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OPINION COMMITTEE

## TARRANT COUNTY

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December 5, 2003

**RQ-0145-GA**

FILE # ML-43367-03  
I.D. # 43367

Honorable Greg Abbott  
Texas Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

VIA U.S. (REGULAR) MAIL

Re: Opinion Request from the Tarrant County  
District Attorney's Office Concerning  
*TEXAS OCCUPATIONS CODE ANN. 1704.163*

Dear General Abbott:

The Tarrant County Bail Bond Board has prompted us to request your opinion concerning interpretation and application of certain provisions of the above-referenced statute, known as the "attorney exemption" to Chapter 1704's general requirement for bail bond sureties to be licensed by a county bail bond board.

Subsection (a) of *TEXAS OCCUPATIONS CODE ANN. § 1704.163* sets forth the "attorney exemption" itself:

*...a person not licensed under this chapter may execute a bail bond or act as a surety for another person in any county in this state if the person:*

- (1) *is licensed to practice law in this state; and*
- (2) *represents the other person in the criminal case for which the bond was given.*

But preceding this rule itself is an "exception clause" as follows: "*Except as provided by this section*". Does this mean that the general rule allowing attorneys to act as sureties for their clients without a bail bond license always applies, **except under the conditions described in subsection (b)?** This seems to be the mandate of a literal reading of the statute's language.

Secondly, we wish your opinion concerning the some of the terms found in subsection (b).

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*(b) A person executing a bail bond or acting as a surety under this section may not engage in conduct involved with that practice that would subject a bail bond surety to license suspension or revocation. If the board determines that a person has violated this subsection, the person may not execute a bail bond or act as a surety under this section until the person has remedied the violation.*

Our specific questions are:

(1) What is "conduct involved with that practice that would subject a bail bond surety to license suspension or revocation?" Does this include, for example, violation of any local board rule by an unlicensed attorney (other than a rule that pertains exclusively to obtaining licenses or renewals, rather than conduct connected to acting as a surety)?

(2) Even more specifically, if an attorney makes a bond under the attorney exemption for one or more individuals whom he does not represent in the related criminal case, and with whom he never formed an attorney-client relationship in connection with the case, has the attorney committed "conduct involved with that practice that would subject a bail bond surety to license suspension or revocation?" What if he had the good-faith belief, based on representations of a friend or relative arranging for the bail, that the friend or relative *believed* the jailed individual would form an attorney-client relationship with the bonding attorney, but the jailed individual chose to hire a different attorney after release from jail? What if the whole subject of legal representation was never discussed before the attorney made the bond?

(3) What does it mean for an attorney to have "remedied a violation" of *TEXAS OCCUPATIONS CODE ANN. § 1704.163 (b)*?

Our preliminary analysis of these issues is as follows:

(1) A board determines whether a practice will subject a bail bond surety to license suspension or revocation by following the statutory procedures set forth in Chapter 1704 of the Texas Occupations Code. *See TEXAS OCCUPATIONS CODE ANN. SECTIONS 1704.251-257.* The Board gives notice as to the specific violation or violations of the Texas Occupations Code that it is investigating. *TEXAS OCCUPATIONS CODE ANN. § 1704.254.* These grounds may allow for license suspension or revocation, or they may compel it. *TEXAS OCCUPATIONS CODE ANN. § 1704.252, 1704.253.* They include any violation of Chapter 1704 or violation of a rule adopted by the board under Chapter 1704. *TEXAS OCCUPATIONS CODE ANN. § 1704.252 (1).* Determination of whether a particular practice will result in a violation is a fact-intensive, case by case decision.

The attorney exemption language in 1704.163(b) evidences a broad legislative intent to subject attorneys to the same rules and regulations that licensed sureties must follow, when the

attorneys themselves act as sureties. This intent cannot extend to EVERY mandate of statute and local rule, for some provisions concern applications for new and renewal licenses, which are obviously the very processes from which the attorney "exemption" exempts its beneficiaries. See, e.g., *TEXAS OCCUPATIONS CODE ANN. § 1704.151-159*. However, 1704.163 (B) could be read to include EVERY mandate of statute and local rule except those facially inapplicable to lawyers operating under the "exception", or those rules and statutes which, if applied to attorneys, would lead to absurd results. An attorney making a bond for an individual whom he or she does not represent in the related criminal case is explicitly violating a term of the bail bond act that is, on its face, applicable to attorneys, and hence COULD be subject to sanction under *TEXAS OCCUPATION CODE ANN. 1704.163(b)*. See *TEXAS OCCUPATIONS CODE ANN. § 1704.163 (a) AND §1704.252 (1)*.

There is another conceivable interpretation of 1704.163 (b): "would subject a licensee to license suspension or revocation" could be construed as limited to violations of mandatory grounds for suspension, but this would fail to do justice to the legislature's manifest broad intent to subject attorneys to the normal strictures of bail bonding. It would mean that attorneys would be subject to very few restrictions on their practice of making bail bonds. See *TEXAS OCCUPATIONS CODE ANN. § 1704.253*.

(2) Under Section 1704.163 (a), an attorney is authorized to make a bond under the "attorney exception" only if he or she "represents [the person] in the criminal case for which the bond [is] given." (emphasis added) This verb "represents" is unequivocal and written in the present tense. Therefore, it is our belief that before an attorney makes a bond under the attorney exception, he or she must have grounds for considering that he or she has a then-existing, current and active attorney-client relationship with the person bonded concerning the criminal matter for which the bond is made. In order to be able to say this, the attorney must communicate with the person in jail and receive his explicit authorization OR must have been explicitly hired as counsel for the person in jail by someone explicitly purporting to have the authority to hire counsel for the incarcerated person. Anything less definite than this would allow attorneys to operate under a lower standard than the statutory "represents...in the criminal case" standard.

(3) Each individual bail bond board must itself determine, using its quasi-judicial powers on a case by case basis, what constitutes "remediation" of a violation of the bail bond act by an attorney. In general, remedying a violation would entail the cessation of the violation, but, in certain cases, it could mean something more.

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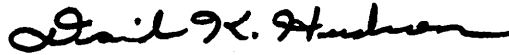
With these comments, we respectfully request your opinion regarding application of this statute.

Sincerely,

TIM CURRY  
CRIMINAL DISTRICT ATTORNEY  
TARRANT COUNTY, TEXAS



TIM CURRY  
Criminal District Attorney



DAVID K. HUDSON  
Assistant District Attorney

TC/DKH/gbb