THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

June 12, 2023

The Honorable Luis V. Saenz
Cameron County District Attorney
964 East Harrison Street, Fourth Floor
Brownsville, Texas 78520

Opinion No. JS-0001

Re: Authority of a county commissioners court to contract for the collection of forfeited commercial bail bonds under Code of Criminal Procedure article 103.0031(h) (RQ-0490-KP)

Dear Mr. Saenz:

You ask several questions concerning Code of Criminal Procedure article 103.0031, which generally permits a county or a municipality to enter into a third-party collection contract to recover debts and accounts receivable, including forfeited bonds.[1] *See generally* TEX. CODE CRIM. PROC. art. 103.0031. At issue is an exception set forth in article 103.0031(h), which provides that "[t]his *section* does not apply to the collection of commercial bail bonds." *Id.* art. 103.0031(h) (emphasis added). This provision prompts the two main essential inquiries in your letter: (1) the scope of the exception, given that there is no "section" in article 103.0031; and (2) whether the term "commercial bail bonds" includes attorney surety bonds. *See generally* Request Letter at 1–4. We address each issue in turn.

The reference to a non-existent "section" in Code of Criminal Procedure article 103.0031(h), providing that "[t]his section" does not apply to commercial bail bonds, is a scrivener's error that creates an absurdity, such that a court would likely construe "this section" to mean "this article."

Chapter 103 of the Code of Criminal Procedure concerns the authority, method, and procedures for collecting fines, costs, and other money payable in certain cases. *See generally* TEX. CODE CRIM. PROC. arts. 103.001–.012. Article 103.0031 governs third-party collection contracts, authorizing "[t]he commissioners court of a county or the governing body of a municipality [to] enter into a contract with a private attorney or a public or private vendor for the provision of collection services for one or more" items from a list in subsection (a) that includes "forfeited

[1] *See* Letter from Honorable Luis V. Saenz, Cameron Cnty. Dist. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 3–4 (Dec. 13, 2022), https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0490KP.pdf ("Request Letter").

bonds[.]" *Id.* art. 103.0031(a)(1). Subsections (b) through (j) detail various aspects of such a collection contract. *See, e.g.*, *id.* art. 103.0031(b) (authorizing the addition of a 30% collection fee for items more than sixty days past due), (c) (authorizing the collection fee for in-house collection programs in certain municipalities), (d) (excusing certain defendants from the collection fee), (e) (providing for proportionate distribution of underpaid collection amounts), (f) (determining what constitutes being more than sixty days past due), (g) (limiting the use of the collection fee), (i) (prohibiting the collection fee for debts stemming from offenses committed before a certain date), (j) (requiring the communication of certain information to accused persons concerning acceptable payment amounts). The provision about which you ask, article 103.0031(h), provides in its entirety that "[t]his section does not apply to the collection of commercial bail bonds." *Id.* art. 103.0031(h). You tell us it is unclear whether the exception in 103.0031(h) for the collection of commercial bail bonds refers to article 103.0031 as a whole, which would affect the authority of a commissioners court to contract out collection services in that particular context, or instead applies only to "some sub-part of the article[.]"[2] Request Letter at 3.

When an internal reference within a code lacks clarity, the Legislature provides guidance intended to aid the reader. Article 101.003(2) addresses internal references within Code of Criminal Procedure Title 2, where article 103.0031 resides, providing that "a reference to a subchapter, article, subsection, subdivision, paragraph, or other numbered or lettered unit without further identification is a reference to a unit of the next larger unit of this title in which the reference appears." TEX. CODE CRIM. PROC. art. 101.003(2). The list of internal references in article 101.003(2) does not refer to the term "section," providing instead that the next-smaller unit after "article" is "subsection[.]" *Id.* This is because the organizational framework of the Code of Criminal Procedure relies on the use of "articles" rather than "sections." *See* TEX. LEG. COUNCIL, *Revisor's Report: Title 2, Code of Criminal Procedure* at i (explaining that the code "is divided into titles, chapters, subchapters, and articles"). Thus, article 101.003(2) does not address how to interpret the phrase "this section" in article 103.0031(h).

In keeping with this organizational framework, other provisions within article 103.0031 use the term "article" to refer to article 103.0031 as a whole, and the term "subsection" to refer to individual units of article 103.0031. *See, e.g.*, TEX. CODE CRIM. PROC. art. 103.0031(b) ("A commissioners court . . . that enters into a contract . . . under *this article* may authorize the addition of a collection fee in the amount of 30 percent on each item described in *Subsection (a)* . . . ." (emphasis added)), (i) ("The commissioners court . . . may enter into a contract as described in *this article* to collect a debt incurred as a result of the commission of a criminal or civil offense committed before the effective date of *this subsection*." (emphasis added)). Indeed, when article 103.0031(h) was added to the statute by the Seventy-eighth Legislature, the language of the bill in its engrossed form referred to "this *article*" before a floor amendment in the closing days of the legislative session changed the wording to "[t]his section." *See* Tex. S.B. 782, 78th Leg., R.S. (2003) (as engrossed) ("(h) A forfeited bond is not an item subject to collection services under *this*

[2]You suggest that the exception in article 103.0031(h) could refer "only to the authorization of the Commissioner's Court to add a collection fee [of] up to 30 percent" in certain instances, as provided in article 103.0031(b). Request Letter at 3.

article." (emphasis added)); H.J. of Tex., 78th Leg., R.S. 4568 (2003) (amending Senate Bill 782 on third reading).

The use of the phrase "this section" occurs nowhere else in article 103.0031 or chapter 103 as a whole, and indeed no "section" exists therein. Furthermore, there is no additional content beyond the single sentence—"This section does not apply to the collection of commercial bail bonds,"—suggesting that the phrase "[t]his section" cannot refer to subsection (h) itself, nor to any other subsection in article 103.0031. TEX. CODE CRIM. PROC. art. 103.0031(h). Thus, construing article 103.0031(h) literally as written—that a non-existent "section" creates an exception under the law—renders the provision meaningless. We cannot conclude that the Legislature intended this result. *See Hunter v. Fort Worth Cap. Corp.*, 620 S.W.2d 547, 551 (Tex. 1981) ("[T]he legislature is never presumed to do a useless act.").

Courts have acknowledged the possibility "that legislators—like judges or anyone else—may make a mistake." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010) (quoting *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004)). The general rule is that "courts are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity." *Id.* at 638. The question here is whether the reference to a non-existent "section" creates an absurdity. The threshold for what constitutes language creating an "absurdity" is high. As the Texas Supreme Court has explained,

> [i]f an as-written statute leads to patently nonsensical results, the "absurdity doctrine" comes into play, but the bar for reworking the words our Legislature passed into law is high, and should be. The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity. A sales-tax exemption for tie pins, even if unintended, even if improvident, even if inequitable, falls short of being unthinkable or unfathomable. The absurdity backstop requires more than a curious loophole. . . . But pointing out a quirky application is quite different from proving it was quite impossible that a rational Legislature could have intended it.

Combs v. Health Care Servs. Corp., 401 S.W.3d 623, 630–31 (Tex. 2013); *see also Tex. Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc.*, 955 F.3d 482, 486 (5th Cir. 2020) (explaining that to be absurd, "[t]he result must be preposterous, one that 'no reasonable person could intend.'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012))).

Relevant here, the absurdity doctrine can encompass another doctrine known as "scrivener's error," which is an error resulting from a minor mistake or inadvertence, especially in writing. *See* BLACK'S LAW DICTIONARY 582 (8th ed. 2004); *see also Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting) (noting that when a statutory text has no plausible purpose for being written as it is, the text "may represent a 'scrivener's error' that [a court] may properly correct"); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 n.1 (2021) (noting that the "scrivener's error" doctrine applies in exceptional circumstances to obvious technical drafting errors); *In re Blair*, 408 S.W.3d 843, 848 n.25 (Tex. 2013) (referring to the absurdity

doctrine and citing to ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012) for the notion that a scrivener's error may be corrected if doing so is technically simple and "failing to do so would result in a disposition that no reasonable person could approve"). Courts recognize the fine line between permissibly correcting a technical error in order to give effect to legislative intent and impermissibly encroaching upon the authority of the legislative branch. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("[T]he *sine qua non* of any 'scrivener's error' doctrine . . . is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237–38 (2012) (advising that the slippery slope leading to impermissible judicial revision can be avoided by ensuring that the absurdity is of the sort "that no reasonable person could intend" and that the absurdity is "reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error").

In this case, no plausible reason exists for article 103.0031(h) to refer to "this section" when there is no section in article 103.0031. In similar situations, the scrivener's error doctrine has been utilized to give effect to legislative intent. *See, e.g.*, *United States v. Lauderdale Cnty.*, 914 F.3d 960, 962 n.2 (5th Cir. 2019) (recognizing that a statutory reference to a "paragraph (1)" was "presumably a scrivener's error that should read 'paragraph (a)'" because no "paragraph (1)" to which it could plausibly be referring existed and the intended reference was clearly to "paragraph (a)"); *State v. Boone*, No. 05-97-01157-CR, 1998 WL 344931, at *2–3 (Tex. App.—Dallas June 30, 1998, no pet.) (correcting a statute that, due to a drafting error inadvertently referencing the wrong provision of the Texas Transportation Code, made having liability insurance a defense to the charge of driving without a driver's license); *Gilmore v. United States*, 699 A.2d 1130, 1132 (D.C. 1997) (holding that the use of the term "subsection" in a sentencing guideline was a clerical error resulting in "a pointlessly circular provision" and that the term "subsection" should therefore be read as "section"). Given this result, a court would likely construe the reference to "this section" as a scrivener's error creating an absurdity and conclude that the only logical reading of article 103.0031(h) is that "this *article*" (that is, article 103.0031 as a whole) does not apply to the collection of commercial bail bonds.

This conclusion is supported by Local Government Code section 140.009. Section 140.009 is a counterpart to article 103.0031, authorizing a municipality or a county to enter into a third-party collection contract to recover overdue amounts owed in civil cases. TEX. LOC. GOV'T CODE § 140.009(a). Unlike the Code of Criminal Procedure, which uses "articles" within its organizational structure, the Local Government Code uses "sections." *See id.* § 1.003(1) (describing internal code references). In language identical to Code of Criminal Procedure article 103.0031(h), Local Government Code subsection 140.009(c) provides in full that "[t]his section does not apply to the collection of commercial bail bonds." *Id.* § 140.009(c). But in that context, the language of subsection 140.009(c) clearly indicates that what does not apply to the collection of commercial bail bonds is the next-larger unit, section 140.009, which otherwise authorizes the use of third-party collection services.

Thus, in answer to your specific question, a court would likely conclude that the term "section" as used in article 103.0031(h) refers to article 103.0031 as a whole, thereby prohibiting

a commissioners court from entering into a third-party contract for the collection of forfeited commercial bail bonds. *See* Request Letter at 2–3. We next consider your question about the meaning of the term "commercial bail bonds."

A court would likely conclude that attorney sureties execute "commercial bail bonds" to the extent they sell their bonding services for a fee, such that a commissioners court may not use third-party collections contracts to collect on forfeited attorney surety bonds. Instead, such forfeited bonds would be collected pursuant to Code of Criminal Procedure article 103.003(a).

Your other question concerns whether the term "commercial bail bonds" encompasses bail bonds executed by an attorney surety. *See id.* at 3–4. The Cameron County Bail Bond Board has informed you that "a number of attorney-surety bail bonds have been forfeited and said judgments are awaiting collection." *Id.* at 1. You explain that "the collection of judgments against the traditional sureties has a specified procedure" but that ambiguity exists regarding how to proceed with the collection of attorney surety forfeited bonds. *Id.* at 1, 3 ("[I]f an attorney surety bond is a species of commercial bail bond, the commissioner's court may not have the authority to contract an outside firm to execute on the final judgments."). Accordingly, you ask whether an attorney who acts as a surety for his or her client by executing a bail bond on the client's behalf has executed a "commercial bail bond." *Id.* at 3.

Attorney sureties under chapter 1704 of the Occupations Code

We begin by examining the status of attorney sureties in the context of chapter 1704 of the Occupations Code. *See generally* TEX. OCC. CODE §§ 1704.001–.306. In a county with a bail bond board,[3] a person generally may not act as a bail bond surety unless the person is licensed by the board. *Id.* § 1704.151. A "[b]ail bond surety" is "a person who: (A) executes a bail bond as a surety or cosurety for another person; or (B) for compensation deposits cash to ensure the appearance in court of a person accused of a crime." *Id.* § 1704.001(2). But pursuant to Occupations Code section 1704.163, a Texas-licensed attorney who is counsel of record in the underlying criminal case "may execute a bail bond or act as a surety" without holding a bail bond license from the board. *Id.* § 1704.163(a); *see also id.* § 1704.151 (requiring a license to act as a bail bond surety "[e]xcept as provided by Section 1704.163"); Tex. Att'y Gen. Op. No. GA-0197 (2004) at 2 (characterizing section 1704.163 as "the attorney exemption").

While attorney sureties are exempt from the licensing requirements of chapter 1704, they remain subject to other regulatory aspects of that chapter. *See Minton v. Frank*, 545 S.W.2d 442, 445 (Tex. 1976) (construing chapter 1704's predecessor). For example, an attorney surety acting pursuant to the attorney exemption "may not engage in conduct involved with that practice that would subject a bail bond surety to license suspension or revocation" or the attorney risks having his or her surety privileges revoked by the board. TEX. OCC. CODE § 1704.163(b); *see also id.* § 1704.252 (listing sixteen conduct prohibitions); *Minton*, 545 S.W.2d at 445; Tex. Att'y

[3]Bail bond boards exist automatically in counties with a population of 110,000 or more. TEX. OCC. CODE § 1704.051. The population of Cameron County from the 2020 Census is 421,017. *See Quick Facts*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/cameroncountytexas (last visited May 17, 2023).

Gen. Op. No. GA-0197 (2004) at 5–7 (explaining that, but for items relating to license or security requirements, subsection 1704.163(b) encompasses the same statutory conduct prohibitions and board rule requirements that bind non-attorney sureties).

Indeed, boards "supervise and regulate each phase of the bonding business in the county[.]" TEX. OCC. CODE § 1704.101(3). "Bonding business" means "the solicitation, negotiation, or execution of a bail bond by a bail bond surety." *Id.* § 1704.001(4). The provisions defining "[b]ail bond surety" and "[b]onding business" make no distinction between persons who provide surety services as attorneys versus those who provide them as non-attorneys. *See id.* § 1704.001(2), (4); *see also id.* § 1704.001(1). Thus, attorney sureties in these counties participate in the bail bonding business and are regulated by the county's board.

Commercial Bail Bonds

Next, we turn back to Code of Criminal Procedure article 103.0031(h), which a court would likely conclude prohibits a commissioners court from entering into a third-party contract for the collection of "commercial bail bonds." TEX. CODE CRIM. PROC. art. 103.0031(h). The Legislature did not define the term "commercial bail bonds," either in article 103.0031 or in Local Government Code subsection 140.009(c), the only other statute that uses the term. When a term is left undefined in a statute, a court looks to the "plain and ordinary meaning of the term and interpret[s] it within the context of the statute." *Hogan v. Zoanni*, 627 S.W.3d 163, 169 (Tex. 2021) (quoting *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020)); *see also* TEX. CODE CRIM. PROC. art. 3.01 (providing that "[a]ll words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined"). To determine the term's common, ordinary meaning, courts "typically look first to dictionary definitions." *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). "[C]ommercial" means "concerned with or engaged in commerce" or "making or intended to make a profit[.]" NEW OXFORD AMERICAN DICTIONARY 348 (3d ed. 2010); *see also id.* (defining "commerce" as "the activity of buying and selling, esp. on a large scale"). For purposes of regulating bail bond sureties, the term "[b]ail 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." TEX. OCC. CODE § 1704.001(1); *see also* BLACK'S LAW DICTIONARY 211 (10th ed. 2014) (defining a "bail bond" as "[a] bond given to a court by a criminal defendant's surety to guarantee that the defendant will duly appear in court in the future and, if the defendant is jailed, to obtain the defendant's release from confinement"). Thus, a "commercial bail bond" commonly refers to a cash deposit, bond, or other security that guarantees the appearance of a defendant in a criminal case and is obtained by means of purchase from someone who sells such services for actual or intended profit.

Attorney sureties are statutorily subject to the same prohibitions on conduct as non-attorney sureties, which includes "divid[ing] commissions or fees with" non-licensees. TEX. OCC. CODE § 1704.252(9); *see Villanueva v. Gonzalez*, 123 S.W.3d 461, 466 (Tex. App.—San Antonio 2003, no pet.) (confirming the application of subsection 1704.252(9) to attorney sureties). This suggests that sureties generally sell their services. To the extent they sell their bonding services for a fee or commission, a court would likely thus conclude that attorney sureties executing bail bonds are

engaged in "commercial bail bonds."[4] As such, article 103.0031(h) would prohibit a commissioners court from entering into a third-party contract for collection services on forfeited attorney surety bail bonds. Instead, forfeited attorney surety bonds would be collected by "[d]istrict and county attorneys, clerks of district and county courts, sheriffs, constables, and justices of the peace" pursuant to Code of Criminal Procedure article 103.003(a). TEX. CODE CRIM. PROC. art. 103.003(a).[5]

[4]At least one court has characterized an attorney acting as a surety on a defendant's bond as performing his services "as part of his legal representation of [the defendant], not as a separate business transaction." *Akridge v. State*, 13 S.W.3d 808, 810 (Tex. App.—Beaumont 2000, no pet.) (stating that "the act [of serving as surety] is encompassed within the larger legal relationship"). However, the central issue in that case was whether the defendant could challenge the voluntariness of his plea based on ineffective assistance of counsel stemming from a conflict of interest under the Texas Disciplinary Rules of Professional Conduct. *Id.* at 809. The case did not mention or discuss the underlying fee arrangement. Moreover, subsequent legal authorities have recognized that a "lawyer, in addition to representing the client, is engaging in a business transaction with the client by serving as the client's bail bondsman." Tex. Comm. on Prof'l Ethics, Op. 599, 73 Tex. B.J. 690, 690 (2010); *accord* Tex. Comm. on Prof'l Ethics, Op. 624, 76 Tex. B.J. 359, 359 (2013). Thus, the characterization of the attorney surety services in *Akridge* does not change our view.

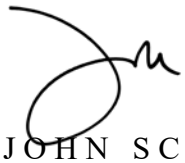
[5]Your letter asks whether "the District or County Attorney's Office of a particular county is the only attorney empowered to collect[] on forfeited attorney-surety bonds[.]" Request Letter at 4. District attorneys and county attorneys are the only attorneys listed in Code of Criminal Procedure article 103.003(a).

S U M M A R Y

Code of Criminal Procedure article 103.0031 generally permits a county or a municipality to enter into a third-party collection contract to recover money owed on certain items in criminal cases, including forfeited bonds. The reference to a non-existent "section" in Code of Criminal Procedure article 103.0031(h), providing that "[t]his section does not apply to commercial bail bonds," is a scrivener's error that creates an absurdity, such that a court would likely construe its exception to refer to article 103.0031.

A court would likely conclude that attorney sureties execute "commercial bail bonds" to the extent they sell their bonding services for a fee or commission. As such, article 103.0031(h) would prohibit a commissioners court from entering into a third-party contract for collection services on forfeited attorney surety bail bonds. Instead, forfeited attorney surety bonds would be collected by district and county attorneys, clerks of district and county courts, sheriffs, constables, and justices of the peace pursuant to Code of Criminal Procedure article 103.003(a).

Very truly yours,



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