THE BAIL BOND HANDBOOK

HANDBOOK FOR TEXAS COUNTIES

TEXAS ASSOCIATION *of* COUNTIES

2007

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FOR
TEXAS COUNTIES

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About the Author

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Personal Information

Robert Davis was born in Dallas, Texas, on September 16, 1962.

Professional Experience

After graduating from law school, Mr. Davis served as Briefing Attorney to the Honorable Justice Sue LaGarde, 5th Judicial District Court of Appeals in Dallas, Texas from 1988 to 1989. Thereafter, Mr. Davis was appointed as Law Clerk to United States District Judge William M. Steger from 1989 to 1991. Mr. Davis is a Regional Counsel for Texas Association of Counties and has extensive experience in representing governmental entities and government officials in all types of litigation. Mr. Davis also has extensive experience in first party and third party litigation for major insurance carriers, drafting coverage opinions for insurance carriers and in medical malpractice litigation for private practitioners as well as county health authorities. Since 1994, Mr. Davis has tried 78 lawsuits in state and federal court to verdict, and he has handled approximately 95 appellate cases during that same period. He was admitted to the Texas bar in November, 1988. Mr. Davis was also admitted to practice before the United States District Court for the Eastern District of Texas in 1990, the United States Court of Appeals for the 5th Circuit in 1991, the United States District Court for the Northern District of Texas in 1991, the United States District Court for the Western District of Texas in 1991, the United States District Court for the Southern District of Texas in 2001 and the Supreme Court of the United States in 1998. Mr. Davis has written papers for and made numerous presentations to such entities as the State Bar of Texas, Texas Sheriff's Association, Texas Association of Counties, Texas Jail Association, and Texas Chief Deputies' Association.

Educational Background

Mr. Davis received his preparatory education at Trinity University in San Antonio, Texas, where he received a Bachelor of Science Degree in History in 1985. Mr. Davis' legal education was at Southern Methodist University, where he graduated with a Juris Doctor Degree in 1988. During law school, Mr. Davis served as the assistant legislative liaison for Dallas District Attorney Henry Wade and his successor, Dallas District Attorney John Vance. During the period of time that Mr. Davis worked for Mr. Wade, the Texas Governor's Office published a paper written by Mr. Davis on recidivism and the need for increased prison capacity, and excerpts of the paper were published by the major news media in Texas.

Professional Development

Mr. Davis served as President of the Smith County Young Lawyers Association from 1994 to 1995, Co-Chairman of the Eastern District of Texas Historical Committee from 1996 to 1997. Mr. Davis is currently a member of the Smith County Bar Association, Gregg County Bar Association, Harrison County Bar Association, Eastern District of Texas Bar Association, and the Defense Research Institute. Mr. Davis is the author or co-author of several publications and papers including: "Civil vs. Criminal Liability for School District Employees," 2006 Texas Association of School Board's Risk Management Fund Members' Conference; "Bail Bond Handbook," Texas Association of Counties, 2005; "Jail School," Chief Deputies Conference, June 2005 and 2006, and Texas Jail Association Annual Conference, May 2005 and 2006; "House Bill 4 - The Newest Version of Tort Reform," Suing & Defending Governmental Entities 2004; "Winning Writing: Summary Judgment Practice in Texas State Courts," Suing & Defending Governmental Entities 2003; "Bail Bonds: Emerging Liability Issues," 1999 Regional Law Enforcement Workshop Series, February 1999; Co-Author, "Jail Litigation: From Class Action Lawsuits to Pro Se Litigation," 1999 Fall Law Enforcement Regional Workshops - Mitigating Liability in County Jails, November 1999."Civil Rights Litigation Update," Texas Association of Counties, Northeast Texas Seminar, August 29, 1998; "Anatomy of a Law Enforcement Lawsuit," County Management Institute Seminar, April 8, 1998; "Jail Litigation: From Pro-Se Lawsuits to Class Actions," State Bar of Texas Seminar Suing and Defending Governmental Entities, 1997; "Bail-Bond Forfeitures," Northern and Eastern County Judges Association of Texas, 1997; "A Court Divided: The 5th Circuit Court of Appeals and the Politics of Judicial Reform," 52 TEX. B. J. 706 (1989) (book review); "The Choice: Increased Prison Capacity or Increased Recidivism," published by the Governor's Office of the State of Texas, 1986; "Using Abstract Questions to Develop Critical Thinking Skills in Social Studies," Holt, Rinehart & Winston, Inc. 1984; and "Selecting a United States President in 1984," MaGraw Hill Book Company, 1984.

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I. NON-BAIL BOND BOARD COUNTIES

In a county without a bail bond board, the taking of bail bonds is generally governed by Chapter 17 of the Texas Code of Criminal Procedure. Op. Tex. Att'y Gen. No. JC-0541 (2002); *see Castaneda v. Gonzalez*, 985 S.W.2d 500, 503 (Tex. App.–Corpus Christi 1988, no writ). Neither the sheriff nor other county officials in a non-bail bond board county may adopt licensing rules modeled on the Bail Bond Board Act rules. Op. Tex. Att'y Gen. No. No. DM-105 (1998). If the county is not a "bail bond board county," the county and its officials are limited to complying with the provisions of Chapter 17.

A. BAIL

1. WHAT IS BAIL – Bail is defined in Texas by the Texas Code of Criminal Procedure as follows:

a. Art. 17.01. – Definition of "bail"

> "Bail" is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond.

It must be recognized that bail is not meant as a punishment. It is meant to secure the appearance of the accused. The ability to be accorded reasonable bail is something that the founders of our nation believed in strongly enough to include in the Bill of Rights. Specifically, the Eighth Amendment leads off by stating that "excessive bail shall not be required . . .." From a practical standpoint, reasonable bail and people who are willing to post reasonable bail for inmates are essential to keeping jail population down.

B. WHEN AND HOW BAIL MUST BE SET

1. ACCUSED MUST BE TAKEN BEFORE MAGISTRATE – Article 14.06 of the Code of Criminal Procedure provides as follows:

a. Art. 14.06. – Must take offender before magistrate[1]

(a) Except as otherwise provided by this article, in each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay, but not later than 48 hours after the person is arrested, before the magistrate who may have ordered the arrest, before some magistrate of the county where the arrest was made without an order, or, if necessary to provide more expeditiously to the person arrested the warnings described by Article 15.17 of this Code, before a magistrate in a county bordering the county in which the arrest was made. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

(b) A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, and the offense charged.

As set forth in Article 14.06 above, a person arrested with or without a warrant must be taken before a magistrate within 48 hours of arrest, and the magistrate must perform the duties set forth in Article 15.17. One of those duties is to set the bond of the accused.[2]

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[1] Article 2.09 of the Texas Code of Criminal Procedure identifies magistrates for purposes of setting bond and performing other duties of a "magistrate" listed under the Code. It states as follows:

> Each of the following officers is a magistrate within the meaning of this Code: The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, the magistrates appointed by the judges of the district courts of Bexar County, Dallas County, or Tarrant County that give preference to criminal cases, the criminal law hearing officers for Harris County appointed under Subchapter L, Chapter 54, Government Code , the magistrates appointed by the judges of the district courts of Lubbock County or Webb County, the magistrates appointed by the judges of the criminal district courts of Dallas County or Tarrant County, the masters appointed by the judges of the district courts and the county courts at law that give preference to criminal cases in Jefferson County, the magistrates appointed by the judges of the district courts and the statutory county courts of Williamson County, the magistrates appointed by the judges of the district courts and statutory county courts that give preference to criminal cases in Travis County, the county judges, the judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the associate judges appointed by the judges of the statutory probate courts under Subchapter G, Chapter 54, Government Code, the justices of the peace, the mayors and recorders and the judges of the municipal courts of incorporated cities or towns.

[2]The Eightieth Legislature amended Article 14.06 to add the following provisions:

> (c) If the person resides in the county where the offense occurred, a peace officer who is charging a person with committing an offense that is a Class A or B misdemeanor may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and

The 48 hour rule is exceptionally important, not only for the purpose of setting a reasonable bond within a reasonable period of time, but also for complying with the Fourth Amendment requirements relating to unreasonable seizures. If an accused is held for more than 48 hours after a warrantless arrest, it presumptively violates the Fourth Amendment to the United States Constitution. *County of Riverside v. McLaughlin,* 500 U.S. 44, 55-57, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). The Fourth Amendment requires a prompt determination of probable cause by a magistrate following a warrantless arrest, and failure to provide such a determination within 48 hours shifts the burden to the government to demonstrate a bona fide emergency or extraordinary circumstances justifying the lengthier delay. *Id.; United States v. Adekunle,* 2 F.3d 559, 561 (5th Cir. 1993).

2. <u>DUTIES OF MAGISTRATE AND ARRESTING OFFICER FOLLOWING ARREST</u> – In cases where an arrest has been made either with or without a warrant, the magistrate has certain duties, as set forth below, that must be performed. One of those duties is to set bond. Article 15.17 states as follows:

a. Art. 15.17. – Duties of arresting officer and magistrate

> (a) In each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested, take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, if necessary to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in a county bordering the county in which the arrest was made. The arrested person may be taken before the magistrate in person or the image of the arrested person may be broadcast by closed circuit television to the magistrate. The magistrate shall inform in clear language the person arrested, either in person or by closed circuit television, of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to

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place the person must appear before a magistrate of this state as described by Subsection (a), the name and address of the person charged, and the offense charged.

(d) Subsection (c)applies only to a person charged with committing an offense under:

(1) Section 481.121, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2) of that section;

(2) Section 28.03, Penal Code, if the offense is punishable under Subsection (b)(2) of that section;

(3) Section 28.08, Penal Code, if the offense is punishable under Subsection (b)(1) of that section;

(4) Section 31.03, Penal Code, if the offense is punishable under Subsection (e)(2)(A) of that section;

(5) Section 31.04, Penal Code, if the offense is punishable under Subsection (e)(2) of that section;

(6) Section 38.114, Penal Code, if the offense is punishable as a Class B misdemeanor, or

(7) Section 521.457, Transportation Code.

have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate shall also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel. If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate. The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. If the person arrested is indigent and requests appointment of counsel and if the magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the county, the magistrate shall appoint counsel in accordance with Article 1.051. If the magistrate is not authorized to appoint counsel, the magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel. The magistrate shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall, after determining whether the person is currently on bail for a separate criminal offense, admit the person arrested to bail if allowed by law. A closed circuit television system may not be used under this subsection unless the system provides for a two-way communication of image and sound between the arrested person and the magistrate. A recording of the communication between the arrested person and the magistrate shall be made. The recording shall be preserved until the earlier of the following dates: (1) the date on which the pretrial hearing ends; or (2) the 91st day after the date on which the recording is made if the person is charged with a misdemeanor or the 120th day after the date on which the recording is made if the person is charged with a felony. The counsel for the defendant may obtain a copy of the recording on payment of a reasonable amount to cover costs of reproduction. For purposes of this subsection, "electronic broadcast system" means a two-way electronic communication of image and sound between the arrested person and the magistrate and includes secure internet videoconferencing.

(b) After an accused charged with a misdemeanor punishable by fine only is taken before a magistrate under Subsection (a) of this article and the magistrate has identified the accused with certainty, the magistrate may release the accused without bond and order the accused to appear at a later date for arraignment in the county court or statutory county court. The order must state in writing the time, date, and place of the arraignment, and the magistrate must sign the order. The accused shall receive a copy of the order on release. If an accused fails to appear as required by the order, the judge of the court in which the accused is required to appear shall issue a

warrant for the arrest of the accused. If the accused is arrested and brought before the judge, the judge may admit the accused to bail, and in admitting the accused to bail, the judge should set as the amount of bail an amount double that generally set for the offense for which the accused was arrested. This subsection does not apply to an accused who has previously been convicted of a felony or a misdemeanor other than a misdemeanor punishable by fine only.

(c) When a deaf accused is taken before a magistrate under this article or Article 14.06 of this Code, an interpreter appointed by the magistrate qualified and sworn as provided in Article 38.31 of this Code shall interpret the warning required by those articles in a language that the accused can understand, including but not limited to sign language.

(d) If a magistrate determines that a person brought before the magistrate after an arrest authorized by Article 14.051 of this code was arrested unlawfully, the magistrate shall release the person from custody[3]. If the magistrate determines that the arrest was lawful, the person arrested is considered a fugitive from justice for the purposes of Article 51.13 of this code, and the disposition of the person is controlled by that article.

(e) In each case in which a person arrested is taken before a magistrate as required by Subsection (a), a record shall be made of:

> (1) the magistrate informing the person of the person's right to request appointment of counsel;
>
> (2) the magistrate asking the person whether the person wants to request appointment of counsel; and
>
> (3) whether the person requested appointment of counsel.

(f) A record required under Subsection (e) may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under Article 26.04(a).

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[3] An arrest under Article 14.051 is a warrantless arrest by an officer from another state who is in fresh pursuit of a fleeing felon. As stated above, if an accused is held for more than 48 hours after a warrantless arrest, it presumptively violates the Fourth Amendment to the United States Constitution as established in *County of Riverside v. McLaughlin,* 500 U.S. 44, 55-57, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). The Fourth Amendment requires a prompt determination of probable cause following a warrantless arrest, and failure to provide such a determination within 48 hours shifts the burden to the government to demonstrate a bona fide emergency or extraordinary circumstances justifying the lengthier delay. *Id.; United States v. Adekunle,* 2 F.3d 559, 561 (5th Cir. 1993).

A justice of the peace may not set bail by telephone and may not establish pre-set bail amounts by posting a schedule at the county jail. Op. Tex. Att'y Gen. No. DM-057 (1991).

Finally, a court may not require a bailable defendant to satisfy a "split bond," where a portion of the bond amount is designated a personal bond and the remaining portion of the bond amount is a secured bail bond backed by a surety. Op. Tex. Att'y Gen. No. JC-0215 (2000).

3. ARTICLE 17.033 TIME PERIOD FOR RELEASE FOR WARRANTLESS ARRESTS AND CAPS ON BOND AMOUNTS – Article 17.033 of the Code of Criminal Procedure caps bond amounts in misdemeanor cases involving warrantless arrests where a magistrate has not determined the existence of probable cause within 24 hours, and Article 17.033 requires release on a personal bond if the accused is unable to obtain a surety or post a cash bond. The same section also caps bonds in felony cases involving warrantless arrests where a magistrate has not determined the existence of probable cause within 24 hours, and Article 17.033 requires release on a personal bond if the accused is unable to obtain a surety or post a cash bond. Article 17.033 reads as follows:

a. Art. 17.033. – Release on Bond of Certain Persons Arrested Without a Warrant

(a) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $5,000, not later than the 24th hour after the person's arrest if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

(b) Except as provided by Subsection (c), a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $10,000, not later than the 48th hour after the person's arrest if the person was arrested for a felony and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.

(c) On the filing of an application by the attorney representing the state, a magistrate may postpone the release of a person under Subsection (a) or (b) for not more than 72 hours after the person's arrest. An application filed under this subsection must state the reason a magistrate has not determined whether probable cause exists to believe that the person committed the offense for which the person was arrested.

(d) The time limits imposed by Subsections (a) and (b) do not apply to a person arrested without a warrant who is taken to a hospital, clinic, or other medical facility

before being taken before a magistrate under Article 15.17. For a person described by this subsection, the time limits imposed by Subsections (a) and (b) begin to run at the time, as documented in the records of the hospital, clinic, or other medical facility, that a physician or other medical professional releases the person from the hospital, clinic, or other medical facility.

This section should be read in conjunction with Article 17.22, which authorizes the sheriff or other peace officer, in certain situations, to take and/or "fix" the amount of a bond. This section provides as follows:

b. Art. 17.22. – May take bail in felony[4]

In a felony case, if the court before which the same is pending is not in session in the county where the defendant is in custody, the sheriff, or other peace officer having him in custody, may take his bail bond in such amount as may have been fixed by the court or magistrate, **or if no amount has been fixed, then in such amount as such officer may consider reasonable.**[5]

It is recommended that the Sheriff refrain whenever possible from setting the amount of any bond, as he or she is not a magistrate. However, in any case involving a warrantless arrest where a magistrate has not made a finding of probable cause within 48 hours, the Sheriff needs to get that person out of his or her jail within 48 hours to avoid a presumptive Fourth Amendment violation cause of action.

In practice, the best course of action is to get each accused individual to a magistrate as quickly as possible, but, in order to comply with Article 17.033, within 24 hours for all persons accused of misdemeanor offenses and within 48 hours for all persons accused of felony offenses. Otherwise, the caps and personal bond requirements of Article 17.033 will apply.

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[4] Article 17.20 speaks to the sheriff's ability to "take" a bond in misdemeanor cases, but does not provide a specific provision to "fix" the amount of a reasonable bond as does Article 17.22. It seems unusual that a sheriff would be allowed, in certain circumstances, to "fix" the reasonable amount of bond for a felony offense, and Article 17.20 does not specifically allow the sheriff to "fix" the amount of a reasonable bond for a misdemeanor offense. Article 17.20 merely reads as follows: "The sheriff, or other peace officer, in cases of misdemeanor, may, whether during the term of the court or in vacation, where he has a defendant in custody, take of the defendant a bail bond." Acceptance of bail bonds by peace officers for non-municipal offenses at locations other than the county jail pursuant to the provisions of articles 17.20, 17.21 and 17.22 of the Code of Criminal Procedure is permissible. Op. Tex. Att'y Gen. No. JM-1217 (1990).

[5] According to a prior Texas Attorney General Opinion, a peace officer may not, however, without authorization from a court or magistrate, release an individual charged with a misdemeanor offense on a personal bond (except in traffic cases by obtaining his or her written promise to appear in court). Op. Tex. Att'y Gen. No. JM-760 (1987).

Further, any additional delay may give rise to a lawsuit alleging false arrest or detention under the Fourth Amendment. The *McLaughlin* line of cases state that the Fourth Amendment requires a prompt determination of probable cause following a warrantless arrest, and failure to provide such a determination within 48 hours shifts the burden to the government to demonstrate a *bona fide* emergency or extraordinary circumstances justifying a lengthier delay. *McLaughlin* at 55-57; *United States v. Adekunle,* 2 F.3d 559, 561 (5th Cir. 1993).

4. DETERMINING THE AMOUNT OF BAIL – In determining the amount of bail to be set in situations where the accused is taken before a magistrate within the specified period of time noted above, the following provisions of the Code of Criminal Procedure and Texas Constitution apply:

a. Art. 17.15. – Rules for fixing amount of bail

> The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:
>
> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
>
> 5. The future safety of a victim of the alleged offense and the community shall be considered.

These rules comport with the Eighth Amendment to the United States Constitution as well as, Article 1, § 13 of the Texas Constitution which provides, in pertinent part, as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." The magistrate setting bail must remember that setting bail is not punitive in nature. Bail is not meant to be a fine or a punishment. The main purpose of setting bail is to ensure that the accused will show up for court.

C. DEFINITION AND REQUIREMENTS OF BAIL BONDS

1. WHAT IS A BAIL BOND – A "bail bond" is defined by the Texas Code of Criminal Procedure, and includes "surety bonds," "cash bonds," and "personal bonds." The Code of Criminal Procedure specifically defines "bail bond" as follows:

a. Art. 17.02. – Definition of "bail bond"

> A "bail bond" is a written undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation; provided, however, that the defendant upon execution of such bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United States in the amount of the bond in lieu of having sureties signing the same. Any cash funds deposited under this Article shall be receipted for by the officer receiving the same and shall be refunded to the defendant if and when the defendant complies with the conditions of his bond, and upon order of the court.

It is important to note that this section of the Texas Code of Criminal Procedure mentions two types of "bail bonds." The first type of bail bond is a bond executed by the criminal defendant as the "principal" and one or more "sureties" to secure his appearance before the Court, which is often referred to as a "surety bond." The second type of bond addressed in Article 17.02 of the Code of Criminal Procedure is what is often referred to as a "cash bond."[6] A "cash bond" occurs when the criminal defendant executes the bond himself as principal and posts the entire amount of the bond in cash with the "custodian of funds of the court" in lieu of having sureties sign the bond.

Another type of bond not specifically mentioned in Article 17.02 is a "Personal Bond." Personal Bonds are examined in depth later in Subsection E at page 14 of this paper.

"Cash bonds" need no further explanation, but the requirements for "surety bonds" and "personal bonds" will have to be examined in depth in the following sections of this paper.

2. <u>WHAT IS REQUIRED ON A BAIL BOND</u> – On any "bail bond" tendered, including a "cash bond," the bond must meet certain requirements to be in the proper form. Article 17.08 speaks to the requirements of the bond form as follows:

a. Art. 17.08. – Requisites of a Bail Bond

A bail bond must contain the following requisites:

1. That it be made payable to "The State of Texas";

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[6] A cash bond must be made in the name of the criminal defendant, and any refund of the cash bond after the conditions of the bond have been met must be made to the criminal defendant. The court officer is not required to inform a third party who actually posted the cash bond of the refund of the cash bond, but the court officer is not prohibited from issuing such notification. Op. Tex. Att'y Gen. No. JC-0024 (1999).

2. That the defendant and his sureties, if any, bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him;

3. If the defendant is charged with a felony, that it state that he is charged with a felony. If the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor;

4. That the bond be signed by name or mark by the principal and sureties, if any, each of whom shall write thereon his mailing address;

5. That the bond state the time and place, when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. The bond shall also bind the defendant to appear before any court or magistrate before whom the cause may thereafter be pending at any time when, and place where, his presence may be required under this Code or by any court or magistrate, but in no event shall the sureties be bound after such time as the defendant receives an order of deferred adjudication or is acquitted, sentenced, placed on community supervision, or dismissed from the charge;

6. The bond shall also be conditioned that the principal and sureties, if any, will pay all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in re-arresting the principal in the event he fails to appear before the court or magistrate named in the bond at the time stated therein. The amount of such expense shall be in addition to the principal amount specified in the bond. The failure of any bail bond to contain the conditions specified in this paragraph shall in no manner affect the legality of any such bond, but it is intended that the sheriff or other peace officer shall look to the defendant and his sureties, if any, for expenses incurred by him, and not to the State for any fees earned by him in connection with the re-arresting of an accused who has violated the conditions of his bond.

It should be noted that sub-section 6 requires that the principal and surety pay the reasonable and necessary expenses incurred by law enforcement in re-arresting the principal if he fails to appear.

Now that the types of bonds have been identified and the requisites of the bond form have been identified, it is important to specifically discuss the requirements of "surety bonds" and "personal bonds."[7]

D. **<u>WHO MAY ACT AS SURETY ON A "SURETY BAIL BOND"</u>** – Bail bonds, other than "cash bonds" and "personal bonds," are generally referred to as "surety bonds." Such bonds may be made by "corporate sureties" or "individual sureties." Although the term "corporate surety" is

[7] As previously stated, "cash bonds" are simple and require no in-depth explanation.

used throughout the Code of Criminal Procedure," not just any corporation qualifies to act as a surety to write bonds. Only corporations specifically licensed to act as sureties can make bonds, and the only corporations that qualify are insurance companies that are duly authorized by the Texas Department of Insurance.[8]

1. <u>CORPORATE SURETIES (INSURANCE COMPANIES)</u> – As stated above, the only corporations that may act as sureties are insurance companies. The relevant portions of the Texas Code of Criminal Procedure read as follows:

a. Art. 17.06. – Corporation as surety

> Wherever in this Chapter, any person is required or authorized to give or execute any bail bond, such bail bond may be given or executed by such principal and any corporation authorized by law to act as surety, subject to all the provisions of this Chapter regulating and governing the giving of bail bonds by personal surety insofar as the same is applicable.

b. Art. 17.07. – Corporation to file with county clerk power of attorney designating agent

> Any corporation authorized by the law of this State to act as a surety, shall before executing any bail bond as authorized in the preceding Article, first file in the office of the county clerk of the county where such bail bond is given, a power of attorney designating and authorizing the named agent, agents or attorney of such corporation to execute such bail bonds and thereafter the execution of such bail bonds by such agent, agents or attorney, shall be a valid and binding obligation of such corporation.

In counties where no bail bond board exists, only a licensed "local recording agent" may act as the agent for an insurance company writing bonds.[9]

Insurance companies for whom local recording agents are writing bonds do not have to satisfy any requirements to prove that they have sufficient security to write a bond. They are exempt from the requirements of signing a sufficiency affidavit (as allowed by Article 17.13 for individual sureties) and are also exempt from any additional investigation into the sufficiency of their security (as allowed by Article 17.14 for individual sureties). An officer taking a bond under chapter 17 of the Code of Criminal Procedure lacks the authority to question the solvency of a corporate surety authorized to do business by the Texas Department of Insurance. Op. Tex. Att'y Gen. No. JC-0541

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[8] The only corporation which may act as a surety on bail bonds is an insurance company and it must comply with the Texas Insurance Code and obtain a certificate of authority from the State Board of Insurance. Op. Att'y Gen. No. MW-321 (1981).

[9] In counties where a bail bond board exists, there is no requirement for the agent of the insurance company to be a licensed "local recording agent."

(2002); *see International Fid. Ins. Co. v. Sheriff of Dallas County,* 476 S.W.2d 500 (Tex. Civ. App.–Beaumont 1972, writ ref'd n.r.e.).

Indeed, the sheriff, or other County official, is not authorized to set a limit on the value amount of bonds which a corporate surety may provide where the corporation has been issued a certificate of authority to do business in Texas by the State Board of Insurance pursuant to the Texas Insurance Code. Op. Tex. Att'y Gen. No. JM-799 (1987); *see* Op. Tex. Att'y Gen. No. DM (1993) There is no automatic limit on the value of the bonds a corporate bail bondsman may issue. Id. However, the Power of Attorney on file with the County Clerk pursuant to Article 17.07 may attempt to limit the agents authority and may be examined by the Sheriff's office.

2. <u>INDIVIDUAL SURETIES</u> – In Texas, any individual,[10] except a minor, can post a bond in counties that do not have a bail bond board so long as certain educational requirements are satisfied. Indeed, even convicted felons and some government employees[11] can write bonds as sureties in "non-bail bond board counties." The only requirements that have to be met are the educational requirements and the individual's ability to meet the financial standards.[12] The sufficiency of the security offered by a surety is governed by articles 17.11 through 17.14. Op. Tex. Att'y Gen. No. DM-105 (1998). The relevant portion of the Code of Criminal Procedure relating to age and educational requirements is set forth in article 17.10 as follows:

a. Art. 17.10. – Disqualified sureties[13]

(a) A minor may not be surety on a bail bond, but the accused party may sign as principal.

(b) A person, for compensation, may not be a surety on a bail bond written in a county in which a county bail bond board regulated under Chapter 1704, Occupations

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[10] Only corporations and individuals may be licensed to act as bail bondsmen. Op. Tex. Att'y Gen. No. MW-507 (1982).

[11] The Attorney General has opined that a superintendent in charge of streets for the City of Madisonville is not precluded as a matter of law from engaging in the writing of bail bonds. Op. Tex. Att'y Gen. No. JM-598 (1986). Moreover, it is the opinion of the Attorney General that an individual whose spouse is a bail bondsman may be employed as an investigator for the criminal district attorney. Op. Tex. Att'y Gen. No. JM-776 (1987).

[12] For years, officials have held a misconception that attorneys are somehow exempt from meeting the sufficiency requirements. However, a sheriff or other official taking bond in either a bail bond board county or a non-bail bond board county must inquire into the sufficiency of security of an attorney posting bond for one of his clients, just as must be done for any other surety under Chapter 17 of the Code of Criminal Procedure. Attorneys are exempt from the Bail Bond Board Act, but, even in a county with a bail bond board, an attorney is subject to the requirements of Chapter 17 of the Code of Criminal Procedure. Op. Tex. Att'y Gen. No. DM-483 (1998); Op. Tex. Att'y Gen. No. JC-0277 (2000).

[13] Art. 17.10, Code of Criminal Procedure, was amended effective September 1, 2005.

Code, does not exist unless the person, within two years before the bail bond is given, completed in person at least eight hours of continuing legal education in criminal law courses or bail bond law courses that are:

(1) approved by the State Bar of Texas; and

(2) offered by an accredited institution of higher education in this state.

The term "for compensation" must be specifically noted in Article 17.10(b). Attorneys that practice in this area differ on the interpretation of this section. The Flowers Davis law firm is of the opinion that Attorneys who are bonding out their clients, without receiving separate compensation for their bonding services, do not have to meet the educational requirements of Article 17.10(b).[14] There are attorneys who disagree with the opinion of Flowers Davis. It is the opinion of some of these attorneys that an Attorney posting a bond in a non-bail bond county would have to meet the educational requirements even if the attorney was not posting the bond "for compensation," or at least not for compensation separate from their ordinary legal fees. It is also the opinion of Flowers Davis law firm that if an attorney is charging a separate fee for bonding a client out of jail other than his ordinary legal fees, then the attorney would be writing a bond "for compensation," which would require the attorney to meet the educational requirements just like any other person bonding people out "for compensation." These conflicting opinions are both reasonable, and the attorneys that hold these conflicting opinions are all excellent attorneys. **If this issue arises in your county, the best possible advice is to contact your county attorney or outside legal counsel for legal advice specific to the situation with which you are confronted.** The matter may be best resolved by seeking an attorney general's opinion on this matter.

b. Art. 17.11. – How bail bond is taken

Sec. 1. Every court, judge, magistrate or other officer taking a bail bond shall require evidence of the sufficiency of the security offered; but in every case, one surety shall be sufficient, if it be made to appear that such surety is worth at least double the amount of the sum for which he is bound, exclusive of all property exempted by law from execution, and of debts or other encumbrances; and that he is a resident of this state, and has property therein liable to execution worth the sum for which he is bound.

Sec. 2. Provided, however, any person who has signed as a surety on a bail bond and is in default thereon shall thereafter be disqualified to sign as a surety so long as he is in default on said bond. It shall be the duty of the clerk of the court wherein such surety is in default on a bail bond, to notify in writing the sheriff, chief of police, or other peace officer, of such default. A surety shall be deemed in default from the

[14]Flowers Davis law firm is also of the opinion that family members can sign sureties if they meet the financial requirements set forth in Articles 17.11 through 17.13, as long as it is not done "for compensation."

time execution may be issued on a final judgment in a bond forfeiture proceeding under the Texas Rules of Civil Procedure, unless the final judgment is superseded by the posting of a supersedeas bond.

c. Art. 17.12. – Exempt property

The property secured by the Constitution and laws from forced sale shall not, in any case, be held liable for the satisfaction of bail, either as to principal or sureties, if any.

d. Art. 17.13. – Sufficiency of sureties ascertained

To test the sufficiency of the security offered to any bail bond, unless the court or officer taking the same is fully satisfied as to its sufficiency, the following oath shall be made in writing and subscribed by the sureties: "I, do swear that I am worth, in my own right, at least the sum of (here insert the amount in which the surety is bound), after deducting from my property all that which is exempt by the Constitution and Laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances upon my property which are known to me; that I reside in ..... County, and have property in this State liable to execution worth said amount or more.

(Dated ....., and attested by the judge of the court, clerk, magistrate or sheriff.)"

Such affidavit shall be filed with the papers of the proceedings.

e. Art. 17.14. – Affidavit not conclusive

Such affidavit shall not be conclusive as to the sufficiency of the security; and if the court or officer taking the bail bond is not fully satisfied as to the sufficiency of the security offered, further evidence shall be required before approving the same.

Sheriffs may require additional evidence of the sufficiency of the surety, including documents showing ownership interest in properties, the number and amount of bonds written in other counties and other financial records. In addition, Article 17.141 requires sureties to submit sworn financial statements if they are included on a list of approved sureties posted in the jail under Article 17.141.

Whatever additional evidence a sheriff decides to require in a particular county should apply equally to each bondsman. In other words, everyone should be treated the same, and the same information should be required of each bondsman unless a viable reason exists to require more information from a particular individual.

In considering the sufficiency of the security of a surety, many officials have suffered from the misconception that real property that is used as collateral by a bondsman must be in the county

in which the bond is posted – that is not accurate. The property may be outside the county. Op. Tex. Att'y Gen. No. DM-264 (1993).

Additionally, collateral may not be required to secure the bond in a "non-bail bond board" county for either a corporate surety or an individual surety. Op. Tex. Att'y Gen. No. DM-483 (1998). A sheriff in a non-bail bond board county cannot require a bondsman to post real or personal property as collateral for a bond. However, a sheriff may take into account the amount of other outstanding bonds, including bonds in other counties, when determining a surety's worth; the outstanding bonds are considered "debts or other encumbrances."

It should also be noted that a licensed corporate surety may have authorized agents sign bonds in its behalf, but an individual surety may not do so, according to the Texas Attorney General's interpretation of TEX. CRIM. PROC. CODE ANN. § 17.08. Op. Tex. Att'y Gen. No. MW-507 (1982). A sheriff in a non-bail bond board county is not required to accept a bail bond signed by an individual surety's attorney-in-fact on the surety's behalf. Op. Tex. Att'y Gen. No. GA-0288 (2004).

Finally, it is also important to realize that a person who operates as a bail bond licensee in an individual capacity may, in addition, be licensed as an agent for a corporate surety. Op. Tex. Att'y Gen. No. DM96-019 (1996). They may operate in the same place of business, use the same telephone numbers, the same employees, and the same advertising. Op. Tex. Att'y Gen. No. DM96-019 (1996).

f. Art. 17.141. – Posted List of Eligible Bail Bond Sureties in Certain Counties[15]

> In a county in which a county bail bond board regulated under Chapter 1704, Occupations Code, does not exist, the sheriff may post a list of eligible bail bond sureties whose security has been determined to be sufficient. Each surety listed under this article must file annually a sworn financial statement with the sheriff.

Prior to September 1, 2005, the posting of a list of pre-approved bondsmen in a county jail was not allowed in a non-bail bond board county because it exceeded the authority of a sheriff under Chapter 17 of the Code of Criminal Procedure. Op. Tex. Att'y Gen. No. JC-0541 (2002). This prior rule has now been changed through legislation.

Article 17.141 also adds a requirement for a "sworn financial statement." Prior to this clarification regarding an annual sworn financial statement, there was no specific statute requiring a surety to provide a financial statement. Some sheriffs have been requiring financial statements under Article 17.14, either "sworn" or audited, for some time. Audited financial statements require an audit by an accountant. "Sworn financial statements" are not generally defined by either the Code

[15] Article 17.141 was added to the Code of Criminal Procedure effective September 1, 2005.

of Criminal Procedure or by generally accepted accounting principles. However, it can be presumed that a "sworn financial statement" only requires that the surety swear to the accuracy of the statement under penalty of perjury.

E. <u>PERSONAL BONDS</u> – Personal bonds provide an excellent tool for decreasing jail overcrowding, and good communication between the magistrates and the sheriff's department can assist in good jail management and reduce the jail costs for the county through the use of personal bonds. Proper identification of those inmates eligible for personal bonds is very important. The more quickly such accused people are brought before magistrates, the more quickly such accused individuals can be moved out of the jail.

1. Art. 17.03. – Definition of Personal Bond

(a) Except as provided by Subsection (b) of this article, a magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security.

(b) Only the court before whom the case is pending may release on personal bond a defendant who:

(1) is charged with an offense under the following sections of the Penal Code:

(A) Section 19.03 (Capital Murder);

(B) Section 20.04 (Aggravated Kidnaping);

(C) Section 22.021 (Aggravated Sexual Assault);

(D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, or Court Participant);

(E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);

(F) Section 29.03 (Aggravated Robbery);

(G) Section 30.02 (Burglary); or

(H) Section 71.02 (Engaging in Organized Criminal Activity);

(I) Section 21.02 (Continuous Sexual Abuse of Young Child or Children)

(2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first degree felony; or

(3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.

(c) When setting a personal bond under this chapter, on reasonable belief by the investigating or arresting law enforcement agent or magistrate of the presence of a controlled substance in the defendant's body or on the finding of drug or alcohol abuse related to the offense for which the defendant is charged, the court or a magistrate shall require as a condition of personal bond that the defendant submit to testing for alcohol or a controlled substance in the defendant's body and participate in an alcohol or drug abuse treatment or education program if such a condition will serve to reasonably assure the appearance of the defendant for trial.

(d) The state may not use the results of any test conducted under this chapter in any criminal proceeding arising out of the offense for which the defendant is charged.

(e) Costs of testing may be assessed as court costs or ordered paid directly by the defendant as a condition of bond.

(f) In this article, "controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(g) The court may order that a personal bond fee assessed under Section 17.42 be:

(1) paid before the defendant is released;

(2) paid as a condition of bond;

(3) paid as court costs;

(4) reduced as otherwise provided for by statute; or

(5) waived.

2. Art. 17.031. – Release on personal bond

(a) Any magistrate in this state may release a defendant eligible for release on personal bond under Article 17.03 of this code on his personal bond where the complaint and warrant for arrest does not originate in the county wherein the accused is arrested if the magistrate would have had jurisdiction over the matter had the complaint arisen within the county wherein the magistrate presides. The personal bond may not be revoked by the judge of the court issuing the warrant for arrest except for good cause shown.

(b) If there is a personal bond office in the county from which the warrant for arrest was issued, the court releasing a defendant on his personal bond will forward a copy of the personal bond to the personal bond office in that county.

Article 17.031 provides a method of releasing inmates arrested on warrants from other counties. This provision may be utilized as part of a good jail population management policy.

3. Art. 17.032. – Release on Personal Bond of Certain Mentally Ill Defendants

(a) In this article, "violent offense" means an offense under the following sections of the Penal Code:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.03 (kidnaping);

(4) Section 20.04 (aggravated kidnaping);

(5) Section 21.11 (indecency with a child);

(6) Section 22.01(a)(1) (assault);

(7) Section 22.011 (sexual assault);

(8) Section 22.02 (aggravated assault);

(9) Section 22.021 (aggravated sexual assault);

(10) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(11) Section 29.03 (aggravated robbery); or

(12) Section 21.02 (continuous sexual abuse of young child or children).

(b) A magistrate shall release a defendant on personal bond unless good cause is shown otherwise if the:

(1) defendant is not charged with and has not been previously convicted of a violent offense;

(2) defendant is examined by the local mental health or mental retardation authority or another mental health expert under Article 16.22 of this code;

(3) examining expert, in a report submitted to the magistrate under Article 16.22:

(A) concludes that the defendant has a mental illness or is a person with mental retardation and is nonetheless competent to stand trial; and

(B) recommends mental health treatment for the defendant; and

(4) magistrate determines, in consultation with the local mental health or mental retardation authority, that appropriate community-based mental health or mental retardation services for the defendant are available through the Texas Department of Mental Health and Mental Retardation under Section 534.053, Health and Safety Code, or through another mental health or mental retardation services provider.

(c) The magistrate, unless good cause is shown for not requiring treatment, shall require as a condition of release on personal bond under this article that the defendant submit to outpatient or inpatient mental health or mental retardation treatment as recommended by the local mental health or mental retardation authority if the defendant's:

(1) mental illness or mental retardation is chronic in nature; or

(2) ability to function independently will continue to deteriorate if the defendant is not treated.

(d) In addition to a condition of release imposed under Subsection (c) of this article, the magistrate may require the defendant to comply with other conditions that are reasonably necessary to protect the community.

(e) In this article, a person is considered to have been convicted of an offense if:

(1) a sentence is imposed;

(2) the person is placed on community supervision or receives deferred adjudication; or

(3) the court defers final disposition of the case.

One of the biggest problems facing jails today is the continuing influx of inmates that have mental health issues. County jails are not designed as long term incarceration facilities, and, as such, are generally not equipped to deal with large populations of inmates with mental health issues. This article may be used as frequently as possible to get the accused individuals who qualify for personal bond under this section out of county jails and into a more suitable situation for both the accused and the county.

4. Art. 17.04. – Requisites of a personal bond

A personal bond is sufficient if it includes the requisites of a bail bond as set out in Article 17.08, except that no sureties are required. In addition, a personal bond shall contain:

(1) the defendant's name, address, and place of employment;

(2) identification information, including the defendant's:

(A) date and place of birth;

(B) height, weight, and color of hair and eyes;

(C) driver's license number and state of issuance, if any; and

(D) nearest relative's name and address, if any; and

(3) the following oath sworn and signed by the defendant:

"I swear that I will appear before (the court or magistrate) at (address, city, county) Texas, on the (date), at the hour of (time, a.m. or p.m.) or upon

notice by the court, or pay to the court the principal sum of (amount) plus all necessary and reasonable expenses incurred in any arrest for failure to appear."

5. Art. 17.151. – Release because of delay

Sec. 1. A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Sec. 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against him as to which the applicable period has not yet elapsed; or

(3) incompetent to stand trial, during the period of his incompetence.

(4) being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

The mandatory "release because of delay" provisions have been held to be constitutional, although they were adopted as part of the same package as the speedy trial act, which was held to be unconstitutional. These mandatory requirements, however, can be difficult to monitor, especially in a county with a large jail population. Nevertheless, it is important to monitor these mandatory deadlines to avoid allegations of unlawful arrest and detention.

6. Art. 17.42. – Personal bond office

Sec. 1. Any county, or any judicial district with jurisdiction in more than one county, with the approval of the commissioners court of each county in the district, may establish a personal bond office to gather and review information about an accused that may have a bearing on whether he will comply with the conditions of a personal bond and report its findings to the court before which the case is pending.

Sec. 2. (a) The commissioners court of a county that establishes the office or the district and county judges of a judicial district that establishes the office may employ a director of the office.

(b) The director may employ the staff authorized by the commissioners court of the county or the commissioners court of each county in the judicial district.

Sec. 3. If a judicial district establishes an office, each county in the district shall pay its pro rata share of the costs of administering the office according to its population.

Sec. 4. (a) If a court releases an accused on personal bond on the recommendation of a personal bond office, the court shall assess a personal bond fee of $20 or three percent of the amount of the bail fixed for the accused, whichever is greater. The court may waive the fee or assess a lesser fee if good cause is shown.

(b) Fees collected under this article may be used solely to defray expenses of the personal bond office, including defraying the expenses of extradition.

(c) Fees collected under this article shall be deposited in the county treasury, or if the office serves more than one county, the fees shall be apportioned to each county in the district according to each county's pro rata share of the costs of the office.

Sec. 5. (a) A personal bond pretrial release office established under this article shall:

> (1) prepare a record containing information about any accused person identified by case number only who, after review by the office, is released by a court on personal bond;
>
> (2) update the record on a monthly basis; and
>
> (3) post a copy of the record in the office of the clerk of the county court in any county served by the office.

(b) In preparing a record under Subsection (a), the office shall include in the record a statement of:

(1) the offense with which the person is charged;

(2) the dates of any court appearances scheduled in the matter that were previously unattended by the person;

(3) whether a warrant has been issued for the person's arrest for failure to appear in accordance with the terms of the person's release;

(4) whether the person has failed to comply with conditions of release on personal bond; and

(5) the presiding judge or magistrate who authorized the personal bond.

(c) This section does not apply to a personal bond pretrial release office that on January 1, 1995, was operated by a community corrections and supervision department.

Sec. 6. (a) Not later than April 1 of each year, a personal bond office established under this article shall submit to the commissioners court or district and county judges that established the office an annual report containing information about the operations of the office during the preceding year.

(b) In preparing an annual report under Subsection (a), the office shall include in the report a statement of:

(1) the office's operating budget;

(2) the number of positions maintained for office staff;

(3) the number of accused persons who, after review by the office, were released by a court on personal bond; and

(4) the number of persons described by Subdivision (3):

(A) who were convicted of the same offense or of any felony within the six years preceding the date on which charges were filed in the matter pending during the person's release;

(B) who failed to attend a scheduled court appearance;

(C) for whom a warrant was issued for the person's arrest for failure to appear in accordance with the terms of the person's release; or

(D) who were arrested for any other offense while on the personal bond.

(c) This section does not apply to a personal bond pretrial release office that on January 1, 1995, was operated by a community corrections and supervision department.

A personal bond office can have a positive impact on jail population. A cost and benefit analysis should be conducted to determine if a personal bond office reduces jail overcrowding enough to justify its creation and the initial and continuing funding.

7. Art. 17.43. – Home curfew and electronic monitoring as condition

(a) A magistrate may require as a condition of release on personal bond that the defendant submit to home curfew and electronic monitoring under the supervision of an agency designated by the magistrate.

(b) Cost of monitoring may be assessed as court costs or ordered paid directly by the defendant as a condition of bond.

In certain segments of the potential jail population, home curfew and monitoring have been found to be successful.

F. <u>WHO MAY ACCEPT OR "TAKE" BONDS</u> – The following articles relate to whom a bail bond should be presented once bond has been set and the bail bond is ready to be posted. These articles point out that a sheriff or any peace officer that has the accused in custody may accept the bail bond for the accused.

1. Art. 17.05. – When a bail bond is given

A bail bond is entered into either before a magistrate, upon an examination of a criminal accusation, or before a judge upon an application under habeas corpus; or it is taken from the defendant by a peace officer if authorized by Article 17.20, 17.21, or 17.22.

2. Art. 17.20. – Bail in misdemeanor

The sheriff, or other peace officer, in cases of misdemeanor, may, whether during the term of the court or in vacation, where he has a defendant in custody, take of the defendant a bail bond.

3. Art. 17.21. – Bail in felony

In cases of felony, when the accused is in custody of the sheriff or other peace officer, and the court before which the prosecution is pending is in session in the county where the accused is in custody, the court shall fix the amount of bail, if it is a bailable case and determine if the accused is eligible for a personal bond; and the sheriff, or other peace officer, unless it be the police of a city, is authorized to take a bail bond of the accused in the amount as fixed by the court, to be approved by such officer taking the same, and will thereupon discharge the accused from custody. It shall not be necessary for the defendant or his sureties to appear in court.

4. Art. 17.22. – May take bail in felony

In a felony case, if the court before which the same is pending is not in session in the county where the defendant is in custody, the sheriff, or other peace officer having him in custody, may take his bail bond in such amount as may have been fixed by the court or magistrate, or if no amount has been fixed, then in such amount as such officer may consider reasonable.

Generally speaking, the sheriff of the county usually has the inmate in custody, and magistrates are usually available within 24 to 48 hours to fix the amount of bond. On the rare occasions where no magistrate is available within 48 hours and court is not in session, the sheriff does apparently have the power under Article 17.22 to fix and take a reasonable bond in felony cases. However, the use of Article 17.22 is discouraged by the Flowers Davis law firm whenever possible, and every effort should be made to promptly take the accused before a magistrate as quickly as reasonably possible. In cases of an arrest without a warrant, an accused must be taken before a magistrate for a determination of probable cause within 48 hours or the Fourth Amendment rights of that person have presumptively been violated. *Infra.* at 2.

G. A BOND LASTS FOR THE DURATION OF THE CRIMINAL PROSECUTION UNLESS THE COURT FINDS OTHERWISE

1. Art. 17.09. – Duration; original and subsequent proceedings; new bail

Sec. 1. Where a defendant, in the course of a criminal action, gives bail before any court or person authorized by law to take same, for his personal appearance before a court or magistrate, to answer a charge against him, the said bond shall be valid and binding upon the defendant and his sureties, if any, thereon, for the defendant's

personal appearance before the court or magistrate designated therein, as well as before any other court to which same may be transferred, and for any and all subsequent proceedings had relative to the charge, and each such bond shall be so conditioned except as hereinafter provided.

Sec. 2. When a defendant has once given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same criminal action except as herein provided.

Sec. 3. Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

Sec. 4. Notwithstanding any other provision of this article, the judge or magistrate in whose court a criminal action is pending may not order the accused to be rearrested or require the accused to give another bond in a higher amount because the accused:

(1) withdraws a waiver of the right to counsel; or

(2) requests the assistance of counsel, appointed or retained.

H. <u>DISCHARGE OF LIABILITY OF SURETY</u> – Bondsmen are becoming increasingly aggressive about discharging their liability on bonds by surrendering the principal (the person accused), especially in counties that are aggressive in pursuing bond forfeitures. Surrendering the principal is a good way for proactive bondsmen to get off the bond. Unfortunately, it can also be used as a collection technique by some bondsmen when their principals are past due in making payments to the bondsman.

1. Art. 17.16. – Discharge of liability; surrender or incarceration of principal before forfeiture

(a) A surety may before forfeiture relieve himself of his undertaking by:

(1) surrendering the accused into the custody of the sheriff of the county where the prosecution is pending; or

(2) delivering to the sheriff of the county where the prosecution is pending an affidavit stating that the accused is incarcerated in federal custody, in the custody of any state, or in any county of this state.

(b) For the purposes of Subsection (a)(2) of this article, the bond is discharged and the surety is absolved of liability on the bond on the sheriff's verification of the incarceration of the accused.

There have been some reported instances where a bondsman or someone retained by a bondsman has allegedly used force against the principal to make him surrender to the sheriff of the county where the prosecution is pending. Using force in this situation may be illegal, and the bondsman may be sued by the principal and may be liable for civil damages for such actions. Additionally, the bondsman may also be guilty of assault in cases where force or unlawful coercion is used to force the principal to surrender. From the standpoint of the sheriff's department, if the bondsman surrenders the principal to the sheriff with detectible injuries, the sheriff and jail staff have a duty to see that the accused gets reasonable medical attention.

2. Art. 17.17. – When surrender is made during term

If a surrender of the accused be made during a term of the court to which he has bound himself to appear, the sheriff shall take him before the court; and if he is willing to give other bail, the court shall forthwith require him to do so. If he fails or refuses to give bail, the court shall make an order that he be committed to jail until the bail is given, and this shall be a sufficient commitment without any written order to the sheriff.

3. Art. 17.18. – Surrender in vacation

When the surrender is made at any other time than during the session of the court, the sheriff may take the necessary bail bond, but if the defendant fails or refuses to give other bail, the sheriff shall take him before the nearest magistrate; and such magistrate shall issue a warrant of commitment, reciting the fact that the accused has been once admitted to bail, has been surrendered, and now fails or refuses to give other bail.

4. Art. 17.19. – Surety may obtain a warrant

(a) Any surety, desiring to surrender his principal and after notifying the principal's attorney, if the principal is represented by an attorney, in a manner provided by Rule 21a, Texas Rules of Civil Procedure, of the surety's intention to surrender the principal, may file an affidavit of such intention before the court or magistrate before which the prosecution is pending. The affidavit must state:

(1) the court and cause number of the case;

(2) the name of the defendant;

(3) the offense with which the defendant is charged;

(4) the date of the bond;

(5) the cause for the surrender; and

(6) that notice of the surety's intention to surrender the principal has been given as required by this subsection.

(b) If the court or magistrate finds that there is cause for the surety to surrender his principal, the court shall issue a warrant of arrest or capias for the principal. It is an affirmative defense to any liability on the bond that:

(1) the court or magistrate refused to issue a warrant of arrest or capias for the principal; and

(2) after the refusal to issue the warrant or capias the principal failed to appear.

(c) If the court or magistrate before whom the prosecution is pending is not available, the surety may deliver the affidavit to any other magistrate in the county and that magistrate, on a finding of cause for the surety to surrender his principal, shall issue a warrant of arrest or capias for the principal.

(d) An arrest warrant or capias issued under this article shall be issued to the sheriff of the county in which the case is pending, and a copy of the warrant or capias shall be issued to the surety or his agent.

(e) An arrest warrant or capias issued under this article may be executed by a peace officer, a security officer, or a private investigator licensed in this state.

It should be noted that in 1998, the Texas Attorney General's Office issued an opinion that found for the purposes of article 17.19 of the Texas Code of Criminal Procedure, a bail bondsman who wishes to surrender his principal must do so by filing the affidavit before the court in which the prosecution is pending or the magistrate who received the complaint, or the court to which proceedings are subsequently transferred if that judge or magistrate is available. Op. Tex. Att'y Gen. No. LO98-066 (1998). However, reliance on LO98-066 for the stated proposition may be misplaced. The opinion did not consider 17.19(c) which clearly provides for the presenting of the affidavit to any other magistrate if the court or magistrate before whom the matter is pending is unavailable.

5. Art. 17.23. – Sureties severally bound

Article 17.23 provides that all sureties on the bond (if there is more than one) are severally bound and will also be considered "severally discharged" from the bond once any of them surrenders the principal.

I. RELEASING THE PERSON AFTER MAKING BOND – The important requirement for releasing the person after making bond is for the accused to "at once be set at liberty." Due to increased jail overcrowding across the state and a shortage of funds for increased staffing, the "book-out" procedure can take a longer period of time than law enforcement would like. For potential liability purposes, it is important to show, through good documentation, that the jail staff was diligent in attempting to release inmates posting bond as quickly as reasonably possible.

1. Art. 17.29. – Accused liberated

(a) When the accused has given the required bond, either to the magistrate or the officer having him in custody, he shall at once be set at liberty.

(b) Before releasing on bail a person arrested for an offense under Section 42.072, Penal Code (Stalking), or a person arrested or held without warrant in the prevention of family violence, the law enforcement agency holding the person shall make a reasonable attempt to give personal notice of the imminent release to the victim of the alleged offense or to another person designated by the victim to receive the notice. An attempt by an agency to give notice to the victim or the person designated by the victim at the victim's or person's last known telephone number or address, as shown on the records of the agency, constitutes a reasonable attempt to give notice under this subsection. If possible, the arresting officer shall collect the address and telephone number of the victim at the time the arrest is made and shall communicate that information to the agency holding the person.

(c) A law enforcement agency or an employee of a law enforcement agency is not liable for damages arising from complying or failing to comply with Subsection (b) of this article.

(d) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

J. HOLDING A PERSON AFTER THE POSTING OF A BOND – Due to the increase in family violence and the desire of the Legislature to provide a "cooling off" period prior to release of the accused back into the general public, the Legislature has provided that persons accused of family violence can be held for four additional hours after bail has been posted on the direction of the head of the agency holding that person (usually the sheriff of the County). The accused may be held for up to an additional 48 hours if authorized in writing by a magistrate upon certain findings.

1. Art. 17.291. – Further detention of certain persons

(a) In this article:

(1) "family violence" has the meaning assigned to that phrase by Section 71.004, Family Code; and

(2) "magistrate" has the meaning assigned to it by Article 2.09 of this code.

(b) Article 17.29 does not apply when a person has been arrested or held without a warrant in the prevention of family violence if there is probable cause to believe the violence will continue if the person is immediately released. The head of the agency arresting or holding such a person may hold the person for a period of not more than four hours after bond has been posted. This detention period may be extended for an additional period not to exceed 48 hours, but only if authorized in a writing directed to the person having custody of the detained person by a magistrate who concludes that:

(1) the violence would continue if the person is released; and

(2) if the additional period exceeds 24 hours, probable cause exists to believe that the person committed the instant offense and that, during the 10-year period preceding the date of the instant offense, the person has been arrested:

(A) on more than one occasion for an offense involving family violence; or

(B) for any other offense, if a deadly weapon, as defined by Section 1.07, Penal Code, was used or exhibited during commission of the offense or during immediate flight after commission of the offense.

This provision has provided a useful tool in preventing family violence from re-occurring, but the requirements should be carefully followed to avoid claims for false arrest and imprisonment for the time spent in jail after bond has been posted.

K. <u>ORDER FOR EMERGENCY PROTECTION</u> – A magistrate may issue an Order for Emergency Protection in cases involving family violence or stalking. Due to increased concerns relating to these incidents, and in an attempt to keep additional criminal offenses and possible injuries from occurring, the Legislature has enacted the following articles:

1. Art. 17.292. Magistrate's Order for Emergency Protection

(a) At a defendant's appearance before a magistrate after arrest for an offense involving family violence or an offense under Section 22.011, 22.021 or 42.072 Penal Code (Stalking), the magistrate may issue an order for emergency protection on the magistrate's own motion or on the request of:

(1) the victim of the offense;

(2) the guardian of the victim;

(3) a peace officer; or

(4) the attorney representing the state.

(b) At a defendant's appearance before a magistrate after arrest for an offense involving family violence, the magistrate shall issue an order for emergency protection if the arrest is for an offense that also involves:

(1) serious bodily injury to the victim; or

(2) the use or exhibition of a deadly weapon during the commission of an assault.

(c) The magistrate in the order for emergency protection may prohibit the arrested party from:

(1) committing:

(A) family violence or an assault on the person protected under the order; or

(B) an act in furtherance of an offense under section 42.072, Penal Code;

(2) communicating:

(A) directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner; or

(B) a threat through any person to a member of the family or household or to the person protected under the order;

(3) going to or near:

(A) the residence, place of employment, or business of a member of the family or household or of the person protected under the order; or

(B) the residence, child care facility, or school where a child protected under the order resides or attends; or

(4) possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.

(d) The victim of the offense need not be present in court when the order for emergency protection is issued.

(e) In the order for emergency protection the magistrate shall specifically describe the prohibited locations and the minimum distances, if any, that the party must maintain, unless the magistrate determines for the safety of the person or persons protected by the order that specific descriptions of the locations should be omitted.

(f) To the extent that a condition imposed by an order for emergency protection issued under this article conflicts with an existing court order granting possession of or access to a child, the condition imposed under this article prevails for the duration of the order for emergency protection.

(f-1) To the extent that a condition imposed by an order issued under this article conflicts with a condition imposed by an order subsequently issued under Chapter 85, Subtitle B, Title 4, Family Code (Family Code 85.001 et seq.), or under Title 1 (Family Code 1.001 et seq.) or Title 5 (Family Code 101.001 et seq.), the condition imposed by the order issued under the Family Code prevails.

(f-2) To the extent that a condition imposed by an order issued under this article conflicts with a condition imposed by an order subsequently issued under Chapter 83, Subtitle B, Title 4, Family Code (Family Code 83.001 et. seq.), the condition imposed by the order issued under this article prevails unless the court under Chapter 83, Family Code:

(1) is informed of the existence of the order issued under this article; and

(2) makes a finding in the order issued under Chapter 83, Family Code, that the court is superseding the order issued under this article.

(g) An order for emergency protection issued under this article must contain the following statements printed in bold-face type or in capital letters:

"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS $4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR OR BY BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE OR A STALKING OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY

OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS. THE POSSESSION OF A FIREARM BY A PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO THIS ORDER MAY BE PROSECUTED AS A SEPARATE OFFENSE PUNISHABLE BY CONFINEMENT OR IMPRISONMENT.

"NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER."

(h) The magistrate issuing an order for emergency protection under this article shall send a copy of the order to the chief of police in the municipality where the member of the family or household or individual protected by the order resides, if the person resides in a municipality, or to the sheriff of the county where the person resides, if the person does not reside in a municipality. If the victim of the offense is not present when the order is issued, the magistrate issuing the order shall order an appropriate peace officer to make a good faith effort to notify, within 24 hours, the victim that the order has been issued by calling the victim's residence and place of employment. The clerk of the court shall send a copy of the order to the victim.

(i) If an order for emergency protection issued under this article prohibits a person from going to or near a child care facility or school, the magistrate shall send a copy of the order to the child care facility or school.

(j) An order for emergency protection issued under this article is effective on issuance, and the defendant shall be served a copy of the order in open court. An order for emergency protection issued under this article remains in effect up to the 61st day but not less than 31 days after the date of issuance. After notice to each affected party and a hearing, the issuing court may modify all or part of an order issued under this article if the court finds that:

(1) the order as originally issued is unworkable;

(2) the modification will not place the victim of the offense at greater risk than did the original order; and

(3) the modification will not in any way endanger a person protected under the order.

(k) To ensure that an officer responding to a call is aware of the existence and terms of an order for emergency protection issued under this article, each municipal police department and sheriff shall establish a procedure within the department or office to provide adequate information or access to information for peace officers of the names of persons protected by an order for emergency protection issued under this article and of persons to whom the order is directed. The police department or sheriff may enter an order for emergency protection issued under this article in the department's or office's record of outstanding warrants as notice that the order has been issued and is in effect.

(l) In the order for emergency protection, the magistrate may suspend a license to carry a concealed handgun issued under Section 411.177, Government Code, that is held by the defendant.

(m) In this article:

(1) "Family," "family violence," and "household" have the meanings assigned by Chapter 71, Family Code.

(2) "Firearm" has the meaning assigned by Chapter 46, Penal Code.

(n) On motion, notice, and hearing, or on agreement of the parties, an order for emergency protection issued under this article may be transferred to the court assuming jurisdiction over the criminal act giving rise to the issuance of the emergency order for protection. On transfer, the criminal court may modify all or part of an order issued under this subsection in the same manner and under the same standards as the issuing court under Subsection (j).

2. Art. 17.293. – Delivery of Order for Emergency Protection to Other Persons

The magistrate or the clerk of the magistrate's court issuing an order for emergency protection under Article 17.292 that suspends a license to carry a concealed handgun shall immediately send a copy of the order to the appropriate division of the Department of Public Safety at its Austin headquarters. On receipt of the order suspending the license, the department shall:

(1) record the suspension of the license in the records of the department;

(2) report the suspension to local law enforcement agencies, as appropriate; and

(3) demand surrender of the suspended license from the license holder.

3. Art. 17.30. – Shall certify proceedings

The magistrate, before whom an examination has taken place upon a criminal accusation, shall certify to all the proceedings had before him, as well as where he discharges, holds to bail or commits, and transmit them, sealed up, to the court before which the defendant may be tried, writing his name across the seals of the envelope. The voluntary statement of the defendant, the testimony, bail bonds, and every other proceeding in the case, shall be thus delivered to the clerk of the proper court, without delay.

4. Art. 17.31. – Duty of clerks who receive such proceedings

If the proceedings be delivered to a district clerk, he shall keep them safely and deliver the same to the next grand jury. If the proceedings are delivered to a county clerk, he shall without delay deliver them to the district or county attorney of his county.

5. Art. 17.32. – In case of no arrest

Upon failure from any cause to arrest the accused the magistrate shall file with the proper clerk the complaint, warrant of arrest, and a list of the witnesses.

L. REVIEW OF BAIL UPON REQUEST OF DEFENDANT – An accused may request a review of his bond by a magistrate at any time during his confinement.

1. Art. 17.33. – Request setting of bail

The accused may at any time after being confined request a magistrate to review the written statements of the witnesses for the State as well as all other evidence available at that time in determining the amount of bail. This setting of the amount of bail does not waive the defendant's right to an examining trial as provided in Article 16.01.

M. BONDS FOR WITNESSES – Although this is a little-used process, a magistrate may require bail for witnesses important to a criminal case. The following articles of the Texas Code of Criminal Procedure apply in such situations:

1. Art. 17.34. – Witnesses to give bond

Witnesses for the State or defendant may be required by the magistrate, upon the examination of any criminal accusation before him, to give bail for their appearance to testify before the proper court. A personal bond may be taken of a witness by the court before whom the case is pending.

2. Art. 17.35. – Security of witness

The amount of security to be required of a witness is to be regulated by his pecuniary condition, character and the nature of the offense with respect to which he is a witness.

3. Art. 17.36. – Effect of witness bond

The bond given by a witness for his appearance has the same effect as a bond of the accused and may be forfeited and recovered upon in the same manner.

4. Art. 17.37. – Witness may be committed

A witness required to give bail who fails or refuses to do so shall be committed to jail as in other cases of a failure to give bail when required, but shall be released from custody upon giving such bail.

5. Art. 17.38. – Rules applicable to all cases of bail

The rules in this Chapter respecting bail are applicable to all such undertakings when entered into in the course of a criminal action, whether before or after an indictment, in every case where authority is given to any court, judge, magistrate, or other officer, to require bail of a person accused of an offense, or of a witness in a criminal action.

N. **RECORDS OF BAIL** – Magistrates or officers setting or taking bail are required to keep the following records in a "well bound book." Since many magistrates and officers do not keep records in such a format, some bail bondsmen who are looking to file a lawsuit against a county will file Open Meetings and Open Records Act requests for the book. Because these records are often kept in a computer data bank and are hard to access in this format, the time and effort to retrieve these records may cause a problem for the responding official. Legislation may need to be considered to amend this section to allow such records to be kept in a computer-generated format instead of a "well bound book."

1. Art. 17.39. – Records of bail

A magistrate or other officer who sets the amount of bail or who takes bail shall record in a well-bound book the name of the person whose appearance the bail secures, the amount of bail, the date bail is set, the magistrate or officer who sets bail, the offense or other cause for which the appearance is secured, the magistrate or other officer who takes bail, the date the person is released, and the name of the bondsman, if any.

O. <u>ADDITIONAL CONDITIONS OF BOND IMPOSED BY COURT</u> – In certain types of cases enumerated below, the State has allowed additional terms of bail that may be set by a magistrate to limit the likelihood of the commission of additional crimes while an accused is on bail. Those additional conditions are:

1. Art. 17.40. – Conditions Related to Victim or Community Safety

(a) To secure a defendant's attendance at trial, a magistrate may impose any reasonable condition of bond related to the safety of a victim of the alleged offense or to the safety of the community.

(b) At a hearing limited to determining whether the defendant violated a condition of bond imposed under Subsection (a), the magistrate may revoke the defendant's bond only if the magistrate finds by a preponderance of the evidence that the violation occurred.

2. Art. 17.41. – Condition Where Child Alleged Victim

(a) This article applies to a defendant charged with an offense under any of the following provisions of the Penal Code, if committed against a child 12 years of age or younger:

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Prohibited Sexual Conduct); or

(3) Section 43.25 (Sexual Performance by a Child).

(b) A magistrate may require as a condition of bond for a defendant charged with an offense described by Subsection (a) of this article that the defendant not directly communicate with the alleged victim of the offense or go near a residence, school, or other location, as specifically described in the bond, frequented by the alleged victim.

(c) A magistrate who imposes a condition of bond under this article may grant the defendant supervised access to the alleged victim.

(d) To the extent that a condition imposed under this article conflicts with an existing court order granting possession of or access to a child, the condition imposed under this article prevails for a period specified by the magistrate, not to exceed 90 days.

3. Art. 17.44. – Home confinement, electronic monitoring, and drug testing as condition

(a) A magistrate may require as a condition of release on bond that the defendant submit to:

> (1) home confinement and electronic monitoring under the supervision of an agency designated by the magistrate; or
>
> (2) testing on a weekly basis for the presence of a controlled substance in the defendant's body.

(b) In this article, "controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(c) If a defendant violates a condition of home confinement and electronic monitoring, refuses to submit to a test for controlled substances, or submits to a test for controlled substances and the test indicates the presence of a controlled substance in the defendant's body, the magistrate may revoke the bond and order the defendant arrested.

(d) The community justice assistance division of the Texas Department of Criminal Justice may provide grants to counties to implement electronic monitoring programs authorized by this article.

4. Art. 17.441. – Conditions requiring motor vehicle ignition interlock – The State, recognizing the dangers from repeat DWI offenders, has provided magistrates with an additional tool to limit repeat offenses while defendants are on bail pending trial. Article 17.441 reads as follows:

(a) Except as provided by Subsection (b), a magistrate shall require on release that a defendant charged with a subsequent offense under Sections 49.04-49.06, Penal Code, or an offense under Section 49.07 or 49.08 of that code:

> (1) have installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator; and
>
> (2) not operate any motor vehicle unless the vehicle is equipped with that device.

(b) The magistrate may not require the installation of the device if the magistrate finds that to require the device would not be in the best interest of justice.

(c) If the defendant is required to have the device installed, the magistrate shall require that the defendant have the device installed on the appropriate motor vehicle, at the defendant's expense, before the 30th day after the date the defendant is released on bond.

(d) The magistrate may designate an appropriate agency to verify the installation of the device and to monitor the device. If the magistrate designates an agency under this subsection, in each month during which the agency verifies the installation of the device or provides a monitoring service the defendant shall pay a fee to the designated agency in the amount set by the magistrate. The defendant shall pay the initial fee at the time the agency verifies the installation of the device. In each subsequent month during which the defendant is required to pay a fee the defendant shall pay the fee on the first occasion in that month that the agency provides a monitoring service. The magistrate shall set the fee in an amount not to exceed $10 as determined by the county auditor, or by the commissioners court of the county if the county does not have a county auditor, to be sufficient to cover the cost incurred by the designated agency in conducting the verification or providing the monitoring service, as applicable in that county.

5. Art. 17.45. – Conditions requiring AIDS and HIV instruction – The State, realizing that the spread of this disease might be lessened by educating a segment of the population at risk for the disease (i.e. those defendants charged with prostitution), has provided magistrates with the following tool:

A magistrate may require as a condition of bond that a defendant charged with an offense under Section 43.02, Penal Code, receive counseling or education, or both, relating to acquired immune deficiency syndrome or human immunodeficiency virus.

6. Art. 17.46. – Conditions for a defendant charged with stalking – In recent years, stalking has become a more recognized offense which can lead to more violent crimes, and for that reason, the following condition was established:

(a) A magistrate may require as a condition of release on bond that a defendant charged with an offense under Section 42.072, Penal Code, may not:

(1) communicate directly or indirectly with the victim; or

(2) go to or near the residence, place of employment, or business of the victim or to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance.

(b) If the magistrate requires the prohibition contained in Subsection (a)(2) of this article as a condition of release on bond, the magistrate shall specifically describe the prohibited locations and the minimum distances, if any, that the defendant must maintain from the locations.

7. Art. 17.47. – Conditions Requiring Submission of Specimen – In cases involving an arrest of a defendant after a prior conviction for one or more of the offenses described in Section 411.1471(a) of the Texas Government Code (which lists offenses such as sexual assault, public lewdness and indecent exposure), the state has seen fit to prescribe testing to establish a DNA data base for repeat offenders of such offenses. Article 17.47 reads as follows:

A magistrate shall require as a condition of release of a defendant described by Section 411.1471(a), Government Code, that the defendant provide to a law enforcement agency one or more specimens for the purpose of creating a DNA record.

P. <u>POST-TRIAL</u> – The post-trial bond provision listed below applies specifically to forensic DNA testing that has been requested by a person convicted of an offense. If the motion for testing is granted, and the court enters findings favorable to the convicted person, then the court may set a new bail, within the court's discretion. If the court chooses to set bail, the same requirements listed above still apply to setting and taking the bail. Section 17.48 states as follows.

1**. Art. 17.48. – Post-trial Actions**

A convicting court on entering a finding favorable to a convicted person under Article 64.04, after a hearing at which the attorney representing the state and the counsel for the defendant are entitled to appear, may release the convicted person on bail under this chapter pending the conclusion of court proceedings or proceedings under Section 11, Article IV, Texas Constitution, and Article 48. 01.

In light of the numerous motions that have been filed in the last several years due to advances of DNA testing, this provision for post-trial bail has become more and more important.

II. BAIL BOND BOARD COUNTIES

In counties with a population over 110,000, bail bond boards are automatically created. Counties with a population under 110,000 may choose to create a bail bond board. Counties with a bail bond board are governed by Sections 1704.001 through 1704.306 of the Texas Occupations Code. Counties without bail bond boards are governed by Chapter 17 of the Texas Code of Criminal Procedure. There are some benefits and advantages that counties with bail bond boards have that other counties do not possess. As we discuss each applicable section of the Texas Occupations Code, we will try to identify the advantages and disadvantages, if any, of each specific section.

A. DEFINITIONS UNDER THE ACT – The first section defines important terms used throughout the applicable sections of the Texas Occupations Code, and it is important to understand the meaning of each definition.

1. § 1704.001. Definitions

In this chapter:

> (1) "Bail bond" means a cash deposit, or similar deposit or written undertaking, or a bond or other security, given to guarantee the appearance of a defendant in a criminal case.
>
> (2) "Bail bond surety" means a person who:
>
> > (A) executes a bail bond as a surety or co-surety for another person; or
> >
> > (B) for compensation deposits cash to ensure the appearance in court of a person accused of a crime.
>
> (3) "Board" means a county bail bond board.
>
> (4) "Bonding business" or "bail bond business" means the solicitation, negotiation, or execution of a bail bond by a bail bond surety[16].
>
> (4-a) "Final judgment" means a judgment that disposes of all issues and parties in a case.
>
> (5) "Person" means an individual or corporation.

[16] Subdivision (4), Section 1704.001, Occupations Code, was amended effective September 1, 2005.

B. COUNTIES TO WHICH CHAPTER 17 APPLIES – This Chapter, which creates bail bond boards, only applies to a limited number of counties – those counties with a population over 110,000 or less than 110,000 when a bail bond board has been specifically created as discussed below. Sections 1704.002 through 1704.052 specifically deal with these issues and state as follows:

> This chapter applies only in a county with a population of:
>
> > (1) 110,000 or more; or
> >
> > (2) less than 110,000 in which a board is created.

1. § 1704.051. Mandatory Creation of Board

> A board is created in each county with a population of 110,000 or more.

2. § 1704.052. Discretionary Creation of Board

> A board may be created in a county with a population of less than 110,000 if a majority of the persons who would serve as members of the board under Section 1704.053, or who would designate the persons who would serve as members of the board, determine to create a board.

C. WHO SERVES ON THE BOARD AND HOW THEY ARE ELECTED OR APPOINTED – Section 1704.053 specifically lists the membership of the board and specifies how board members are either elected or appointed to the board. This membership is meant to represent all those actively involved in the bonding process. Section 1704.053 states as follows:

1. § 1704.053. Board Composition

> A board consists of:
>
> > (1) the sheriff or a designee from the sheriff's office who must be the sheriff's administrator or a deputy sheriff of the rank of at least sergeant;
> >
> > (2) a district judge of the county having jurisdiction over criminal matters and designated by the presiding judge of the administrative judicial district or a designee of the district judge who is approved by the presiding judge;
> >
> > (3) the county judge, a member of the commissioners court designated by the county judge, or a designee approved by the commissioners court;

(4) a judge of a county court or county court at law in the county having jurisdiction over criminal matters and designated by the commissioners court or a designee of the judge who is approved by the commissioners court;

(5) the district attorney or an assistant district attorney designated by the district attorney;

(6) a licensed bail bond surety or agent for a corporate surety in the county elected under Section 1704.0535, or a bail bond surety or agent for a corporate surety licensed in the county who is designated by the elected surety or agent;

(7) a justice of the peace;

(8) the district clerk or the clerk's designee;

(9) the county clerk or the clerk's designee, if the county clerk has responsibility over criminal matters;

(10) if appointed by the board, a presiding judge of a municipal court in the county;

(11) if the county's principal municipality designates a presiding judge in the municipal court system, the presiding judge or a municipal judge from the system designated by the presiding judge;

(12) the county treasurer or the treasurer's designee or, if appointed by the commissioners court in a county that does not have a county treasurer, the person designated by the county commissioners court to perform the duties of the county treasurer; and

(13) a criminal defense attorney practicing in the county and elected by other attorneys whose principal places of business are located in the county and who are not legally prohibited from representing criminal defendants or the designee of the criminal defense attorney.

2. § 1704.0535. Election of Bail Bond Surety Board Member

(a) The board shall annually conduct a secret ballot election to elect the member of the board who serves as the representative of licensed bail bond sureties by electing a licensed bail bond surety or agent for a corporate surety board member.[17]

(b) Each individual licensed in the county as a bail bond surety or agent for a corporate surety is entitled to cast one vote for each license held.

D. ELECTION OF PRESIDING OFFICER

1. § 1704.054. Presiding Officer

(a) A board shall initially elect one of its members as presiding officer.

(b) The presiding officer shall preside over board meetings.

(c) The presiding officer may vote on any board matter.

E. MEETINGS AND WHAT CONSTITUTES A QUORUM

1. § 1704.055. Meetings

(a) A board shall hold its initial meeting not later than the 60th day after the date the board is created.

(b) A board shall meet:

(1) at least once a month; and

(2) at other times at the call of the presiding officer.

2. § 1704.056. Quorum; Majority Vote

(a) Four members of a board constitute a quorum.

(b) A board may take action only on a majority vote of the board members present.

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[17]A county bail bond board does not have the authority to authorize an alternate to serve on the bail bond board when the licensed bail bond surety representative is unable to attend its meetings. Op. Tex. Att'y Gen. No. JC-0428 (2001).

F. OBLIGATIONS AND DUTIES OF THE BOARD

1. § 1704.101. Administrative Authority[18]

A board shall:

(1) exercise powers incidental or necessary to the administration of this chapter;

(2) deposit fees collected under this chapter in the general fund of the county;

(3) supervise and regulate each phase of the bonding business in the county;

(4) adopt and post rules necessary to implement this chapter;[19]

(5) conduct hearings and investigations and make determinations relating to the issuance, denial, or renewal of licenses;

(6) issue licenses to qualified applicants;

(7) deny licenses to unqualified applicants;

(8) employ persons necessary to assist in board functions; and

(9) conduct board business, including maintaining records and minutes.

2. § 1704.102. Enforcement Authority

(a) A board shall:

(1) enforce this chapter in the county;

(2) conduct hearings and investigations and make determinations relating to license suspension and revocation;

(3) suspend or revoke a license for a violation of this chapter or a rule adopted by the board under this chapter; and

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[18]The regulatory authority of county bail bond board is limited to those powers enumerated in this article. Op. Tex. Att'y Gen. No. JM-1057 (1989).

[19]The board should be very careful when adopting local rules. A large percentage of lawsuits against bail bond boards relate to claims for injunctive and declaratory relief relating to local rules. The best advice is to only enact local rules that are absolutely necessary. The bail bond board is to administer the article, not amend it. *Bexar County Bail Bond Board v. Deckard*, 604 S.W.2d 314 (Tex. App. – Dallas 1999, no writ).

(4) require a record and transcription of each board proceeding.

(b) A board may:

(1) compel the appearance before the board of an applicant or license holder; and

(2) during a hearing conducted by the board, administer oaths, examine witnesses, and compel the production of pertinent records and testimony by a license holder or applicant.

3. § 1704.104. Posting of Board Rule or Action

A board shall post a rule adopted or an action taken by the board in an appropriate place in the county courthouse for the 10 days preceding the date the rule or action takes effect.

4. § 1704.105. Licensed Bail Bond Surety List

(a) A board shall post in each court having criminal jurisdiction in the county, and shall provide to each local official responsible for the detention of prisoners in the county, a current list of each licensed bail bond surety and each licensed agent of a corporate surety in the county.[20]

(b) A list of each licensed bail bond surety and each licensed agent of a corporate surety in a county must be displayed at each location where prisoners are examined, processed, or confined.

5. § 1704.107. Notification of License Suspension or Revocation

A board shall immediately notify each court and each local official responsible for the detention of prisoners in the county of:

(1) the suspension or revocation of a license issued under this chapter; and

(2) the revocation of the authority of a license holder's agent.

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[20]This article does not authorize a bail bond board to limit the number of bail bond licensees in a county. Op. Tex. Att'y Gen. No. JM-206 (1984).

6. § 1704.108. Notification of Default by Corporation

A board shall promptly notify the Texas Department of Insurance if a corporation fails to pay a judgment of forfeiture as provided by Section 1704.204(a).

G. SOLICITATION AND ADVERTISEMENTS BY SURETIES

1. § 1704.109. Solicitation and Advertisement

(a) A board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect:

(1) the public from:

(A) harassment;

(B) fraud;

(C) misrepresentation; or

(D) threats to public safety; or

(2) the safety of law enforcement officers.

(b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:

(1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or

(2) in person or by telephone to solicit bonding business:

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

H. LICENSE REQUIRED TO WRITE A BOND

1. § 1704.151. License Required

Except as provided by Section 1704.163, a person may not act as a bail bond surety or as an agent for a corporate surety in the county unless the person holds a license issued under this chapter.[21]

I. PERSONS OR ENTITIES ELIGIBLE TO APPLY FOR LICENSE

1. § 1704.152. Eligibility[22]

(a) To be eligible for a license under this chapter, an individual, including an agent designated by a corporation in an application, must[23]:

(1) be a resident of this state and a citizen of the United States;

(2) be at least 18 years of age;

(3) possess the financial resources required to comply with Section 1704.160, unless the individual is acting only as agent for a corporation holding a license under this chapter; and

(4) submit documentary evidence that, in the two years preceding the date a license application is filed, the individual:

(A) has been continuously employed by a person licensed under this chapter for at least one year and for not less than 30 hours per week, excluding annual leave, and has performed duties that encompass all phases of the bonding business; and

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[21] Only corporations and individuals may be licensed to act as bail bondsmen, according to this article. Op. Tex. Att'y Gen. No. MW-507 (1982).

[22] County bail-bond boards lack the authority to impose different or additional requirements for obtaining a bail bondsman's license. Op. Tex. Att'y Gen. No. DM-264 (1993). Courts have stricken county bail bond board regulations that add licensing requirements or bases for license revocation and suspension not set forth in the Bail Bond Board Act. *Dallas County Bail Bond Board v. Stein*, 771 S.W.2d 577, 580-81 (Tex. App. – Dallas 1989, writ denied).

[23] Subsection (a), Section 1704.152, Occupations Code, was amended effective September 1, 2005.

(B) completed in person at least eight hours of continuing legal education in criminal law courses or bail bond law courses that are approved by the State Bar of Texas and that are offered by an accredited institution of higher education in the state.

(b) To be eligible for a license under this chapter, a corporation must be:

(1) chartered or admitted to do business in this state; and

(2) qualified to write fidelity, guaranty, and surety bonds under the Insurance Code.

(c) Subsection (a)(4) does not apply to the issuance of an original license:

(1) in a county before the first anniversary of the date a board is created in the county; or

(2) to an individual who applies to operate the bail bond business of a license holder who has died if the individual is related to the decedent within the first degree by consanguinity or is the decedent's surviving spouse.

A person who operates as a bail bond licensee in an individual capacity may, in addition, be licensed as an agent for a corporate surety. Op. Tex. Att'y Gen. No. DM 96-019 (1996). They may operate in the same place of business, use the same telephone numbers, the same employees, and the same advertising. Op. Tex. Att'y Gen. No. DM 96-019 (1996). However, a bail bond board is not authorized to grant more than one license to any individual surety, so an individual may not operate under more than one assumed name as if the person had more than one license. The application process requires that the license shall include "the name under which the business shall be conducted, so the bondsman cannot operate under a name other than that specified in the application of the licensee."

2. § 1704.153. Ineligibility Because of Criminal Conviction

A person is not eligible for a license under this chapter if, after August 27, 1973, the person commits and is finally convicted of a misdemeanor involving moral turpitude or a felony.

J. THE APPLICATION PROCESS AND HEARINGS ON APPLICATIONS

1. § 1704.154. Application Requirements

(a) To be licensed under this chapter, a person must apply for a license by filing a sworn application with the board.

(b) The application must:

(1) be in a form and contain the information prescribed by the board;

(2) state:

(A) the applicant's name, age, and address;

(B) if the applicant is a corporation, whether the applicant is:

(i) chartered or admitted to do business in this state; and

(ii) qualified to write fidelity, guaranty, and surety bonds under the Insurance Code;

(C) the name under which the bail bond business will be conducted, including a bail bond business that is conducted by an agent of a corporation;

(D) each place, including the street address and municipality, at which the business will be conducted; and

(E) the amount of cash or the cash value of a certificate of deposit or cashier's check that the applicant intends to deposit with the county treasurer if the applicant's application is approved or, if the applicant is an individual intending to execute nonexempt real property in trust to the board, the value of the real property;

(3) if the applicant is an individual, be accompanied by a list, as required by Section 1704.155, of nonexempt real property owned by the applicant that the applicant intends to execute in trust to the board if the applicant's application is approved; and

(4) be accompanied by:

(A) the applicant's complete, sworn financial statement;

(B) the applicant's declaration that the applicant will comply with this chapter and the rules adopted by the board;

(C) three letters of recommendation, each from a person who:

(i) is reputable; and

(ii) has known the applicant or, if the applicant is a corporation, the agent designated by the corporation in the application for at least three years;

(D) a $500 filing fee;

(E) a photograph of the applicant or, if the applicant is a corporation, of the agent designated by the corporation in the application;

(F) a set of fingerprints of the applicant or, if the applicant is a corporation, of the agent designated by the corporation in the application taken by a law enforcement officer designated by the board;

(G) if the applicant is or has been licensed under this chapter in another county:

(i) a list of each county in which the applicant holds a license; and

(ii) a statement by the applicant, as of the date of the application, of any final judgments that have been unpaid for more than 30 days and that arose directly or indirectly from a bail bond executed by the applicant as a surety or as an agent for a surety; and

(H) if the applicant is a corporation, a statement by the designated agent, as of the date of the application, of any final judgments that have been unpaid for more than 30 days and that arose directly or indirectly from any bond executed by the agent as a surety or as an agent for a surety.

(c) A letter of recommendation submitted under Subsection (b)(4)(C) must:

(1) state that the applicant or, if the applicant is a corporation, the agent designated by the corporation in the application has a reputation for honesty, truthfulness, fair dealing, and competency; and

(2) recommend that the board issue the license.

(d) Until payment of the final judgment, an unpaid final judgment disclosed under Subsection (b)(4)(G)(ii) or (b)(4)(H) bars licensure for the applicant unless the applicant has deposited with the court cash or a supersedeas bond in the amount of the final judgment pending:

(1) a ruling on a timely filed motion for a new trial; or

(2) an appeal.

(e) A corporation must file a separate corporate application for each agent the corporation designates in the county.

2. § 1704.155. Real Property List

A list of nonexempt real property required under Section 1704.154(b)(3) must, for each parcel listed, include:

(1) a legal description of the property that would be sufficient to convey the property by general warranty deed;

(2) a current statement from each taxing unit authorized to impose taxes on the property showing that there is no outstanding tax lien against the property;

(3) at the option of the applicant, either the property's:

(A) net value according to a current appraisal made by a real estate appraiser who is a member in good standing of a nationally recognized professional appraiser society or trade organization that has an established code of ethics, educational program, and professional certification program; or

(B) value according to a statement from the county from the county's most recent certified tax appraisal roll;

(4) a statement by the applicant that, while the property remains in trust, the applicant:

(A) agrees to pay the taxes on the property;

(B) will not further encumber the property unless the applicant notifies the board of the applicant's intent to encumber the property and the board permits the encumbrance; and

(C) agrees to maintain insurance on any improvements on the property against damage or destruction in the full amount of the value claimed for the improvements;

(5) a statement of whether the applicant is married; and

(6) if the applicant is married, a sworn statement from the applicant's spouse agreeing to transfer to the board, as a part of the trust, any right, title, or interest that the spouse may have in the property.

3. § 1704.156. Reappraisal of Real Property

(a) An appraisal district may not reappraise real property solely because the property owner is a license holder or an applicant for a license under this chapter.

(b) An appraisal district is not prohibited from reappraising real property in connection with the appraisal of real property in the same general area or if the reappraisal is requested by the board, a license holder, or an applicant for a license.

4. § 1704.157. Preliminary Determinations

Before a hearing on an application, a board or a board's authorized representative shall determine whether the applicant:

(1) possesses the financial resources to comply with Section 1704.160; and

(2) satisfies the other requirements of this chapter.

5. § 1704.158. Hearing on Application

(a) After making the determinations required by Section 1704.157, a board shall conduct a hearing on the application.

(b) During the hearing:

(1) the board may submit to the applicant or the applicant's agent any questions relevant to the board's decision on the application; and
(2) the applicant may present oral and documentary evidence.

6. § 1704.159. Decision on Application; Board Order

(a) After the hearing under Section 1704.158, the board shall enter an order conditionally approving the application unless the board determines that a ground exists to deny the application. If the board determines that a ground exists to deny the application, the board shall enter an order denying the application.

(b) An order issued under Subsection (a) conditionally approving an application becomes final on the date the applicant complies with the security requirements of Section 1704.160.

(c) A board shall give written notice to an applicant of the board's decision on the application.

K. SECURITY REQUIREMENTS FOLLOWING CONDITIONAL APPROVAL OF LICENSE

1. § 1704.160. Security Requirements

(a) On receipt of notice under Section 1704.159 that an application has been conditionally approved, the applicant, not later than the 90th day after the date of receipt of the notice, must:

(1) if the applicant is an individual:

(A) subject to Subsection (b), deposit with the county treasurer a cashier's check, certificate of deposit, or cash in the amount stated on the application under Section 1704.154(b)(2)(E); or

(B) subject to Subsections (c)-(f), execute in trust to the board each deed to the property listed on the application under Section 1704.154(b)(3); or

(2) if the applicant is a corporation, subject to Subsection (b), deposit with the county treasurer a cashier's check, certificate of deposit, or cash in the amount stated on the application under Section 1704.154(b)(2)(E).

(b) A deposit made under Subsection (a)(1)(A) or (a)(2) may not be less than $50,000. A corporation must make a separate deposit for each license granted to it in a county. A deposit made to a county with a population of less than 250,000 shall be placed in a fund known as a bail security fund.

(c) At the option of the applicant, the property executed in trust under Subsection (a)(1)(B) must be valued in the amount indicated by:

> (1) an appraisal by a real estate appraiser who is a member in good standing of a nationally recognized professional appraiser society or trade organization that has an established code of ethics, educational program, and professional certification program; or
>
> (2) the county's most recent certified tax appraisal roll.[24]

(d) The total value of the property executed in trust under Subsection (a)(1)(B) may not be less than $50,000.[25]

(e) A trust created under Subsection (a)(1)(B) is subject to the condition that the property executed in trust may, after notice is provided and under the conditions required by the Code of Criminal Procedure, be sold to satisfy a final judgment on a forfeiture on a bail bond executed by the applicant.

(f) If an applicant is married, the applicant's spouse must execute each deed of trust under Subsection (a)(1)(B) that involves community property.

(g) A board shall file each deed of trust in the records of each county in which the property is located.[26] The applicant shall pay the filing fee.

(h) The certificate of authority to do business in this state issued under Section 861.102, Insurance Code, to an applicant that is a corporation is conclusive evidence of:

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[24] A bail bond board county may not require title opinions or title insurance on property used as security. Op. Tex. Att'y Gen. No. DM97-102 (1997).

[25] A bail bond board may not accept from a bondsman applicant a certificate of deposit for $20,000 and a deed to real property valued at $30,000 in order to meet the $50,000 security deposit requirement under § 6(f) of this article. Op. Tex. Att'y Gen. No. JM-875 (1988).

[26] Property that is used as collateral by a bondsman does not have to be in the county in which the bond is posted. Op. Tex. Att'y Gen. No. DM-264 (1993).

(1) the sufficiency of the applicant's security; and

(2) the applicant's solvency and credits.

(i) A license holder must maintain the amount of security required by this section during the time the person holds the license.

L. LICENSE FORM

1. § 1704.161. License Form

(a) Each license issued under this chapter must show on its face the license expiration date and the license number.

(b) The same license number must appear on each subsequent renewal license.

M. LICENSE EXPIRATION AND RENEWAL – In situations where individuals or insurance companies seek to renew their license, the board should carefully review the renewal application to ensure that the surety has complied with each section of the requirements. If a license is renewed without meeting the statutory requirements, other bondsmen may file suit against the board seeking declaratory relief that the application was not timely filed, or did not meet the statutory requirements, and seek injunctive relief and attorney fees.

The bonding business is very competitive. A bondsman may carefully review their competitor's renewal application looking for an infirmity in the application so that they can force their competitor to file for a new application – in which case the financial requirements would be more stringent. A person who holds a license issued prior to September 1, 1999 may write bonds that equal up to ten times the value of security posted. Licensees licensed after September 1, 1999 have more limitations imposed on their ability to write bonds.

1. § 1704.162. License Expiration and Renewal

(a) A license issued or renewed under this chapter expires on the second anniversary after the date the license is issued or is to expire, as appropriate, if the license:

(1) has been issued for less than eight consecutive years; or

(2) has been suspended.

(b) To renew a license, a license holder must file with the board an application for renewal not later than the 31st day before the license expiration date.

(c) An application for renewal must comply with the requirements for an original license application under Section 1704.154, including the $500 filing fee requirement.

(d) A board shall approve an application for renewal if:

(1) the applicant's current license is not suspended or revoked;

(2) the application complies with the requirements of this chapter; and

(3) the board does not determine that a ground exists to deny the application.

(e) A person who applies to renew a license that has been held by the person for at least eight consecutive years without having been suspended or revoked under this chapter and who complies with the requirements of this chapter may renew the license for a period of 36 months from the date of expiration if the board:

(1) knows of no legal reason why the license should not be renewed; and

(2) determines that the applicant has submitted an annual financial report to each county bail bond board before the anniversary date of the issuance of the applicant's license.

(f) A license renewed under Subsection (e) may be renewed subsequently each 36 months in a similar manner.

(g) The board may disapprove an application only by entering an order.

N. ATTORNEYS ARE EXEMPT FROM THIS CHAPTER AND MAY POST BOND FOR AN ACCUSED THAT THEY REPRESENT – Attorneys are exempt from the requirements of this chapter for bonds that they write for individuals they represent in a particular criminal case. However, the sheriff in a county must still inquire into the sufficiency of the attorney's security to write a bond in compliance with Chapter 17 of the Code of Criminal Procedure.

1. § 1704.163. Attorney Exemption[27]

(a) Except as provided by this section, 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) at the time the bond is executed or the person acts as a surety, files a notice of appearance as counsel of record in the criminal case for which the bond was executed or surety provided or submits proof that the person has previously filed with the court in which the criminal case is pending the notice of appearance as counsel of record.

(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 board may suspend or revoke the person's authorization to post a bond under this section or may bar the person from executing a bail bond or acting as a surety under this section until the person has remedied the violation.

(c) A person executing a bail bond or acting as a surety under this section is not relieved of liability on the bond solely because the person is later replaced as attorney of record in the criminal case.

A sheriff or other official taking bond in either a bail bond board county or a non-bail bond board county may inquire into the sufficiency of security of an attorney posting bond for one of his clients, just as must be done for any other surety under Chapter 17 of the Texas Code of Criminal Procedure. Attorneys are exempt from the Bail Bond Board Act, but an attorney is still subject to the financial requirements of Chapter 17. Op. Tex. Att'y Gen. No. DM-483 (1998); Op. Tex. Att'y Gen. No. JC-0277 (2000).

The Texas Attorney General has concluded that the Bail Bond Board Act does not prohibit an attorney advertising in the bail bond section of the yellow pages of the phone book, as long as he advertises that he or she is permitted by law to execute bail bonds for persons that he or she represents in criminal cases. Op. Tex. Att'y Gen. No. JC-0008 (1999).

The Bail Bond Board Act permits an attorney to act as a surety for clients that he represents in a criminal case without being licensed by the bail bond board. If the board determines that the attorney violated this provision by executing bonds for individuals that he or she did not represent,

[27]Section 1704.163, Occupations Code, was amended effective September 1, 2005.

then the bail bond board can revoke or suspend that attorney's ability to write bonds. Op. Tex. Att'y Gen. No. JC-0534 (2002).

O. <u>ACCEPTANCE OF BAIL BONDS</u> – A sheriff must accept bonds from licensed sureties unless the license has been revoked or suspended.

1. § 1704.201. Acceptance of License Holder Bail Bonds

A sheriff shall accept or approve a bail bond executed by a license holder in the county in which the license holder is licensed if:

(1) the bond is for a county or district case;

(2) the bond is executed in accordance with this chapter and the rules adopted by the board; and

(3) a bail bond is required as a condition of release of the defendant for whom the bond is executed.

In a bail bond board county, the sheriff may not accept a bail bond from a bondsman *not licensed in that county*. Op. Tex. Att'y Gen. No. DM-59 (1991). This would also apply to a family member of a principal who wants to post a bond using real property as collateral – in other words, a family member, if he or she is not licensed as a bondsman in that county or is not an attorney, could not post a property bond for the accused.

The predecessor to § 1704.201 has been interpreted to require the sheriff in the county of arrest to accept and approve bail bonds offered by a bail bondsman licensed in the county of arrest to obtain release of an accused who is being held on an out-of-county *capias* or warrant. Op. Tex. Att'y Gen. No. JM-271 (1985). The interpretation should be the same under this recodified section.

It should also be noted that a sheriff in a bail bond board county may not unilaterally refuse the bond of a bondsman licensed in that county on the basis that the bondsman is in default on a bond in another county. Op. Tex. Att'y Gen. No. JC-0019 (1999). Additionally, the sheriff cannot question the solvency of a licensed bail bondsman in the county. The sheriff can, however, inquire into the solvency of an attorney posting an "attorney bond" for someone that he allegedly represents in the pending criminal action, since he is exempt from this Chapter under Section 1704.163.

P. <u>RECORD KEEPING REQUIREMENTS OF LICENSEES</u> – Licensees are required to maintain records for at least four years so that the bail bond board can better regulate and oversee the writing of bonds in their county. The record keeping requirements provide a safeguard for the members of the public who utilize the services of bail bondsmen.

1. § 1704.202. Record Requirements

(a) A license holder shall maintain:

(1) a record of each bail bond executed by the license holder; and

(2) a separate set of records for each county in which the license holder is licensed.

(b) The records required to be maintained under this section must include for each bail bond executed and enforced:

(1) the style and number of the case and the court in which the bond is executed;

(2) the name of the defendant released on bond;

(3) the amount of bail set in the case;

(4) the amount and type of security held by the license holder; and

(5) a statement of:

(A) whether the security held by the license holder is:

(i) for the payment of a bail bond fee; or

(ii) to assure the principal's appearance in court; and

(B) the conditions under which the security will be returned.

(c) Repealed by Acts 2003, 78th Leg., ch. 942, § 28.

(d) The records required under this section shall be:

(1) made available for inspection and copying at the board's expense on demand by the board or an authorized representative of the board;

(2) maintained at the license holder's office location in the county; and

(3) maintained for not less than four years after the conclusion of the case for which the bond was given.

Q. **BAIL BOND LIMIT FORMULA AND ADDITIONAL SECURITY POSTING**[28] – The limits that an individual surety has are determined by a formula. A person who holds a license issued prior to September 1, 1999 may write bonds that equal up to ten times the value of security posted. Licensees licensed after September 1, 1999 have more limitations imposed on their ability to write bonds as set out below in subsection (f).

1. § 1704.203. Bail Bond Limit; Additional Security

(a) Except as provided by Subsection (d), a license holder who holds a license originally issued before September 1, 1999, may not execute, and a person may not accept from the license holder, a bail bond that, in the aggregate with other bail bonds executed by the license holder in that county, results in a total amount that exceeds 10 times the value of the security deposited or executed by the license holder under Section 1704.160.

(b) A county officer or an employee designated by the board shall maintain for each license holder the total amount of the license holder's current liability on bail bonds.

(c) A license holder may not execute a bail bond if the amount of the license holder's current total liability on judgments nisi in that county equals or exceeds twice the amount of security deposited or executed by the license holder under Section 1704.160.

(d) A license holder, at any time, may increase the limits prescribed by this section by depositing or executing additional security.

(e) This section does not apply to a license holder that is a corporation.

(f) A bail bond surety who holds a license originally issued on or after September 1, 1999, and who:

> (1) has been licensed for fewer than two years or has had a license under this chapter suspended or revoked may not execute, and a person may not accept from the license holder, bail bonds that in the aggregate exceed 10 times the value of property held as security under Section 1704.160(a)(1)(A) plus five times the value of property held in trust under Section 1704.160(a)(1)(B);

[28] A county does not have the authority to raise or lower the bail bond ratio set by the Bail Bond Board Act. Op. Tex. Att'y Gen. No. DM93-21 (1993).

(2) has been licensed for at least two years and fewer than four years may not execute, and a person may not accept from the license holder, bail bonds that in the aggregate exceed 10 times the value of property held as security under Section 1704.160(a)(1)(A) plus six times the value of property held in trust under Section 1704.160(a)(1)(B);

(3) has been licensed for at least four years and fewer than six years may not execute, and a person may not accept from the license holder, bail bonds that in the aggregate exceed 10 times the value of property held as security under Section 1704.160(a)(1)(A) plus eight times the value of property held in trust under Section 1704.160(a)(1)(B); or

(4) has been licensed for at least six years may not execute, and a person may not accept from the license holder, bail bonds that in the aggregate exceed 10 times the value of property held as security under Section 1704.160(a)(1)(A) plus 10 times the value of property held in trust under Section 1704.160(a)(1)(B).

(g) If a bail bond surety is subject to Subsection (f)(1) because the person has had a license under this chapter suspended or revoked and is also subject to Subsection (f)(2), (3), or (4), the prohibition imposed by Subsection (f)(1) controls.

R. DUTY OF LICENSEE TO PAY FINAL JUDGMENT ON FORFEITURE

1. § 1704.204. Payment of Final Judgment

(a) A person shall pay a final judgment on a forfeiture of a bail bond executed by the person not later than the 31st day after the date of the final judgment unless a timely motion for a new trial has been filed. If a timely motion for a new trial or a notice of appeal has been filed, the person shall:

(1) pay the judgment not later than the 31st day after the date the motion is overruled, if the motion is overruled; or

(2) deposit with the court cash or a supersedeas bond in the amount of the final judgment, if an appeal is filed.

(b) If a license holder fails to pay a final judgment as required by Subsection (a), the judgment shall be paid from the security deposited or executed by the license holder under Section 1704.160.

S. STATE AND LICENSEE MAY SETTLE BAIL BOND FORFEITURE CASES

1. § 1704.205. Bail Bond Settlement

Before a final judgment on a forfeiture of a bail bond:

(1) the prosecuting attorney may recommend to the court a settlement in an amount less than the amount stated in the bond; or

(2) the court may, on its own motion, approve a settlement.

T. REPLACEMENT OF SECURITY BY LICENSE HOLDER FOLLOWING JUDGMENT ON FORFEITURE

1. § 1704.206. Replacement of Security

If a final judgment on a forfeiture of a bail bond is paid from the security deposited or executed by a license holder under Section 1704.160, the license holder shall deposit or execute additional security in an amount sufficient to comply with that section.

U. SURRENDER OF PRINCIPAL – This provision for surrender is much better than the surrender requirements in Chapter 17 of the Code of Criminal Procedure that govern non-bail bond board counties. However, the legislature may want to consider providing a time period that must elapse between the time of notice to counsel for the State and counsel for the principal that would allow either counsel time to contest the surrender prior to the authorization of the surrender.

1. § 1704.207. Surrender of Principal; Contest

(a) A person executing a bail bond may surrender the principal for whom the bond is executed by:

(1) if the principal is represented by an attorney, notifying the principal's attorney of the person's intention to surrender the principal in a manner provided by Rule 21a, Texas Rules of Civil Procedure; and

(2) filing an affidavit with the court or magistrate before which the prosecution is pending that states:

(A) the person's intention to surrender the principal;

(B) the court and cause number of the case;

(C) the name of the defendant;

(D) the offense with which the defendant is charged;

(E) the date of the bond;

(F) the reason for the intended surrender; and

(G) that notice of the person's intention to surrender the principal has been provided as required by this subsection.

(b) If a principal is surrendered under Subsection (a) and the principal or an attorney representing the state or an accused in the case determines that a reason for the surrender was without reasonable cause, the person may contest the surrender in the court that authorized the surrender.

(c) If the court finds that a contested surrender was without reasonable cause, the court may require the person who executed the bond to refund to the principal all or part of the fees paid for execution of the bond. The court shall identify the fees paid to induce the person to execute the bond regardless of whether the fees are described as fees for execution of the bond.

V. <u>BONDSMAN RELIEVED OF LIABILITY UPON DISMISSAL, ACQUITTAL OR CONVICTION</u> – Upon dismissal, acquittal or conviction of the principal, the surety is relieved of liability and may not be required to remain on any bond if the criminal defendant appeals.

1. § 1704.208. Bond Liability

(a) A person executing a bail bond is relieved of liability on the bond on the date of disposition of the case for which the bond is executed.

(b) For purposes of this section, disposition of a case occurs on the date the case is dismissed or the principal is acquitted or convicted.

2. § 1704.209. Bond Discharged on Appeal

(a) A bail bond shall be discharged if:

(1) the principal appeals the case for which the bond is executed; and

(2) the person who executed the bond does not agree to continue during the appeal as surety.

(b) A court may not require a person who executes a bail bond to continue as surety while the principal appeals the case for which the bond is executed unless the person agrees to continue during the appeal as surety.

(c) This section does not prohibit a principal from obtaining an appeal bond under the Code of Criminal Procedure.

(d) This section prevails over any provision contained in the bail bond.

W. LICENSE HOLDER MAY WITHDRAW SECURITY

1. § 1704.210. Withdrawal of Security

(a) A license holder may withdraw the security deposited or executed under Section 1704.160, and the security shall be returned to the license holder or the license holder's heirs or assigns, if:

(1) the license holder:

(A) ceases to engage in the bonding business;

(B) ceases to maintain the license; and

(C) presents a release by the board; and

(2) no judgment or bond liability, actual or potential, is outstanding against the license holder.

(b) The security returned to a license holder under Subsection (a) is equal to the amount of security deposited or executed under Section 1704.160 minus the amount of security:

(1) depleted under Section 1704.204(b) to pay a judgment; and

(2) necessary to secure any unexpired obligation on a bail bond executed by the license holder.

X. AGENTS OF CORPORATE SURETIES – A corporate surety can have more than one agent in a county. This section requires the filing of a corporate power of attorney with the county clerk designating a person as an agent for a corporate surety. An agent must be designated in the corporation's application. The agent does not have to be a local recording agent under Article 21.14 of the Texas Insurance Code. A corporate surety may limit the amount of bonds that an agent can write by specifying the limitation in the power of attorney on file with the county clerk.

1. § 1704.211. Corporate Power of Attorney

(a) A corporation shall, before executing any bail bond, file with the county clerk of the county in which the corporation intends to execute the bond a power of attorney designating an agent of the corporation authorized to execute bail bonds on behalf of the corporation.

(b) An agent designated by a power of attorney under Subsection (a) for a corporation holding a license under this chapter must be designated by the corporation in the corporation's application for a license.

(c) An agent designated by a power of attorney under Subsection (a) is not required under this chapter to obtain a local recording agent license under Article 21.14, Insurance Code.[29]

(d) A corporation may limit the authority of an agent designated under Subsection (a) by specifying the limitation in the power of attorney that is filed with the county clerk and the board.

A corporate surety may appoint as agents various individual licensees, each of whom may use a direct assumed name. Op. Tex. Att'y Gen. No. GA-0135 (2004). However, the power of attorney must fully disclose the person acting as agent and his assumed name, so long as any posted listing of the person under his assumed name also notes that he is agent for the corporate surety. Op. Tex. Att'y Gen. No. GA-0135 (2004). A licensed corporate surety is not prohibited from designating a separate business entity as its agent for executing bail bonds; however, the corporate surety must obtain a separate license on behalf of each individual who ultimately acts as the surety's agent by executing the bail bonds. Op. Tex. Att'y Gen. No. MW-507 (1982). A county bail bond board may exercise its administrative and regulatory powers to prevent an individual licensee from using more than one assumed name. Op. Tex. Att'y Gen. No. GA-0135 (2004).

A corporation must make a separate deposit of financial security "for each license granted it in a county." *Harris County Bail Bond Board v. Blackwood,* 41 S.W.3d 123, 124 (Tex. 2001). Unless the qualifying affidavit limits the amount an agent can write, there is no limit on the value of the bonds a corporate bail bondsman may issue. Op. Tex. Att'y Gen. No. DM (1999). Moreover, a bail bond board is not authorized to set a limit on the dollar amount of bonds which a corporate surety may provide where the corporation has been issued a certificate of authority to do business in Texas by the State Board of Insurance. Op. Tex. Att'y Gen. No. JM-799 (1987).

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[29] This section exempts, under certain circumstances, a licensee under this article from the requirements of holding a local recording agent's license. Notwithstanding licensing with a local bail bond board, an insurance company is required to comply with the applicable provisions of the Texas Insurance Code in order to act as a surety or co-surety on bonds. Op. Tex. Att'y Gen. No. MW-321 (1981).

Y. DEFAULT BY CORPORATE SURETY – A corporation may not act as a surety in a county where it is in default on five or more bonds.

1. § 1704.212. Effect of Default by Corporation; Notice Required

(a) A corporation may not act as a bail bond surety in a county in which the corporation is in default on five or more bail bonds.

(b) If a corporation defaults on a bail bond, the clerk of the court in which the corporation executed the bond shall deliver a written notice of the default to:

(1) the sheriff;

(2) the chief of police; or

(3) another appropriate peace officer.

(c) For purposes of this section:

(1) a corporation is considered in default on a bail bond beginning on the 11th day after the date the trial court enters a final judgment on the scire facias and ending on the date the judgment is satisfied, set aside, or superseded; and

(2) a corporation is not considered in default on a bail bond if, pending appeal, the corporation deposits cash or a supersedeas bond in the amount of the final judgment with the court in which the bond is executed.

(d) A deposit made under Subsection (c)(2) shall be applied to the payment of a final judgment in the case.

Z. BOARD INVESTIGATION FOLLOWING COMPLAINT OR ON ITS OWN MOTION – The investigation into any complaint is an important part of the process prior to hearing the complaint. The board may want to adopt a local rule that sets forth the exact procedure that an investigation will follow and who from the board will head the investigation. The board may want to establish an investigative committee to look into the complaint, or ask the sheriff or the county attorney or district attorney to investigate and report back to the board. If the investigation reveals that there is probable cause to believe that a violation of the statute has occurred, then notice can be provided to the person or entity being investigated and a hearing can be set. If suspension or revocation is a possible action following a hearing on a complaint, then the board must comply with the notice provisions of Section 1704.254.

1. § 1704.251. Investigation

(a) A board, on its own motion, may investigate an action of or a record maintained by a license holder that relates to a complaint that the license holder has violated this chapter.

(b) A board shall investigate an action of or a record maintained by a license holder if:

(1) the board receives a sworn complaint providing reasonable cause to believe that a violation of this chapter has occurred; or

(2) a court requests an investigation.

AA. <u>DISCRETIONARY LICENSE SUSPENSION OR REVOCATION</u> – A violation of the following 16 subsections can result in a revocation or suspension following notice and a hearing.

1. § 1704.252. Discretionary License Suspension or Revocation: Grounds

After notice and hearing, a board may revoke or suspend a license if the license holder:

(1) violates this chapter or a rule adopted by the board under this chapter;

(2) fraudulently obtains a license under this chapter;

(3) makes a false statement or misrepresentation:

(A) in an application for an original or renewal license; or

(B) during a hearing conducted by the board;

(4) refuses to answer a question submitted by the board during a hearing relating to the license holder's license, conduct, or qualifications;

(5) is finally convicted under the laws of this state, another state, or the United States of an offense that:

(A) is a misdemeanor involving moral turpitude or a felony; and

(B) is committed after August 27, 1973;

(6) is found by a court to be bankrupt or is insolvent;

(7) is found by a court to be mentally incompetent;

(8) fails to pay a judgment in accordance with Section 1704.204;

(9) pays commissions or fees to or divides commissions or fees with, or offers to pay commissions or fees to or divide commissions or fees with, a person or business entity not licensed under this chapter;

(10) solicits bonding business in a building in which prisoners are processed or confined;

(11) recommends to a client the employment of a particular attorney or law firm in a criminal case;

(12) falsifies or fails to maintain a record required under this chapter;

(13) fails to promptly permit the board, or a representative or an agent of the board, of the county in which the license holder is licensed to inspect a record required under this chapter;

(14) acts as a bail bond surety under a suspended or expired license;

(15) fails two or more times to maintain the amount of security required by Section 1704.160; or

(16) misrepresents to an official or an employee of the official the amount for which the license holder may execute a bail bond for purposes of obtaining the release of a person on bond.

BB. MANDATORY SUSPENSION – FAILURE TO MAINTAIN REQUIRED SECURITY OR PAY JUDGMENT – Mandatory license suspension must occur if the license holder fails to maintain the amount of security required by Section 1704.160. No notice or hearing is required in that situation. The suspension is immediately lifted and the license reinstated if the license holder deposits the required amount of security. The failure to pay a final judgment results in the automatic suspension of a license, with no requirement for notice or a hearing. The license is reinstated when the judgment is paid.

1. § 1704.253. Mandatory License Suspension or Revocation: Grounds

(a) A board shall immediately suspend a license if the license holder fails to maintain the amount of security required by Section 1704.160. A board is not required to provide notice or a hearing before suspending a license under this subsection. A license suspended under this subsection shall be immediately reinstated if the license holder deposits or executes the amount of security required by Section 1704.160.

(b) After notice and hearing as provided by Section 1704.254, a board shall revoke a license if:

(1) the license holder fails to pay a judgment in accordance with Section 1704.204; and

(2) the amount of security maintained by the license holder under Section 1704.160 is insufficient to pay the judgment.

2. § 1704.2535. Failure to Pay Final Judgment by Bail Bond Surety

(a) The board or its authorized representative shall immediately notify the sheriff if a bail bond surety fails to pay a final judgment of forfeiture as provided by Section 1704.204(a).

(b) After receiving notification, the sheriff may not accept any bonds from the bail bond surety until the surety pays the judgment.

(c) The bail bond surety's privilege to post bonds is reinstated when the bail bond surety pays the judgment.

(d) A board is not required to provide notice or a hearing before making the notification required by this section.

CC. NOTICE AND HEARING PROCEDURES TO REVOKE OR SUSPEND LICENSE

1. § 1704.254. Notice and Hearing

(a) Notice of a hearing to suspend or revoke a license under this chapter must:

(1) be sent by certified mail to the last known address of the license holder not later than the 11th day before the date of the hearing;

(2) state each alleged violation of this chapter; and

(3) include a copy of any written complaint on which the hearing will be based.

(b) The hearing is limited to each alleged violation stated in the notice.

(c) During the hearing, the license holder:

(1) is entitled to an opportunity to be heard; and

(2) may present and cross-examine witnesses.

(d) The hearing must be recorded. A license holder may obtain a copy of the record on request and payment of the reasonable costs of transcription.

The notice requirements must be adhered to prior to any hearing to afford due process to the individual or corporate surety. The hearing must be limited to the alleged violation stated in the notice, and the licensee must be afforded the opportunity to be heard and present evidence. The exact procedures to use in the hearing itself may be a valid topic for a local rule, so long as nothing in this section is in any manner abridged and the licensees' rights are protected. If suspension or revocation results following a hearing on a complaint, then the board must comply with the notice provisions of Section 1704.254.

DD. APPEAL OF A BOARD ORDER DENYING A LICENSE OR RENEWAL OR SUSPENDING OR REVOKING A LICENSE – Appeal of an order of the board denying a license, denying renewal of a license, suspending a license, or revoking a license must occur not later than the 30th day after notice of the board action is received. The action can only be filed against the board and not against any individual board member. The notice must specify the reasons for the action in the Section 1704.254 hearing, and the reasons for board action on appeal cannot be different from those specified in the notice. Board action on denial of a license, denial of renewal, suspension or revocation becomes final on the 31st day following the action if it is not appealed.

1. § 1704.255. Appeal; Venue

(a) An applicant or a license holder may appeal an order of a board denying an application for a license or renewal of a license, or suspending or revoking a license, by filing a petition in a district court in the county not later than the 30th day after the date the person receives notice of the denial, suspension, or revocation.

(b) An appeal filed under this section is an action against the board. An applicant or a license holder may not bring the action against an individual board member.

(c) The board may not assert a reason on appeal for an action by the board that differs from the reasons specified in the board's notice of hearing under Section 1704.254.

2. § 1704.256. Standard of Judicial Review

Judicial review of an appeal filed under Section 1704.255 is by trial de novo in the same manner as an appeal from a justice court to a county court.

3. § 1704.257. Effect of Board Order

(a) A board order denying an application for a license or renewal of a license, or suspending or revoking a license, becomes final on the 31st day after the date the applicant or license holder receives notice of the order unless the applicant or license holder files an appeal under Section 1704.255.

(b) A board order appealed under Section 1704.255 has full force and effect pending determination of the appeal.

Generally speaking, actions denying a license or renewal or suspending or revoking a license may be appealed to state district court, along with a request for injunctive relief, and attorney fees and costs. *See Garcia-Marroquin v. Nueces County Bail Bond Bd.,* 1 S.W.3d 366 (Tex. App. – Corpus Christi 1999, no writ). It is generally necessary for a bondsman or potential bondsman to first exhaust administrative remedies, otherwise the District Court has no jurisdiction. *Id.* A bondsman is generally required to attend a hearing and await a final order from the board revoking or suspending the license. *Id.* However, exhaustion of administrative remedies is not required where the action seeks a declaratory judgment concerning the validity or applicability of an agency rule. *Id.*

Depending on the factual situation in the case, the litigation costs can be high in this type of litigation. These declaratory judgment actions and de novo appeals are often laced with allegations of favoritism, discrimination or unequal treatment. Some bail bondsmen are litigious and well funded, so caution must be exercised by the board in following the procedures in a meticulous manner.[30]

EE. RETURN BY BONDSMAN OF SECURITY OF THE PRINCIPAL – On occasion, a bail bond surety will hold something of value of the principal (the person who was bonded out of jail) to ensure payment of the bond fee or appearance in court. A bondsman may receive a fee of ten or even twenty percent of the full bond amount as payment for posting the bond. The amount of the fee can be very steep if the bond is high. For instance, if a $50,000 bond is set, the bond fee could be between $5,000 and $10,000. Many people do not have that much money in cash, so the bondsman may set up installment payments and require that he or she be allowed to "hold" an item or several items of value as security for payment of the installments. Section 1704.301 controls the return of such security.

[30]This statement is not meant as a criticism of the bail bond industry as a whole. As with any profession or occupation, some of the people in the profession or occupation are more litigious than others.

1. § 1704.301. Return Of Security

A bail bond surety may not hold security for the payment of a bail bond fee or to assure the principal's appearance in court for more than 30 days after the date on which the owner of the security:

(1) requests return of the security in writing; and

(2) submits to the bail bond surety written evidence of the conclusion of:

(A) the payment agreement; or

(B) all of the criminal cases for which the security was given.

This section requires the return of the property within 30 days after the principal provides written request for the return of the property and written proof that the installment agreement was satisfied, or that the criminal cases have been concluded.

FF. <u>BAIL BONDSMEN PROHIBITIONS AND OFFENSES</u> – The Texas Occupations Code makes several acts criminal in nature. These acts include payment of referrals to people in the criminal justice system, unlawful advertising, unlawful solicitation of bond business, failure to issue receipts and keep records and falsification of documents.

1. § 1704.302. Prohibited Referrals of or Employments With Bonding Business; Offense

(a) A person in the bonding business may not directly or indirectly give, donate, lend, or contribute, or promise to give, donate, lend, or contribute, money or property to an attorney, police officer, sheriff, deputy, constable, jailer, or employee of a law enforcement agency for the referral of bonding business.

(b) A person may not accept or receive from a license holder money, property, or any other thing of value as payment for the referral of bonding business unless the records of the board show that the person is an agent or employee of the license holder.

(c) A person may not accept or receive from a license holder money, property, or any other thing of value as payment for employment with a bonding business if, within

the preceding 10 years, the person has been convicted of a misdemeanor involving moral turpitude or of a felony.[31]

(d) A person commits an offense if the person violates this section. An offense under this section is a Class A misdemeanor.

It is important to note that subsections (a) and (b) contain the language "for the referral of bonding business." This provides a potential "out" for any individual violating these subsections since they can claim that any remuneration was for some other purpose or reason than for the referral of bonds. The best practice for all County officials and employees is to avoid any contact or conduct between these parties that could be perceived as improper. For example, sheriff's deputies should not accept lunch, dinner, tickets to the rodeo, etc. from a bondsman.

2. § 1704.303. Bail Bond Surety Activity; Offense

(a) A person required to be licensed under this chapter may not execute a bail bond unless the person holds a license issued under this chapter.

(b) A person may not advertise as a bail bond surety in a county unless the person holds a license issued under this chapter by a bail bond board in that county. A person does not violate this subsection if the person places an advertisement that appears in more than one county and:

(1) the advertisement clearly indicates the county or counties in which the person holds a license issued under this chapter; and

(2) any local telephone number in the advertisement is a local number only for a county in which the person holds a license issued under this chapter.

(c) A person commits an offense if the person violates this section. An offense under this section is a Class B misdemeanor.

[31] Section 1704.302(c) of the Texas Occupations Code as amended effective September 1, 2001, prohibits the employment of a convicted felon by a bail bond business unless the person was employed by the business before the section's effective date. Op. Tex. Att'y Gen. No. JC-0534 (2002). However, a convicted felon's continued employment by a family owned bail bond business has been found permissible by the Attorney General despite the amendment of section 1704.302 (c) of the Occupations Code. Op. Tex. Att'y Gen. No. JC-0534 (2002). He or she does not forfeit that status solely because the business in which he is employed changes hands within the family due to a death in the family. Op. Tex. Att'y Gen. No. JC-0534 (2002).

3. § 1704.304. Prohibited Recommendations or Solicitations; Offense

(a) A bail bond surety or an agent of a bail bond surety may not recommend or suggest to a person for whom the bail bond surety executes a bond the employment of an attorney or law firm in connection with a criminal offense.

(b) The following persons may not recommend a particular bail bond surety to another person:

(1) a police officer, sheriff, or deputy;

(2) a constable, jailer, or employee of a law enforcement agency;

(3) a judge or employee of a court;

(4) another public official; or

(5) an employee of a related agency.

(c) A bail bond surety or an agent of a bail bond surety may not solicit bonding business in a police station, jail, prison, detention facility, or other place of detainment for persons in the custody of law enforcement.

(d) A person may not place a device in a place of detention, confinement, or imprisonment that dispenses a bail bond in exchange for a fee.

(e) A person commits an offense if the person violates this section. An offense under this section is a Class B misdemeanor.[32]

Once again, any appearance of impropriety should be avoided. It is interesting to note that a bondsman may not refer a client to an attorney. Upon information and belief, the Flowers Davis law firm believes that this provision has been ignored or abused in the past by some bondsmen and some attorneys.

As set forth in this section, the bail bond board statute prohibits: (1) a bail bond surety from recommending an attorney or law firm to the surety's client; and (2) various public officials and employees of the jail or court system from recommending a particular bail bond surety to another person. Op. Tex. Att'y Gen. No. GA-0089 (2003). This provision *also prohibits any affected person from providing a list of attorneys, law firms or bail bond sureties.* Op. Tex. Att'y Gen. No. GA-

[32] A bail bond surety who is convicted of soliciting clients inside an area prohibited by section 1704.304(c) of the Occupations Code does not commit a crime of "moral turpitude" for purposes of section 1704.302(c) of the Occupations Code. Op. Tex. Att'y Gen. No. GA-0299 (2004).

0135 (2004). This same provision prohibits the collection by a bail bondsman, from a person for whom the bondsman executes a bond, a legal fee for an attorney and/or remittal of such fee to the attorney. The section is sufficiently broad to cover the collection and remittal of such a fee. Op. Tex. Att'y Gen. No. JC-0528 (2002). However, it must be noted that sheriff's departments must post a list in the jail of licensed bondsmen in counties with a bail bond board and may post a list in the jail of bondsmen in counties without a bail bond board, pursuant to Article 17.141 of the Texas Code of Criminal Procedure. The practice of posting such a list is not considered "solicitation."

4. § 1704.305. Bail Bond Receipt and Inspection; Offense

(a) A bail bond surety or an agent of a bail bond surety may not receive money or other consideration or thing of value from a person for whom the bail bond surety executes a bond unless the bail bond surety or agent issues a receipt to the person as provided by Subsection (b).

(b) The receipt must state:

> (1) the name of the person who pays the money or transfers the consideration or thing of value;
>
> (2) the amount of money paid or the estimated amount of value transferred;
>
> (3) if the person transfers consideration or a thing of value, a brief description of the consideration or thing of value;
>
> (4) the style and number of the case and the court in which the bond is executed; and
>
> (5) the name of the person receiving the money, consideration, or thing of value.

(c) A bail bond surety or an agent of a bail bond surety shall retain a duplicate copy of a receipt issued under Subsection (a). The copy of the receipt shall be made available for inspection by:

> (1) a representative of the board in any county in which the bail bond surety is licensed; and
>
> (2) an appointed representative of a court in which the bail bond surety agrees to execute bail bonds.

(d) A person commits an offense if the person violates this section. An offense under this section is a Class B misdemeanor.

This provision was adopted to ensure that documentation exists to show that installment agreements have either been paid or not and to document the financial dealings in what is otherwise often a cash based business. This rule protects the accused and the bondsman.

5. § 1704.306. Records; Offense

(a) A person commits an offense if the person falsifies a record required to be maintained under this chapter.

(b) An offense under this section is a Class B misdemeanor.

The penalty for falsifying documents that are required to be maintained for government inspection is only a Class B misdemeanor. This is an area where legislative action might be proper to increase this specific penalty to a Class A misdemeanor, consistent with the other listed offenses under these sections of the Texas Occupations Code.

GG. DISBURSEMENTS FROM COUNTY FUND

1. § 1704.103. Disbursements From County Fund

(a) Fees deposited in the general fund of a county under Section 1704.101(2) may be used only to administer and enforce this chapter, including reimbursement for:

(1) reasonable expenses incurred by the board in enforcing this chapter; and

(2) actual expenses incurred by a board member in serving on the board.

(b) For purposes of this section, serving on a board is an additional duty of a board member's office. A board member may not receive compensation for serving on this board.

III. FREQUENTLY ASKED QUESTIONS

A. NON-BAIL BOND BOARD COUNTIES

1. Can an insurance company write a bail bond in a county when the Sheriff has never even heard of the insurance company or the agent presenting the bond?

Yes. An insurance company licensed by the Texas Department of Insurance to do business in the State of Texas can write bail bonds through a licensed recording agent in your county. *See* pp 10 -11; TEX. CODE CRIM. PRO. art. 17.06; 17.07. The only requirements are that the company file a power of attorney with the County Clerk that authorizes the local recording agent to sign bonds on behalf of the company. *Id.* The bond must be executed by the licensed recording agent for the insurance company and be in the proper form. *Id.*; TEX. CRIM. PRO. CODE ANN. art. 17.08.

2. What does a Sheriff need to make sure is contained in a bail bond submitted by a bondsman?

Article 17.08 of the Texas Code of Criminal Procedure sets out a laundry list of items that a bail bond is supposed to contain. *See* pp 8-9; TEX. CRIM. PRO. CODE ANN. art. 17.08.

3. Can the Sheriff post a list of eligible bondsmen in a non-bail bond board county?

Yes. *See* pp 9 -10; TEX. CRIM. PRO. CODE ANN. art. 17.141. The Texas Legislature amended the Code of Criminal Procedure to allow the posting of such a list effective September 1, 2005. The legislature amended the statute specifically to address a prior Texas Attorney General Opinion that held that lists could not be posted by the Sheriff, because the statute did not specifically authorize such a list. It should be noted that the Sheriff in a non-bail bond board county **may** post a list of sureties whose security he has determined to be sufficient. The language is not mandatory.

4. Are there any other requirements for a person writing a bond in a non-bail bond board county other than the financial requirements for individual sureties and the licensing requirement for insurance companies?

Yes. Effective September 1, 2005, a person may not write a bail bond in a county unless, within two years before the bail bond is given, the individual has completed, in person, at least eight hours of continuing education in criminal law courses or bail bond law courses that meet the requirements of article 17.10 of the Code of Criminal Procedure. *See* pp 11-12.

5. What can the Sheriff do to make sure that an individual surety is actually worth enough money to write the bond?

Articles 17.11 through 17.141 of the Texas Code of Criminal Procedure govern the manner in which sheriffs may determine whether the surety has sufficient security to write a bond. Under article 17.11, it must appear that the surety is worth at least double the amount of the sum for which he or she is bound, exclusive of exempt property (such as homestead), debts, and other encumbrances. Article 17.13 specifically sets forth an oath that the surety can be required to take to swear that they are worth at least the sum of the amount for which the surety is bound. Article 17.14 allows the Sheriff to require further evidence if he or she is not fully satisfied as to the sufficiency of the security of the surety. Additionally, article 14.141, one of the recent amendments to the Code of Criminal Procedure effective September 1, 2005, requires that each person on a list of eligible bond sureties posted by the Sheriff provide a "sworn financial statement." The term "sworn financial statement" appears to mean that the surety must provide a statement of his or her finances and swear, under penalty of perjury, that the statement is true and correct. Of course, an audited financial statement signed by an accountant would be the best proof of actual financial worth. However, such audited financial statements can be costly and time consuming to obtain. Consequently, the legislation only requires a "sworn financial statement." The Sheriff may also request a list of the bonds written by an individual surety in other counties in making an assessment of the sufficiency of the security of the surety.

6. Is there any mechanism that would help the Sheriff in releasing people with emotional or mental disabilities from his or her jail?

Yes. Article 17.032 provides procedures for releasing certain mentally ill defendants from jail on personal bonds. In recent years, due primarily to State budget restraints, counties have been forced to house an increasing number of mentally ill pre-trial arrestees and convicted inmates. Article 17.032 provides some relief from that burden in certain types of cases. *See* pp 16-18.

7. Is there anything that the County can do to facilitate inmate releases and reduce overcrowding?

Yes. As previously discussed, article 17.032 provides a mechanism for releasing certain mentally ill offenders. Additionally, article 17.42 establishes the statutory authority for a county or judicial district to create a "personal bond office" that investigates and gathers information bearing on whether an inmate will comply with the conditions of a personal bond and then reports that information to the appropriate court. *See* pp 19-22.

8. When does a person who has been arrested pursuant to a warrantless arrest have to be released if no bond is set?

Article 17.033 of the Texas Code of Criminal Procedure states that a person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $5,000.00, not later than the 24th hour after the person's arrest if the person was arrested for a

misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. Additionally, if the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on a personal bond. A person who is arrested without a warrant and who is detained in jail must be released on bond in an amount not to exceed $10,000, not later than the 48th hour after the person's arrest if the person was arrested for a felony and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on a personal bond. While Section (c) of article 17.003 allows the filing of an application by the attorney representing the State to postpone the release of a person for up to 72 hours after the person's arrest, constitutional standards only allow such an extension of time where exceptional reasons are present. Additionally, from a liability standpoint, anyone arrested without a warrant who has not been taken before a magistrate for a determination of probable cause within 48 hours and is still in jail has suffered a presumptive violation of his or her Fourth Amendment rights as a matter of law. For that reason, it is exceptionally important that every person arrested without a warrant be taken to a magistrate as quickly as possible following arrest. *Infra.*

9. How should the amount of bail be determined?

It must be remembered that setting bail is not punitive in nature, nor is bail meant to be a fine or a punishment. The purpose of bail is to make sure that the person shows up for court. Generally, magistrates or officers taking bail should abide by the following rules: 1) the bail should be sufficiently high to give reasonable assurance that the undertaking will be complied with; 2) the power to require bail is not to be so used to make it an instrument of oppression; 3) the nature of the offense and the circumstances under which the offense was committed should be considered; 4) the ability to make bail is to be considered and proof can be taken on this point; and 5) the future safety of the victim of the alleged offense and the safety of the community in general should be considered.

10. Besides an individual surety, who may execute or sign a bond?

Articles 17.06 and 17.07 of the Texas Code of Criminal Procedure speak to a "corporation" acting as a surety. However, the only corporation that can act as a surety is an insurance company lawfully licensed to do business in the State of Texas, specifically authorized by the Texas Department of Insurance. A licensed local recording agent for the insurance company may execute a bond.

11. What is the difference between a surety bond, a personal bond, and a cash bond?

Surety Bonds – Surety bonds are bonds that are signed by the principal (*i.e.* the criminal defendant) and one or more sureties. If the surety signing on the bond for the principal is an individual, he or she must satisfy the sheriff, in a non-bail bond board county, that he or she is worth at least twice the amount of money that the surety would owe in the event the bond was forfeited.

Additionally, in a non-bail bond board county, an insurance company, acting through a local recording agent, can execute as a surety on a surety bond.

Cash Bonds – Cash bonds are bonds which can be posted, in cash, for the total amount of the bond on behalf of the defendant.[33]

Personal Bonds – A personal bond is a bond set by a magistrate, in the magistrate's discretion, that releases a defendant on his personal bond without sureties or other security. Personal bonds are discussed *infra.* at 14-18; TEX. CRIM. PRO. CODE. ANN. arts. 17.03, 17.031, 17.032, and 17.4.

12. Once a bond is set on an individual, what happens if the charge is reduced or an additional or subsequent charge is brought against the criminal defendant?

Generally, when a defendant has once given bail for his appearance to a criminal charge, he is not required to give another bond in the same criminal action. This applies to the court in which the case was originally filed, any court to which the case is transferred, as well as any subsequent proceedings relevant to the charge in any court. However, if during the course of the action, the judge finds that the bond is defective, excessive, or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, the judge or magistrate may order the accused to be rearrested and require the accused to give another bond in such amount as the judge or magistrate may deem proper. If the criminal defendant is subsequently charged with a different and more serious criminal offense and the previous charge is dismissed, a different bond will have to be posted for that offense. If the criminal defendant is subsequently charged with a lesser included offense or with a lesser offense in the same cause number, a new bond would not need to be posted, although the Court could be asked to reduce the bond. If a new lesser charge is filed and the original charge is dismissed, a new bond must be set and posted.

13. In a non-bail bond board county, can a bondsman show up at a Sheriff's office and provide the Sheriff with an affidavit stating that the principal on one of his bonds is incarcerated somewhere else and request to get off of the bond?

Yes. Before a forfeiture occurs, a surety may relieve himself of his liability by delivering an affidavit to the sheriff stating that the accused is incarcerated in federal custody, the custody of any state, or the custody of any county in the State of Texas. The bond is discharged and the surety is absolved of liability of the bond on the sheriff's verification of the incarceration of the accused. TEX. CRIM. PRO. CODE. ANN. art. 17.16, *infra.* at 24. Once the Sheriff has verified the incarceration of the accused, it is advisable for the Sheriff to transmit a copy of the affidavit and a notation of the

[33]It should be noted that a cash bond posted on behalf of the defendant can also be retrieved by the defendant if he is acquitted of the offense, without the permission or knowledge of any third-party who may have posted the cash bond.

Sheriff's verification to the Judge and to the District and/or County Clerk (depending on the court in which the case is filed) for filing in the Court's file.

14. In a non-bail bond board county, can a bondsman bring a criminal defendant into the sheriff's department, give him back to the sheriff, and get off of the individual's bond?

Yes. A surety may, before forfeiture, relieve himself of his liability by surrendering the accused into the custody of the sheriff in the county where the prosecution is pending. TEX. CRIM. PRO. CODE. ANN. art. 17.16, *infra.* at 24.

15. In a non-bail bond board county, what does a sheriff do once a bondsman has surrendered a criminal defendant?

If the accused is surrendered during a term of court, the sheriff takes the criminal defendant before the court, and if the criminal defendant is willing and able to give another bond, then the defendant goes free after posting the bond. If the criminal defendant fails or refuses to give bail, the court must order that he or she be committed to jail until the bail is given. If the surrender is made at any other time than during the session of the court, the sheriff may take the necessary bail bond, If the defendant fails or refuses to give another bond, the sheriff must take him before the nearest magistrate, and that magistrate must issue a warrant of commitment. TEX. CRIM. PRO. CODE. ANN. arts. 17.17, 17.18, *infra.* at 24-25.

16. In a non-bail bond board county, is there any other way for a bail bondsman to get off a bond, other than surrendering a criminal defendant?

Yes. Any surety who wants to surrender his principal (*i.e.* the criminal defendant) can file an affidavit before the court or magistrate before whom the prosecution is pending, after notifying the criminal defendant's attorney, pursuant to Rule 21 a of the Texas Rules of Civil Procedure. The affidavit to the court must state: 1) the court and cause number of the case; 2) the name of the defendant; 3) the offense with which the defendant is charged; 4) the date of the bond; 5) the cause for the surrender; and 6) that notice of the surety's intention to surrender the principal has been given to counsel for the criminal defendant as required. TEX. CRIM. PRO. CODE. ANN. art. 17.19, *infra.* at 25. If the court finds that there is cause for the surety to surrender his principal, the court shall issue a warrant of arrest or capias for the principal. However, it should be noted that it is an affirmative defense for any liability against the bondsman if the court or magistrate refuses to issue a warrant of arrest or capias for the principal and the principal then fails to appear in court.

17. How quickly does a person have to be released after posting bond?

The person is "at once to be set at liberty." TEX. CRIM. PRO. CODE. ANN. art. 17.29, *infra.* at 27. In practice, the person bonding out should be released as quickly as reasonably possible.

18. When, if ever, can a person be intentionally kept in jail after bond has been posted?

Due to an increase in family violence and the desire of the State to provide a "cooling off" period in family violence type cases, the legislature has determined that persons accused of family violence can be held for 4 additional hours after bail has been posted on the direction of the agency holding that person (usually the sheriff of the county). It would be very helpful, although not required, to place notes in the inmate's file to document the specific reasons that the additional 4 hours of detention was directed by the agency. The accused may be held for an additional 48 hours, if authorized in writing by a magistrate, based upon certain findings by said magistrate. TEX. CRIM. PRO. CODE. ANN. art. 17.291, *infra.* at 27-28.

19. Can bonds be required for material witnesses in criminal cases?

Yes, subject to the regular bonding requirements. Witnesses for the State or defendant may be required by the magistrate, upon the examination of any criminal accusation before him, to give bail for their appearance to testify before the proper court. The amount of security required of a witness is regulated by his pecuniary condition, character, and the nature of the offense to which he is a witness. A witness required to give bail who fails or refuses to do so shall be committed to jail as in any other case of failure to give bail when required. Upon giving such bail, the witness must be released.

20. Can a bail bondsman request, under the Open Meetings and Open Records Act, that the sheriff provide him with records of who has set bail, the person for whom each bail was set, the amount of the bail, the date the bail was set, the magistrate or officer who set the bail, and the offense or other cause for which the appearance is secured?

Yes. Article 17.39 of the Texas Code of Criminal Procedure requires that a magistrate or other officer who sets the amount of bail or who takes bail shall record "in a well-bound book" the name of the person whose appearance the bail secures, the amount of the bail, the date the bail is set, the magistrate or officer who set bail, the offense or other cause for which the appearance is secured, the magistrate or other officer who takes bail, the date the person is released, and the name of the bondsman, if any. Obviously, this law was first established prior to the widespread use of computers. If such a "well bound book" exists, the magistrate or sheriff has to provide a copy. If no such record exists, all the sheriff has to do is inform the bail bondsman that nothing of that nature exists. If such information is contained in computer generated files, the sheriff or magistrate must provide copies of the computer generated files that are responsive to the request. Obviously, the statute needs to be changed to amend Article 17.39 so that computer information is specifically allowed.

21. In a non-bail bond board county, can a sheriff consider the contingent liability of a bail bondsman who has written bonds in other counties based on the same security?

Yes. The sheriff can consider the contingent liabilities associated with bonds written in other counties when considering the sufficiency of the security of the surety. However, it is strongly advised that the sheriff contact counsel to discuss the issue before the sheriff makes any decisions regarding not allowing a surety to write bonds or limiting a surety in the amount of bonds that he can write. In other words, it is better to be proactive and talk your way through it with an attorney than to make a decision that may result in litigation without consulting with counsel.

22. In a non-bail bond board county, can a convicted felon write bonds?

Yes. There is no prohibition in a non-bail bond board county against a convicted felon writing bonds. Indeed, convicted felons have written and are writing bail bonds. The opposite is true in bail bond board counties, *e.g.* convicted felons are prohibited from writing bonds, as are persons finally convicted of a misdemeanor involving moral turpitude.

23. Can the sheriff inquire into the sufficiency of an attorney's security to write a bond if the attorney is posting a bond on behalf of an individual that they represent?

Yes, an attorney, just like anyone else, has to have sufficient security to sign a bond as a surety. Their finances can be inquired into just as any other surety.

24. Do attorneys have to comply with the education requirement under article 17.10(b) of the Texas Code of Criminal Procedure?

Attorneys who practice in this area of the law disagree. In the opinion of Flowers Davis law firm, the answer is no, unless the attorney is bonding people out for compensation rather than as part of his regular legal services. If an attorney is engaging in the bonding business for compensation, and not representing the defendant in the criminal case, then he would have to obtain the required education just like any other person engaging in the bonding business. Other attorneys are of the opinion that attorneys posting bond in non-bail bond board counties must meet the educational requirements. The best advice is to seek legal counsel if this becomes an issue in your county. Obtaining an attorney general's opinion is always a possibility.

B. <u>BAIL BOND BOARD COUNTIES</u>

1. Does the Bail Bond Board Act now apply to counties with populations of over 50,000?

No. During the 79th Regular Session of the Texas Legislature, Senate Bill 624 proposed to make the Texas Occupations Code Section 1704.001, *et. seq.* applicable to counties with a population of over 50,000. However, the Senate Bill was amended on the floor to delete those specific provisions.

2. What counties must have a bail bond board?

Counties with a population of over 110,000 are deemed to have bail bond boards.

3. Can a county with a population of under 110,000 choose to create a bail bond board?

Yes. Pursuant to Section 1704.052 of the Texas Occupations Code, a county may create a bail bond board, if it has a population of less than 110,000 and if a majority of the persons who would serve as members of the board under Section 1704.053, or who would designate persons who would serve as members of the board, determine to create such a board. In other words, it would be a majority of the following people in that particular county: 1) the sheriff; 2) the presiding judge of the administrative judicial district; 3) the county judge; 4) the district attorney; 5) the district clerk; 6) the county clerk; 7) the county treasurer; 8) a county judge or county court at law judge chosen by the commissioner's court; 9) a criminal defense attorney practicing in the county elected by other attorneys whose principal places of business are located in the county; 10) a presiding judge in the municipal court system in the county's principal municipality; and 11) a licensed bail bond surety elected by other licensed bondsmen in the county; and 12) a justice of the peace in the county.

4. How is a bail bond board surety elected?

The bail bond board must annually conduct a secret ballot election to elect a member of the board who serves as a representative of the licensed bail bond sureties. This member must be a licensed bail bond surety or agent for a corporate surety board member. Each individual licensed in the county who is a bail bond surety or agent for a corporate surety is entitled to cast one vote for each license held. Consequently, if a person has an individual license and is also a licensed agent for an insurance company, that person would be entitled to 2 votes. TEX. OCC. CODE ANN. § 1704.054.

5. How do we elect the presiding officer?

Section 1704.054 of the Texas Occupations Code specifically states that the board must initially elect one of its members as the presiding officer to preside over board meetings. The presiding officer may vote on any board matter.

6. How often must a board meet?

A board must hold its initial meeting not later than the 60th day after the board is created. Thereafter, a board must meet at least once per month and at any other time or times that the presiding officer calls a meeting.

7. What constitutes a "quorum" of the bail bond board?

Four members of the bail bond board constitute a quorum. A board may take action only on a majority vote of the board members present.

8. What authority does a bail bond board actually have?

Sections 1704.101 and 1704.102 of the Texas Occupations Code specifically set out the administrative authority and enforcement authority, respectively, of a bail bond board. Essentially, the board has the authority to supervise and regulate each phase of the bonding business in the county, and to adopt and post rules necessary to implement the Bail Bond Board Act. The board can conduct hearings and investigations regarding the issuance, denial or renewal of licenses. In terms of enforcement authority, the board is required to enforce the Bail Bond Board Act in the county, conduct hearings and investigations relating to license suspensions and revocations, suspend or revoke licenses for violations of the Act, and require a record and transcription of each board proceeding. Additionally, the bail bond board may compel the appearance before the board of an applicant or license holder and administer oaths, examine witnesses, and compel the production of pertinent records and testimony by a license holder or applicant.

9. Must a bail bond board post a board rule or board action?

Pursuant to Section 1704.104 of the Texas Occupations Code, a board must post a rule adopted by the board or an action taken by the board in an appropriate place in the county courthouse for 10 days preceding the day the rule or action takes effect. For instance, if a licensee's license is revoked, the action must be posted for 10 days prior to the action becoming effective.

10. Does the board have to post a list of licensed bail bond sureties?

Yes. The board must post a list in each court having criminal jurisdiction in the county, and must provide each local official responsible for the detention of prisoners a current list of each licensed bail bond surety and each licensed agent of a corporate surety in the county.

11. If a corporate surety or individual surety has a judgment against him or is in default in another county, can the sheriff immediately cut the bondsman off from writing bonds?

No. In a bail bond board county where each surety is licensed, the licensing in that county stands on its own. A surety cannot be cut off based on issues, defaults, or even judgments in other counties. Of course, the bail bond board can consider that fact when considering the renewal application of the individual or company. Bottom line, the sheriff cannot question the solvency of a licensed bail bondsman in a bail bond board county.

12. Can a family member post a property bond for another family member in a bail bond board county if that person is not licensed and the posting would be a one-time occurrence?

No. Under Section 1704.151 of the Texas Occupations Code, every person who writes a bond in a bail bond board county must hold a license. Even if it is a one-time occurrence by a family member to obtain the release of a close relative, the family member may not post a bond for their relative. This is an issue that should be addressed by legislation in the next session. The fact that there is no exception for a close family member posting a property bond for a relative may inhibit the ability of some people to post bond.

13. What are the requirements for a person to act as a bondsman in a bail bond board county?

All individual sureties and agents designated by insurance companies must be at least18 years of age, a resident of the State of Texas, and a citizen of the United States. The individual must comply with the financial requirements of Section 1704.160 of the Texas Occupations Code or be acting as agent for an insurance company. The individual must submit documentary evidence that in the 2 years preceding the date on which their license application is filed, the individual has been continuously employed by a person licensed under Section 1704 of the Texas Occupations Code for at least 1 year and not less than 30 hours per week, excluding annual leave, and has performed duties that encompass all phases of the bonding business. Additionally, a person must have completed, in person, at least 8 hours of continuing legal education in criminal law or bail bond law courses that are approved by the State Bar of Texas and that are offered by an accredited institution of higher education in the State of Texas. However, the work and education requirements do not apply in a county before the first anniversary of the date a board is created in that county or to an individual who applies to operate the bail bond business of a license holder who has died, if the individual is related to the decedent within the first degree of consanguinity or is the decedent's surviving spouse. While these requirement may limit the creation of new bonding business in some countries, the education and experience requirements may be valid and helpful requirements.

14. In a bail bond board county, can a convicted felon write bonds?

No. A person is not eligible for a license if the person has committed and has been finally convicted of a misdemeanor involving moral turpitude or a felony after August 27, 1973. Misdemeanors involving moral turpitude are convictions involving dishonesty, such as theft.

15. What happens if an individual or insurance company licensed under Section 1704, *et seq.*, of the Texas Occupations Code, does not file its application for renewal at least 31 days before the license expiration date?

In that situation, the person simply cannot file an application to renew the license. He or she would have to file a completely new application. The effect of having to file a completely new application is that the bondsman would not be "grandfathered-in" under the prior financial and

property provisions of the Texas Occupations Code. In essence, more stringent financial requirements would apply to individuals who have to file a new application as opposed to a renewal application. Additionally, it is also important to note that the renewal application must meet the same requirements as a new application. Any infirmities or omissions in the application may result in denial.

16. Can an attorney write a bond in a bail bond board county, when that person is not otherwise licensed as a bondsman?

Yes, if he actually represents the accused. Section 1704.013 of the Texas Occupations Code requires that the attorney be licensed to practice law in the State of Texas and appear as counsel of record for the accused in the pending criminal case. An attorney executing a bail bond is not relieved of liability on the bond solely because the attorney is later replaced as counsel of record in the related criminal case. In the opinion of the Flowers Davis law firm, the attorney also does not have to meet the educational requirements of Chapter 17 of the Code of Criminal Procedure.

17. In a bail bond board county, can the sheriff inquire into the sufficiency of an attorney's security to write a bond?

Yes, if that attorney is not a licensed bondsman in that county.

18. Can the sheriff accept a bail bond from an individual or insurance company licensed in another county?

No. The sheriff in a bail bond board county may not accept a bond from a bail bondsman who is not licensed in that particular county. In other words, even if a person is being held on a warrant from another county, a bail bondsman licensed in the county in which the individual is being held must write the bond. The fact that a bondsman is licensed in one bail bond board county does not allow that bondsman to write bonds in another bail bond board county.

19. Is the surrender of the principal the same as it is in non-bail bond board counties?

No. The provision for the surrender of a principal is somewhat different in bail bond board counties than in non-bail bond board counties. In a bail bond board county, a person executing a bail bond may surrender the principal by: 1) notifying the principal's attorney (if the principal is represented by an attorney) of the bondsman's intention to surrender the principal; and 2) filing an affidavit with the court or magistrate with which prosecution is pending stating the bondsman's intention to surrender the principal, the court and cause number of the case, the name of the defendant, the offense that the defendant is charged with, the date of the bond, the reason for the intended surrender, and that the notice of the bondsman's intention to surrender the principal has been provided to counsel for the principal. Additionally, if the principal is surrendered, and the principal or an attorney representing the State or an accused in the case determines that a reason for the surrender was without reasonable cause, the person may contest the surrender in the court that

authorized the surrender. If the court finds that the contested surrender was without reasonable cause, the court may require the bondsman to refund to the principal all or part of the fees paid for execution of the bond.

20. Does the agent for a corporate surety (*i.e.*, an insurance company) have to be a local recording agent?

No. Unlike non-bail bond board counties, an agent for an insurance company in a bail bond board county does not have to be a licensed local recording agent.

21. What is the complaint process in a bail bond board county?

Section 1704.251 of the Texas Occupations Code relates to board investigations on its own motion or following a sworn complaint. A board, on its own motion, may investigate an action of or a record maintained by a license holder which pertains to a complaint that the license holder has violated some provision of the Bail Bond Board Act or a valid local rule adopted by the bail bond board. Additionally, a board must investigate an action of or a record maintained by a license holder if the board receives a sworn complaint providing reasonable cause to believe that a violation has occurred or a court requests an investigation.

22. What is the procedure relating to an investigation and hearing on a complaint?

There is no specified procedure for how an investigation is to be conducted by the board or how a hearing is to be handled procedurally by a bail bond board. Different counties handle the matter in different ways. Some counties have the county attorney or a representative of the district attorney present the complaint and call witnesses and present evidence. Other counties have subcommittees that investigate the complaint and present their findings and evidence to the bail bond board. All attempts should be made to provide the licensee with due process and equal opportunity to present evidence. On occasion, competing bondsmen will file sworn complaints against each other. If complaints are flowing back and forth between competing bondsmen, it is important to note that the complaints must be sworn. If, after the initial investigation into the complaint, the hearing on the complaint involves revocation or suspension of the license as a possible action on the complaint, the procedures provided in Section 1704.254 must be complied with before the hearing. Those procedures include notification to the licensee by certified mail, not later than the 11th day before the hearing, each alleged violation must be stated in the notice, and a copy of any written complaint on which the hearing will be based must be included in the certified mail notice. The hearing is strictly limited to each alleged violation contained in the notice. During the hearing, the licensee is entitled to be heard and may present and cross-examine witnesses. The hearing must be recorded. A licensee can obtain a transcript of the hearing upon payment of the reasonable cost of transcription. The procedure for the investigation and the procedures for the hearing are a proper ground for the adoption of local rules. However, whenever local rules are adopted, the board should make sure that they do not conflict with the statute or increase the administrative or enforcement powers and duties of the board.

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