govern the terms of the dispute related the bond in question, according to Stancil. He said the group filed the acceleration request to Bank of New York Mellon Corp (N:BK), the fiscal agent for the bond, on Dec.