

Bond Basics: The Essentials for County Attorneys

Douglas E. Goodfriend, Esq.

This page intentionally left blank

Recent Developments in SEC Municipal Securities Litigation that County Attorneys Need to Know

COUNTY ATTORNEYS ASSOCIATION OF STATE
OF NEW YORK ANNUAL MEETING, 2026

MAY 19, 2026

BY
DOUGLAS E. GOODFRIEND, ESQ.
ORRICK, HERRINGTON & SUTCLIFFE LLP
BOND COUNSEL

Context

County Attorney Involvement in the Authorization Stage

- Preliminary Planning Expenses
- SEQRA
- Improvement District Proceedings
- Valid County Purpose
- Shared Facilities / Joint Facilities. Non-Municipal Users. Constitutional Issues.

Primary and Secondary Disclosure – The Issuance and Post Issuance Steps

- The Basic Requirements and Rule 15c2-12 and Section 10b-5 of the Securities Exchange Act of 1934, as amended.

The Realities of Risk Assessment in Primary Disclosure

- CFO Responsibility
- Litigation Disclosure
- The SEC Fraud Standard:

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j) [13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

- The SEC declines to provide a materiality standard as to what information can be omitted under what circumstances.
- Political Speech During a Bond Offering
- SEC Caselaw (In the Matter of State of New Jersey, Administrative Proceeding File No. 3-14009 (2010; Release No. 9135); Securities and Exchange Commission v. City of Miami; SEC Litigation Release

No. 2273 (7/19/2013) and Complaint; Securities and Exchange Commission v. Town of Oyster Bay, SEC Litigation Release No. 24494 (6/17/19) and Complaint; SEC Litigation Release No. 26205 (12/30/24) and Complaint, and Securities and Exchange Commission v. Everton Sewell Complaint Case No. 22-cv-6274. See also Case No. 22-cv-6273. (U.S. Dist. Ct., Western District of New York). (Case settled in October 2024 with plea agreement). Cease and Desist Proceedings: Crosby Independent School District (File No. 3-20799), Sweetwater Union High School District (File No. 3-20560), Montebello Unified School District (File No. 3-19469) (materials available at: www.sec.gov/about/divisions-offices/office-municipal-securities/municipal-securities-enforcement-actions)

The Realities of Risk Assessment in Secondary Disclosure

- CFO Responsibility
- Litigation Disclosure
- The Municipal Continuing Disclosure Cooperation (MCDC) Initiative Era and Aftermath
- The SEC Materiality Standard applied to Secondary Disclosure:
 - Is there a substantial likelihood that the information would be viewed by a reasonable investor as having significantly altered the mix of information available?
- Current State of Late Filings; Typical Examples
 - Material Events Like Lease Purchase Obligations
 - Late Audits
 - Failure to File Material Event Notices and Failure to File Notice of Failure to File
 - Can Delay Be Deception (hence, fraud)? Whistleblowers. (See www.sec.gov/enforcement-litigation/whistleblower-program)
 - SEC Caselaw (In re: City of Harrisburg, Pennsylvania, Exchange Act Release No. 69516 (5/6/2013); SEC Legal Bulletin No. 21 (2020). SEC highlighted and consolidated its views on the applicability of the anti-fraud provisions of federal securities laws to statements made and information disseminated in the secondary market.) (materials available at: www.sec.gov/about/divisions-offices/office-municipal-securities/municipal-securities-enforcement-actions)
 - Depending on the facts and circumstances, information and statements in the following may be subject to the anti-fraud provisions of the securities laws, regardless of whether the County has in fact fulfilled its existing contractual continuing disclosure obligations:
 - Information posted on websites;
 - The use of hyperlinks;
 - Information included in public reports delivered to government agencies or otherwise made part of the public record; and
 - Statements made by officers/officials of the County, including speeches, press releases, interviews, and social media.
 - The standard for applicability is:

- Is such information “reasonably likely to reach investors”? Despite the ubiquitous nature of modern electronic availability of such information and statements, there has been no further guidance other than this phrase and the general materiality standard.
- The SEC recommends that municipal issuers have “policies and procedures” in place to address compliance in these contexts.

What County Attorneys Need to Know About SEC Litigation

Introduction – Why Do You Need to Know About Municipal Securities Litigation?

- You already know litigation can have significant financial and reputational consequences for the County
- You already know, understanding potential litigation risks helps spot issues earlier, provide better advice to the County, and avoid common pitfalls

What We'll Cover

- Litigation Risks in Public Finance
- Practical Steps to Take When Litigation is Threatened or Filed

What We Will Not Cover Because You Know All This

- Document Preservation Obligations
- Attorney-Client Privilege in Public Finance
- The Risks of Informal Communications
- The Litigation Process
- Responding to Subpoenas

Litigation Risks in Public Finance

Securities Law and Disclosure Litigation

- SEC Investigations and Enforcement Actions
 - SEC investigates and brings civil lawsuits concerning alleged misstatements or omissions in official statements and continuing disclosures. It has a dedicated whistleblower application section of its website.
 - Requires proof of falsity, materiality, and (depending on the claim) either scienter or negligence—unlike private plaintiffs, SEC does not have to establish that the alleged misstatements actually caused loss to bondholder
 - Individual issuer officials have increasingly been sued along with entities
 - SEC can seek civil monetary penalties, disgorgement, and industry bars, and can refer matters for criminal prosecution.
 - SEC may make an offer of a plea bargain with a consent decree and a fine without admission or denial of guilt.

Whistleblower Based Litigation: SEC v. A City of Principal

- SEC alleged fraud in connection with a small city bond offering. Orrick represented the City and its Assistant City Manager as securities litigation counsel, not bond counsel.
- SEC's case was exceptionally weak – certain tax increment projections were the responsibility of an independent consultant, and there was no evidence that the City knew tax increment projections were inaccurate or that the Assistant City Manager had any motive to overstate them
- Shortly before trial (just a year or so before the pandemic), the SEC agreed to voluntarily dismiss its case
 - But this came only after a three-year investigation, five years of litigation, millions of pages of documents, dozens of depositions, and millions of dollars in legal expenses
 - There have been instances of whistleblower threats in New York State.

Investor-Based Litigation: Securities Law and Disclosure Litigation

- Private Securities Litigation
 - Investors may bring claims under Rule 10b-5 for alleged material misstatements or omissions in bond offering documents.
 - Plaintiffs must prove elements such as falsity, materiality, scienter (intent to defraud), and they must prove loss causation
 - Litigation can result in damages, reputational harm, and significant legal expenses.

Breach of Contract and Fiduciary Duty Claims

- Disputes Between Issuers, Underwriters, and Bondholders
 - Contractual disagreements may involve payment terms, disclosure obligations, or performance of duties.
 - Claims can also involve breach of fiduciary duty by trustees or other parties.

Other Potential Litigation

- Challenges to Bond Issuance Authority
 - Plaintiffs may challenge the legal authority of a public entity to issue bonds.
 - Successful challenges could invalidate bond issuances and disrupt public projects.
 - Publication of a bond resolution Legal Notice of estoppel is inexpensive insurance against this type of claim in New York State. Must claim a violation of the State Constitution if filed after estoppel has lapsed.
- Claims Against Bond Counsel (or Disclosure Counsel)
 - Allegations may include failure to identify legal risks, improper disclosure advice, or conflicts of interest.
 - Malpractice claims can lead to significant damages and harm to professional reputation.

Other Resources

See Our Free Books at

www.orrick.com/en/Generic-Articles/Public-Finance-Green-Book-Series

SEC Investigations and Enforcement Actions: A Practical Handbook for Issuers of Municipal Securities

Disclosure Obligations of Issuers of Municipal Securities

Post-Issuance Tax Compliance and Continuing Disclosure Responsibilities for Issuers and Borrowers of Tax-Exempt Bonds

Practical Steps to Take When Securities Litigation is Threatened or Filed

Immediate Actions

- Call Bond Counsel Promptly
 - Bond counsel can help assess exposure and help guide the County Attorney response and strategy from the outset.
 - Early involvement ensures preservation of defenses and compliance with procedural requirements.
- Implement Document Preservation (Legal Hold)
 - Issue a written legal hold notice to all relevant personnel.
 - Suspend routine document destruction and ensure electronic and paper records are preserved.
 - Instruct all involved not to discuss the matter outside counsel to avoid inadvertent waiver of privilege.
- Review Dispute Resolution Provisions
 - Examine contracts (or other relevant documents) for arbitration, mediation, venue, and choice of law clauses.
 - Early identification of these provisions can shape litigation strategy and timelines.
- Consider Issues Unique to the County as a Public Entity Client
 - Compliance with public records laws and open meetings requirements.
 - Ensure that litigation strategy aligns with the client's public responsibilities and transparency obligations.
- Consider Disclosure Obligations as to Primary and Secondary Disclosure Responsibilities

Early Case Assessment

- Investigate Facts and Evaluate Merits with Bond Counsel
 - Gather key documents and interview relevant witnesses.
 - Assess strengths and weaknesses of potential claims and defenses.
 - Consider procedural defenses such as statute of limitations or lack of standing.
 - Evaluate substantive defenses based on the facts and applicable law.
- Cost-Benefit Analysis
 - Weigh the financial, operational, and reputational costs of litigation versus settlement.
 - Consider the impact on ongoing projects and public perception.

COUNTY ATTORNEYS KNOW THE FOLLOWING SECTIONS

Document Preservation Obligations

When Document Preservation Obligations Arise

- Trigger: Litigation Threatened or Reasonably Foreseeable
 - Obligation arises when a reasonable person anticipates litigation, not just when a complaint is filed.
 - Preservation obligation could arise upon:
 - Receipt of demand letter or governmental subpoena
 - Incident that you believe is likely to lead to litigation
- Importance of implementing a legal hold – identifying and communicating with custodians of potentially relevant documents
- Duty to preserve potentially relevant documents, in all forms—best to err on side of preservation

Consequences of Failure to Preserve

- Sanctions, Adverse Inferences, Reputational Harm
 - Courts may impose monetary sanctions or instruct juries to presume missing evidence was unfavorable.
 - Loss of evidence can undermine legal defenses and damage client trust.

Considerations For Public Entities

- Statutory Retention Requirements
 - Counties, like most public entities, are often subject to state/local government records retention laws.
 - Non-compliance can result in administrative penalties and complicate litigation.
- Intersection with FOIA/Public Records Requests
 - Litigation may trigger public records requests that overlap with discovery obligations.
 - Coordinate responses to avoid inconsistent disclosures.

Attorney-Client Privilege in Public Finance

Basics of the Attorney-Client Privilege

- Elements of the attorney-client privilege:
 - A communication
 - Made between an attorney and client
 - In confidence
 - For the purpose of seeking, obtaining, or providing legal advice
- Does not protect every communication with an attorney
- The privilege protects communications; but, of course, it does not protect underlying facts

"Dual-Purpose" Communications

- Attorneys can wear multiple hats – particularly in-house counsel
- Not uncommon for attorney communications to have both legal and business (non-legal) purposes
- To assess privilege, courts typically seek to determine whether the primary purpose of the communication is legal in nature

Common Pitfalls

- Overuse of “Privileged” Labels
 - Labeling all communications as privileged can weaken actual privilege claims. Designations are more meaningful when used appropriately.
 - Courts may scrutinize overbroad privilege assertions and order disclosure.
- Communications with Other Parties Involved in Issuance
 - Likely no privilege between issuer’s counsel and underwriter’s counsel.
 - Ensure clients understand the roles of all lawyers involved in a transaction.

Practical Guidance

- Limit Distribution of Sensitive Communications
 - Share privileged information only with those who need to know.
 - Consider speaking, not writing, for ultra-sensitive communications.
 - Avoid copying unnecessary parties, which can risk waiver.
- Make best efforts to separate "business" communications from legal communications
- Educate County Officials on Privilege Boundaries
- Special Issues for Counties as Public Entities
 - Privilege may be waived through public meetings or disclosures required by law.

The Risks of Informal Communications

Emails, Texts, and Social Media as Evidence

- Off-the-Cuff Remarks Can Become Exhibit A
 - Informal or careless comments can be taken out of context and used as evidence of intent or knowledge.

Best Practices

- Pause Before Sending
 - Encourage a culture of thoughtful, deliberate communication.
 - Remind team members that all written communications may be discoverable in litigation.
- Assume All Communications May Be Disclosed
 - Advise clients and colleagues to write as if every email or text could be read in court.
- Training for CFOs, Clerks and Other Others Involved in Debt Issuance
 - Provide regular training on appropriate use of electronic communications.
 - Establish clear policies for business-related messaging.

The Litigation Process

Stages of Litigation

- Pleadings and Motions to Dismiss
 - Filing of complaint and answer
 - Initial motions may seek to dismiss claims on legal grounds
- Discovery
 - Exchange of documents, written questions (interrogatories), and depositions.
 - Discovery is often the most time-consuming and expensive phase.
 - Anticipate that parties in litigation involving clients could seek discovery from the firm as a third-party.
- Summary Judgment
 - Parties may ask the court to resolve all or part of the case before trial if there are no disputed material facts.
- Trial and Appeals
 - If not resolved, the case proceeds to trial for a final decision.
 - Appeals may follow, further extending the timeline.

Time, Burden, and Expense

- Cases can take years to reach trial
- Vast majority of cases settle before trial
- Importance of Early Resolution Strategies
 - Early assessment and negotiation can save significant resources.
 - Consider mediation or other alternative dispute resolution methods.

Responding to Subpoenas

When and Why Subpoenas Arise

- Litigation, Governmental Investigations, Grand Jury Proceedings
 - In civil litigation, subpoenas may be issued to obtain documents or testimony from parties not directly involved in the litigation.
 - Regulatory subpoenas often signal the start of a formal government investigation.
 - Recipient of the subpoena may be a target of the investigation or (more commonly) just a source of relevant information
 - May be directed to clients or to the firm.

What To Do Upon Receipt of a Subpoena

- Immediately Notify Bond Counsel and Outside Litigation Counsel if Retaining Same.
 - Deadlines are often tight so immediate notification is critical.
 - Prompt review by experienced counsel ensures proper response and protection of rights.



Contact: dgoodfriend@orrick.com