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Opinion Committee

December 13, 1999

Honorable John Cornyn
Attorney General
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-41150-99
I.D. # 41150

Re: Whether a magistrate, in determining the amount and type of bail, has authority to direct that a portion of the bond amount be a personal bond and the remaining portion of the bond amount be a secured bail bond backed by a surety (a "split bond").

Dear Attorney General Cornyn:

Because a magistrate has broad discretion under Texas law to determine the amount and type of bail, we are requesting an opinion on whether a magistrate has authority to direct that a portion of the bond amount be designated a personal bond supervised by a local pre-trial services office, and to require that the remaining portion of the bond amount be a secured bail bond backed by a surety. This has been referred to as a "split bond." In addition, if a split bond is permissible under Texas law, we would like to know whether a local pre-trial services office is permitted to collect a bond fee.

Under Code of Criminal Procedure Article 17.01, "bail" is defined as 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. The requisites of a bail bond are described in Code of Criminal Procedure Article 17.08. The requisites of a personal bond are described in Code of Criminal Procedure Article 17.04. The rules for fixing the amount

of bail are found at Code of Criminal Procedure Article 17.15, and provide:

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 his 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.

In Opinion JM-363 (October 22, 1985), the Texas Attorney General was asked to issue an opinion on the authority of a magistrate to restrict the type of bail available to an accused. Specifically, the attorney general was asked (i) whether a court may require a defendant to post bail in cash only; (ii) whether the court may set the amount of bail but agree to accept a cash percentage in lieu of that amount; or (iii) whether a court may set a differential bail amount depending upon the type of bond, i.e., a cash bond of \$1,000 or a surety bond of \$10,000. The attorney general, relying on Professional Bondsmen of Texas v. Carey, 762 S.W.2d 691 (Tex. App.—Amarillo 1988, no writ) concluded that a magistrate has broad discretion in setting the amount and conditions of bail, but may not require an accused to post bail in cash only. In addition, the attorney general determined that the practice of setting a “bail bond” in a certain amount, and agreeing to accept a lesser percentage in lieu of the face amount of the bail bond, is not authorized by Code of Criminal Procedure Article 17.02. Finally, the attorney general concluded that a magistrate is not authorized to set a differential bail bond amount depending upon whether a cash or surety bond is given.

In Carey, the court considered whether a magistrate had discretion to set a differential bail bond amount depending upon whether a cash bond or a surety bond was used. The court wrote:

Articles 17.01, 17.02, and 17.15 confer upon the court, judge, magistrate, or officer taking a bail bond broad discretion in setting the *amount* of bail,

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provided that that discretion is reasonably exercised. The authority granted under these statutes does not, however, vest the court with discretion to require a cash bond or surety bond to the exclusion of the other. Ex parte Rodriguez, 583 S.W.2d 792 (Tex.Crim.App. 1979); Ex parte Deaton, 582 S.W.2d 151 (Tex.Crim.App. 1979). It follows that the court does not have the discretion to set a differential bail bond amount depending upon whether a cash bond or a surety bond is used.

Carey, 762 S.W.2d at 693 (emphasis in original).

Based on the foregoing, it appears that a magistrate has broad discretion in setting the amount of bail, as well as discretion to require a bail bond or a personal bond. However, it is unclear whether a magistrate has authority to direct that a portion of the bail amount be a secured bail bond backed by a surety (the split bond concept). Such discretion would seem to be more closely akin to authorizing a differential bond amount, which has been determined to be beyond the scope of a magistrate's authority in setting bail.

In addition, we have identified other troublesome issues relating to the use of split bonds, particularly in the area of bond forfeiture. For example, would there, in effect, be two bonds requiring two different bond forfeitures? Would the surety and the individual be considered co-sureties, raising issues of proportionate recovery and contribution? What if the surety wants off the bond—should a warrant go out for the defendant's arrest if the surety only secures a limited amount of the bond? Further, sureties are responsible for all necessary and reasonable expenses incurred in re-arresting the principal in the event he fails to appear. Should a surety be responsible for the full amount of the expenses if the surety is only responsible for a portion of the bond? These are just a few of the issues that might arise if "split bonds" are instituted.

Please feel free to contact to me if your office needs anything further on this matter.

Sincerely,



SUSAN D. REED

cc: Joe Delgado, Director, Bexar County Pre-Trial Services Office