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Take the Money or Run: The Risky Business of Acting as Both Your Client's Lawyer and Bail Bondsman The Fifth Annual Symposium on Legal Malpractice and Professional Responsibility.

Dayla S. Pepi

Donna D. Bloom

TAKE THE MONEY OR RUN: THE RISKY BUSINESS OF ACTING AS BOTH YOUR CLIENT'S LAWYER AND BAIL BONDSMAN

DAYLA S. PEPI*
DONNA D. BLOOM**

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* Clinical Fellow, St. Mary's University School of Law Clinical Programs. J.D., 1998, St. Mary's University School of Law. This paper would never have come into existence but for the tragic circumstances that my client, Stephanie Smith, experienced. I am grateful to her for allowing us to tell her story to raise awareness of the problem and also for exemplifying strength and dignity through adversity. Further, I am deeply blessed to have had two of the most talented and dedicated students to work on her case. I am forever grateful to Donna Bloom and Emile Harmon, who, as second-year law students, unselfishly dedicated their entire term to zealously advocate for our client's behalf, gaining her trust, earning her respect, and ensuring that her voice was heard during all stages of the representation. Lastly, I wish to thank Leah Shapiro, a third-year law student, and Andria Brannon, a first-year law student, who graciously volunteered to conduct hours of research for this paper.

** J.D., 2006, St. Mary's University School of Law. B.A., Austin College, 1992. I am thankful for the loving support of my father, Dennis Bloom. He continues to teach me always to expect the very best of myself.

While attorneys as a rule faithfully observe and fearlessly discharge [their ethical] duties and obligations regardless of the effect that their actions in these respects may have on their own personal interests, yet experience has demonstrated that there are exceptions to the general rule, and that there are members of the legal profession who, when their own personal interests are involved in an action or proceeding in which they are acting as counsel, are apt to, and sometimes do, disregard these general duties which the law imposes upon them. Therefore, in order to prevent attorneys from having an undue interest in litigation in which they are employed as counsel,

they are prohibited in this and many other jurisdictions either by statute or rule of court from becoming surety for their clients.[1]

I. INTRODUCTION

Stephanie sat behind the plate glass window in the attorney-client meeting rooms of the county jail with a white face mask covering her nose and mouth, standard procedure for recent detainees, crying hysterically, angrily poking at the air, repeatedly demanding an answer to the same question of her criminal defense attorney: "Why did you do this to me? I did everything you asked me to!" It was then we realized that our client, whom we were representing in an ancillary civil matter, had been betrayed by her criminal defense attorney, the implications of which we would not know until later. Our client was charged with a criminal offense and subsequently released on bond, which her criminal defense attorney posted. The day before her plea bargain conference her criminal defense attorney jumped off her bond after nearly two years of being out on bond and surrendered her back into the custody of the Bexar County Jail. The events that transpired after that incident were predictable, including our client taking a plea on her criminal charges, and it begs the question: Would the outcome have been the same if her bail bondsman had been anyone other than her criminal defense attorney?

Prior to that experience, we were not aware that Texas permitted attorneys, by statute, to be bail bondsmen for their clients. Consequently, we researched this issue and realized that Texas was, when it comes to allowing attorneys to be bondsmen for their clients, an anomaly. Our research led us to a recent American Bar Association (ABA) Formal Opinion, which strongly discourages the practice of attorneys as bondsmen. Ultimately, we felt compelled to write this Article to explore the troublesome aspects of the conflicts that arise when a criminal defense attorney acts as his client's bail bondsman.

While our experiences dealt with an attorney who posted bond for his criminal defense client, the same ethical dilemmas can be encountered in posting a bond for a client in civil matters such as probate, family law, and appeals. This Article focuses primarily on

1. McWhirter v. Donaldson, 104 P. 731, 735 (Utah 1909).

the issue of posting bail in a criminal matter, while drawing corollaries to posting bonds in civil matters. In Part II, we discuss the history of bail, dating from pre-Norman England to the present day. Part III explores the bail system in Texas. Part IV discusses the attorney exemption in the Texas Bail Bond Act, codified in the Occupations Code. Part V provides a survey of the statutes and ethics opinions of other jurisdictions. Part VI reviews Texas ethics opinions addressing attorneys and the practice of bail bonding. Part VII provides an in-depth analysis of the risks associated with acting as a lawyer-bondsman under the Texas Disciplinary Rules of Professional Conduct. Part VIII discusses remedies available to a client if her bondsman has inappropriately "jumped off" her bond. Lastly, Part IX offers a recommendation to solve the dilemma of conflict arising in this manner.

II. HISTORY OF BAIL

The concept of bail can be traced to before the Norman Conquest of 1066.[2] The factors that determined who qualified for release on bail were inconsistent and consequently applied unevenly to similarly situated defendants until bail became codified in England in 1275 through the Statute of Westminster.[3] The American colonists brought the concept of bail to the New World, including a requirement that the bail set could not be excessive, which had originally been established in the English Bill of Rights in 1689.[4] When the forefathers drafted the Constitution of the United States,

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2. *See Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961) (stating that "[t]he modern institution of release on bail pending trial has evolved from a practice which goes back at least to Pre-Norman England").

3. *See* Joseph Buro, *Bail—Defining Sufficient Sureties: The Constitutionality of Cash-Only Bail*, 35 RUTGERS L.J. 1407, 1411 (2004) (noting that the "common law system was littered with corruption and inconsistent application") (citing June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 523 (1983)).

4. *See* Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 271 (1993) (examining some of the colonial methods of determining bail issues). There is some evidence to suggest that the American concept of excessive bail was established before the English Bill of Rights. *Compare Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 n.12 (1961) (referencing the English system's right against excessive bail to the 1689 English Bill of Rights), *with Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 n.13 (1961) ("The first American proscription against excessive bail antedates the English Bill of Rights.").

they included an amendment that prohibited the imposition of excessive bail while not explicitly guaranteeing a right to bail.[5] The purpose of bail was "to ensure that the accused would reappear on the date set for his trial."[6] When a third party, or surety, posted bail, the third party assumed the responsibility and guaranteed the defendant's appearance at trial, risking the forfeiture of personal property.[7] The determination to release an accused was based largely on the offense with which the accused was charged, including consideration of the nature and seriousness of the crime.[8] The third party who assumed responsibility for the presence of the accused at trial, assumed the powers of a jailer and was given the same authority as law enforcement officials to recapture the accused and bring her to trial.[9] This ability by the surety to bring the accused to trial was reflective of an immobile society and did not lend itself to a fluid society with a seemingly endless border, as was encountered in America.[10] In time, the personal surety system was

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5. U.S. CONST. amend. VIII; *see also* Wagner v. United States, 250 F.2d 804, 805 (9th Cir. 1957) (stating that the Constitution provides that bail shall not be excessive, not "that every defendant is entitled to bail"); Nail v. Slayton, 353 F. Supp. 1013, 1019 (W.D. Va. 1972) (stating that neither the Eighth nor Fourteenth Amendment requires that every defendant be released on bail pending trial). *But see* Carlson v. Landon, 342 U.S. 524, 556 (1952) (Black, J., dissenting) (suggesting that proscription against excessive bail assumes an absolute right to bail that only Congress can grant or deny). Although there is no constitutional right to bail on the federal level, many states adopted the concept of a right to bail in their state constitutions, thereby providing a constitutional right to bail in some instances in that particular jurisdiction. Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L REV. 328, 351 (1982) (discussing states that include an absolute right to bail in their constitutions).

6. *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961).

7. *Id.*

8. Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditons*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 273-74 (1993).

9. *See Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961) (referencing the actions a responsible party was allowed to take in connection to controlling the accused).

10. *See id.* (discussing the efficacy of personal surety in a land-based, immobile society); *see also* Joseph Buro, *Bail—Defining Sufficient Sureties: The Constitutionality of Cash-Only Bail*, 35 RUTGERS L.J. 1407, 1411 (2004) (explaining that "the dramatic expansion of the colonial population and the seemingly limitless frontier beyond the colonies' borders provoked some necessary alterations to the way the system had traditionally functioned"). An individual's ties to his local community became increasingly attenuated; most colonists were, by nature, new to their communities and arrived with limited or nonexistent connections to their fellow citizens. These factors made it difficult for a sheriff to "judge the trustworthiness of sureties and defendants based on personal knowledge." *Id.* at 1413

replaced by a commercial one, wherein the surety took financial responsibility for the accused's presence for a fee and, in exchange, risked forfeiture of the security interest if she did not appear.[11]

Essentially, this shift made posting bond a business where both risk and profitability could be evaluated to determine whether a surety should post the bond. Each state has policies and procedures in place to regulate bail bondsmen and to allow its citizens to enjoy their liberty while awaiting trial.

III. THE BAIL SYSTEM IN TEXAS

Following the example of many other states, Texas, in 1836, incorporated a right to bail in its first state Constitution.[12] A corollary was also established in the Texas Code of Criminal Procedure, roughly twenty years later, wherein a right to bail, for certain offenses, primarily non-capital, was codified.[13] According to the statute, an accused could be released either on a recognizance, which was an "unsigned 'undertaking' in a fixed sum by a defendant and his sureties"[14] and the precursor to the personal bond, or through a bail bond defined 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. The effect of the release on bail bond is to transfer custody of the defendant from the officers of the law to the custody of the surety on the bail bond, whose undertaking is to redeliver the

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n.34; *see also* Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditons*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 n.38 (1993) (listing the shortcomings of the personal surety system in America).

11. *See* Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditons*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 (1993) (illustrating the shift from personal sureties to commercial bondsmen).

12. REPUB. TEX. CONST. of 1836, Declaration of Rights, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1083 (Austin, Gammel Book Co. 1898).

13. *See* Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditons*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 300 (1993) (indicating that Texas's first Code of Criminal Procedure established a "bail system" in 1856).

14. *Id.*

defendant to legal custody at the time and place appointed in the bond.[15]

Currently, Texas allows a defendant who is eligible for bond to be released from jail and await trial: (1) on her own recognizance, which does not require any financial obligation if she fails to appear for future hearings; (2) by posting a personal bond, where the defendant must pay a determined amount of money if she does not appear for future hearings; (3) by posting a refundable cash bond for the full amount of the bond; or (4) by obtaining the services of a commercial surety who will post the bond for a nonrefundable fee.[16] If a defendant chooses to employ a commercial surety, she must pay a nonrefundable fee, or a premium, which is a percentage of the amount set by the court as bond.[17] The surety then becomes responsible for ensuring the accused appears at all future hearings, thereby taking on the responsibilities conferred upon law enforcement officials.[18] In essence, the state subcontracts its duties to the surety, thereby establishing a contract between the surety and the state with the end goal being that the surety will guarantee the accused's presence at trial.[19]

If the accused does not appear for a criminal hearing, she becomes in default on the bond and the state can pursue a judgment *nisi*, the judicial mechanism by which a bond is forfeited.[20] At

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15. BLACK'S LAW DICTIONARY 187 (8th ed. 2004).

16. TEX. CODE CRIM. PROC. ANN. art. 17.01-.09 (Vernon 2005). Only one of these options may be available to a defendant at any one given time. *See* Op. Tex. Att'y Gen. No. JC-0215 (2000) (opining that a split bond, where part of the bond is satisfied through a personal bond with a remainder amount due through a surety, is not allowed).

17. Stephanie's bond was set at $75,000 and her attorney set the corresponding bond fee at $7500. *See* Letter from Stephanie Smith, client, to Donna Bloom, co-author (Dec. 13, 2005) (on file with the *St. Mary's Law Journal*) (providing details of her experience as a criminal defendant client with an attorney also acting as her bail bondsman). *See generally* GREATER SAN ANTONIO SOUTHWESTERN BELL YELLOW PAGES 305-18, § BAIL BONDS (2005) (offering some bond fees at rates as low as 2% to 5%). There is, however, no regulatory limit set on the fee that may be imposed.

18. *See* Taylor v. Taintor, 83 U.S. 366, 371 (1872) (listing the enforcement powers of the bondsman); *see also Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961).

19. *See* Op. Tex. Att'y Gen. No. JC-0121 (1999) (opining that "a bail bond is a contract in which the surety has an interest and to which the county is a party").

20. *See* Watkins v. State, 16 Tex. Ct. App. 646, 647 (1884) (stating that a judgment *nisi* is the avenue for bond forfeiture, and prescribing the process and procedure pursuant to the Code of Criminal Procedure); Burgemeister v. Anderson, 113 Tex. 495, 259 S.W. 1078, 1078-79 (1924) (reiterating the procedure to obtain a judgment *nisi*).

common law, if an accused failed to appear, the bondsman was authorized to seize her and surrender her to authorities, virtually granting unlimited authority to recapture the accused—and many jurisdictions still follow the common law approach.[21]

In an effort to regulate the actions of bail bondsmen, and presumably to ensure that defendants are afforded some due process prior to being recaptured, the Texas legislature departed from the common law concept and enacted statutes that require judicial action to authorize the recapture of the defendant.[22] If a surety wants to surrender the accused, she must first notify the accused's attorney by providing notice as authorized in Texas Rule of Civil Procedure 21(a) and then file an affidavit of the intent to surrender the accused with the court in which the criminal action is pending.[23] When reviewing the affidavit, the court, upon a finding that cause exists for the surety to surrender the principal, will issue "a warrant

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21. *See Taintor*, 83 U.S. at 371. The Supreme Court explained the privileges of a surety by stating that:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.

Id.; *see also* Shifflett v. State, 572 A.2d 167, 169 (Md. 1990) (explaining that state rules conferring rights and responsibilities of bail bonds officers do not override the bondsman's common law right to recapture defendant prior to forfeiture of the bond); Hudson v. State, 375 P.2d 164, 166 (Okla. Crim. App. 1962) (proclaiming that sureties can recapture their principal and even imprison them if the surety deems it necessary); 8A AM. JUR. 2D *Bail and Recognizance* § 80 (Supp. 2005) (stating that "[b]y entering into a bond agreement . . . the principal voluntarily consent[s] to be[ing] committed to the custody of the surety, but also implicitly agrees that the surety or the surety's agent may break and enter his home and use reasonable force in apprehending him") (citing State v. Mathis, 349 N.C. 503 (1998)).

22. *See* Green v. State, 829 S.W.2d 222, 223 (Tex. Crim. App. 1992) (holding that *Taylor* "is not the law in Texas," and that "[s]tatutory guidelines have replaced the common law in Texas and define the law as it applies to sureties who seek to apprehend principles").

23. TEX. CODE CRIM. PROC. ANN. art. 17.19(a) (Vernon 2005); *see also* Austin v. State, 541 S.W.2d 162, 165 (Tex. Crim. App. 1976) (concluding that a bondsman whose principal was unwilling to voluntarily comply with the bondsman's request that the principal surrender to the sheriff had no right to use force to compel the principal to do so and that the bondsman's only remedy was to seek a warrant of arrest from the court).

of arrest or capias" for the capture of the principal.[24] The statute refers to the necessity for the court to find cause, but does not specify whether there must be "good" cause or "reasonable" cause. If the principal challenges the surrender, the statutorily defined standard of review will be "reasonable cause," thereby placing a greater burden on the surety in a contest hearing.[25] As to the notice requirement, the statute does not address what notice, if any, is due to the client if her attorney is also her bail bondsman. Presumably, the attorney would have to inform his client that he is intending to "jump off" the bond, but there is no specific statutory requirement to that effect.

In a further effort to exert some control over the commercial surety industry, the legislature enacted a law which requires commercial sureties to secure a license and imposes certain regulatory requirements.[26] The only exception to the licensing requirement is if the bondsman is an attorney licensed to practice law in the state of Texas.[27]

IV. THE ATTORNEY EXEMPTION

A. *The Statute and Its Purpose*

In Texas, an attorney is exempt from the requirements of licensure as a bondsman, including the requirement to maintain a particular level of security to underwrite the bonds.[28] Nonetheless, the attorney is still required to conform to the other requirements regulating the practice of bondsmen and can be disqualified from serving as a bondsman if those requirements are violated.[29] The attorney exemption statute provides:

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24. TEX. CODE CRIM. PROC. ANN. art. 17.19(b) (Vernon 2005).

25. TEX. OCC. CODE ANN. § 1704.207(b) (Vernon 2004).

26. *Id.* § 1704.160.

27. *See id.* § 1704.151 (requiring a license for commercial sureties); § 1704.163 (Vernon Supp. 2005) (providing an exemption of the licensing requirements for attorneys who are also the attorney of record for the defendant/principal).

28. *Id.* § 1704.163 (Vernon Supp. 2005).

29. *See id.* § 1704.163(b) (providing that an attorney acting as a surety under the attorney exemption may not engage in conduct involved with that practice that would subject a bail bond surety to license suspension or revocation.); § 1704.252(1)-(16) (Vernon 2004) (listing instructions where board may suspend or revoke license); *see also* Op. Tex. Att'y Gen. No. GA-0197 (2004) (opining that an attorney who acts as a surety under section 1704.163 of the Texas Occupational Code is not subject to the licensing and security requirements, unlike a non-attorney licensed bail bondsman). "Section 1704.163 exempts an

(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.[30]

This statute was most recently amended by the Regular Session of the 79th Legislature.[31] The amendment included a requirement that the attorney file a notice of appearance as counsel with the court, suggesting that the attorney must prove he is representing the defendant in the underlying criminal proceeding.[32] Whereas before, by not mandating any filings with the court, the statute pre-

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attorney from the chapter 1704 license and security requirements . . . . For that reason, the bases for license suspension and revocation that involve license or security requirement violations do not apply to an attorney who acts as a surety under section 1704.163." *Id.* That same opinion does not, however, absolve the attorney's duty to adhere to the remaining requirements of a licensed bondsman. *See* TEX. OCC. CODE ANN. § 1704.252(1)-(16) (Vernon 2004) (providing examples of behavior which could disqualify the attorney from acting as a bondsman); *see also* Op. Tex. Att'y Gen. No. JC-0277 (2000) (concluding that the court must inquire into the sufficiency of the security offered by a surety, including a criminal defense attorney who is acting as surety on a client's bond). Article 17.11 Section 1 of the Texas Code of Criminal Procedure provides that surety will be deemed sufficient if "such surety is worth at least double the amount of the sum for which he is bound . . . that he is a resident of this state, and has property therein." TEX. CODE CRIM. PROC. ANN. art. 17.11(1) (Vernon 2005).

30. TEX. OCC. CODE ANN. § 1704.163 (Vernon Supp. 2005).

31. Act of September 1, 2005, 79th Leg., ch. 316, § 3, 2005 Tex. Sess. Law Serv. 938, 939 (Vernon) (to be codified as an amendment of TEX. OCC. CODE ANN. § 1704.163).

32. *Id.*

sumed the attorney would in good faith comply with that requirement.[33] The requirements imposed on attorneys are substantially more lenient than those imposed on non-attorney bail bondsmen and arguably do not provide the same level of professional standards within that industry.[34] The statute also created local administrative boards, vesting them with authority to grant licenses and ensure compliance with licensing and surety requirements, as well as to discipline those in violation of the requirements.[35] While attorneys acting in the dual role of attorney and bail bondsman are exempt from many of the licensing and surety requirements, they are still subject to the Texas Disciplinary Rules of Professional Conduct for representation purposes.[36]

B. *Legislative History and Intent*

The attorney exemption was introduced as part of Senate Bill (S.B.) 383 in the 63rd Legislature in 1973 and was passed as an amendment to the Bail Bond Licensing Act, originally passed in 1959.[37] The legislature recognized that attorneys had been posting bonds and wanted to ensure that attorneys would also be regulated

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33. *Compare* TEX. OCC. CODE ANN. § 1704.163(a)(2) (Vernon 2004) (suggesting that the exemption only applies to an attorney who "represents the other person in the criminal case"), *with id.* § 1704.163(a)(2) (Vernon Supp. 2005) (amending the statute to require an attorney to file "a notice of appearance as counsel of record in the criminal case.").

34. *See* TEX. OCC. CODE ANN. § 1704.152 (Vernon Supp. 2005) (requiring a nonlawyer individual seeking a license as a bail bond surety to have in the two years prior to filing an application at least one year of continuous work experience in the bail bond business and to complete "at least eight hours of continuing legal education in criminal law courses or bail bond law courses" in order to be eligible for such licensure). Attorneys are exempt from these requirements. *Id.* § 1704.163; *see also* Cindy V. Culp, *Waco Attorney Arrested in Kidnapping*, WACO TRIBUNE-HERALD, Jan. 13, 2006, at 1A (explaining why and how a Waco attorney who was also serving as her client's bail bondsman abducted her client from his wedding reception as a result of his failure to appear in court). In this matter, the Waco Police Department spokesperson explained that when the attorney handcuffed her client she was committing the criminal act of unlawful restraint. *Id.* Perhaps this is a topic that is covered in training provided and required of non-attorney bail bondsman.

35. *See* TEX. OCC. CODE ANN. §§ 1704.051-.150 (Vernon 2004) (outlining the process mandated by the legislature concerning the regulation of bail bonds).

36. *See* Comm. on Interpretation of the Tex. Code of Prof'l Responsibility, State Bar of Tex., Op. 388 (1977) (asserting that an attorney who is also his client's bondsman is still subject to the rules of professional conduct because the attorney has taken on "the responsibilities imposed by him through the attorney client relationship").

37. Act of May 18, 1973, 63d Leg., R.S., ch. 550, § 3(b), 1973 Tex. Gen. Laws 1520, 1521. The bill was introduced as Senate Bill 383 and sponsored by Senator Tati Santiesteban of El Paso, Texas. S.J. OF TEX., 63d Leg., R.S. 951 (1973).

with respect to the licensing and practice requirements of bail bondsmen.[38] During the Senate hearings on S.B. 383, two senators inquired as to the appropriateness of attorneys acting as bondsmen for their clients and suggested that the bill contain an amendment prohibiting attorneys from serving as bondsmen.[39] The sponsor of the bill cautioned against doing so, considering that there may be attorneys in small counties without bail bondsmen whose clients would otherwise not have access to being released from jail to await trial.[40] Further, the bill's sponsor and a witness both believed that if a prohibition were added to the bill excluding attorneys from making bonds, the entire bill would fail.[41] There was no further discussion of the attorney exemption in the 1973 legislature and the bill ultimately passed by a vote of twenty-six in favor, three opposed, and one abstention.[42] The attorney exemption read as follows:

> (b) Persons who are actually engaged in the practice of law and who are members of the State Bar of Texas who personally execute

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38. *See Regulation of Bail Bond Sureties: Hearings on Tex. S.B. 383 Before the Senate Comm. on Jurisprudence*, 63d Leg., R.S. 4-5 (Mar. 20, 1973) (containing a discussion between Senator Jim Wallace and Mr. Altus Day, bail bondsman) (on file with the *St. Mary's Law Journal*).

39. *Regulation of Bail Bond Sureties: Hearings on Tex. S.B. 383 Before the Senate Comm. on Jurisprudence*, 63d Leg., R.S. 6-7 (Mar. 20, 1973) (on file with the *St. Mary's Law Journal*). Senator Bob Gammage asked the witnesses who were testifying in favor of the bill what they thought about adding an amendment prohibiting attorneys from making bonds. *Id.* at 6. Similarly, Senator Bill Meir wanted the subcommittee to consider amending the bill to prohibit attorneys from making bonds so that it would fall in line with the federal system prohibition, adding his concern that "I think it's impossible to avoid a conflict where an attorney's representing a client and is also on his bond." *Id.* at 8.

40. *Id.* at 8 (containing a discussion between Senator Tati Santiesteban and Senators Meir, Gammage and Ogg) (on file with the *St. Mary's Law Journal*).

41. *Id.* Senator Tati Santiesteban, though not opposed to the suggestion of prohibiting attorneys from making bonds, and saying that the legislature had "been toying with that for seven years now," did feel that by doing so, the measure would fail. *Id.* "Now, if we were to put a . . . provision prohibiting lawyers from writing bonds then I would be for it, but I don't think . . . it would pass, because of what I said." *Id.* Concurring with Senator Santiesteban, Mr. Horace G. Cook, a bail bondsman from Houston, testified in favor of the bill, but was opposed to attorneys making bonds; he stated he would favor an amendment prohibiting attorneys from making bonds, but added, "I just don't think they'll get it passed. We've been trying for years and years. If you put it in front of this committee I think the bill will get amended on the floor. That's my experience over the years." *See id.* at 9 (suggesting that a bill that included an amendment prohibiting attorneys from making bonds would itself be amended, presumably to exclude that prohibition).

42. S.J. OF TEX., 63d Leg., R.S. 958 (1973).

> bail bonds or act as sureties for persons they actually represent in criminal cases may execute bail bonds or sureties without being licensed under this Act, but they are prohibited from engaging in the practices made the basis for revocation of license under this Act and, if found guilty of violating the terms of this Act, may not qualify thereafter under the exception provided in this subsection.[43]

In 1981 the legislature again addressed the issue of bail bond licensing, which included revisiting the attorney exemption during the Regular Session of the 67th Texas Legislature.[44] The measure was introduced as S.B. 727 by Senator Tati Santiesteban.[45] This time, however, there were two separate bills filed both in the House and Senate which would prohibit attorneys or public officials and employees from licensure as bail bondsmen.[46] The Senate hearings on S.B. 727 were short and did not address any substan-

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43. Act of May 18, 1973, 63d Leg., R.S., ch. 550, §1, 1973 Tex. Gen. Laws 1520.

44. Act of June 1, 1981, 67th Leg., R.S., ch. 312, 1981 Tex. Gen. Laws 875.

45. Tex. S.B. 727, As Introduced, 67th Leg., R.S. (1981). The portion of the proposed bill that addressed the attorney exemption read as follows:

> (f) Persons licensed to practice law in this state may make bonds only;
> (1) for persons who will be represented by the attorney on the charge they are bonded out on;
> (2) when he has not written bonds in excess of ten times his net worth as shown in a financial statement filed with the sheriff in the county where the attorney resides;
> (3) when he has posted a security deposit equal to all outstanding judgment nisis with the County Bail Bond board; and
> (4) when he qualifies as a surety under the Code of Criminal Procedure.

Id.

46. *See* Tex. S.B. 128, As Introduced, 67th Leg., R.S. (1981) (detailing the bill introduced by Senator Mauzy, one of the three Senators who had voted against Senate Bill 383 in 1973, which ultimately created the attorney exemption); Tex. H.B. 368, As Introduced, 67th Leg., R.S. (1981) (describing the bill filed by Representative Schlueter as an identical companion to Senate Bill 128). Section 3(b) of Senate Bill 128 stated:

> No individual shall be eligible for a license under this Act who is an attorney licensed to practice law and who is either engaged in the practice of law or who is associated with an individual, firm or professional corporation engaged in the practice of law, nor shall any individual be eligible for a license under this Act who is either an elected public official or an employee of a state or local unit of government.

Id. Senate Bill 128 was set aside at the Senate level, and no hearings or discussions were held on it; rather, it was sent to a subcommittee where it never made it out. *See* Tex. S.B. 128, 67th Leg., R.S., Master Bill History Report, 761 (1981) (outlining the history of the bill in the Senate). Conversely, the House took up H.B. 368, the House companion bill of S.B. 128, and held hearings on the bill. *See Regulation of Bail Bond Sureties: Hearings on Tex. H.B. 368 Before the House Comm. on Criminal Jurisprudence*, 67th Leg., R.S. 7 (Feb. 11, 1981) (noting that the House of Representatives held hearings on Bill 368).

tive issues regarding the attorney exemption.[47] Instead, the Senate left most of the hearings and discussion to the House. The House first addressed House Bill (H.B.) 368 and heard testimony from Kelly Loving, a representative of the Dallas District Attorney's Office who supported passage of the bill.[48] Throughout his testimony, Mr. Loving repeatedly cautioned about the inherent conflict of interests that could arise when an attorney serves as his client's bail bondsman.[49] Mr. Loving fielded questions primarily from Representative Hendricks, the chairperson of the House Criminal Jurisprudence Committee, who did not feel that a conflict of interest exists when an attorney serves as a bail bondsman for his client.[50]

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47. *See generally Regulation of Bail Bond Sureties: Hearings on Tex. S.B. 727 Before the Senate Comm. on Jurisprudence*, 67th Leg., R.S. (Apr. 21, 1981) (discussing no substantive issue when adopting the subcommittee's reports on S.B. 727). The attorney exemption passed at the Senate level read as follows:

> (e) Persons licensed to practice law in this state may execute bail bonds or act as sureties for persons they actually represent in criminal cases without being licensed under this Act but they are prohibited from engaging in the practices made the basis for revocation of license under this Act and if found by the sheriff to have violated any term of this Act, may not qualify thereafter under the exception provided in this subsection unless and until he comes into compliance with those practices made the basis for revocation under this Act.

S.J. OF TEX., 67th Leg., R.S. 1166 (1981).

48. *Regulation of Bail Bond Sureties: Hearings on Tex. H.B. 368 Before the House Comm. on Criminal Jurisprudence*, 67th Leg., R.S. 4 (Feb. 11, 1981).

49. *See id.* at 4-7 (reiterating the conflicts of interest that arise when an attorney serves a client in two different capacities). During a part of his testimony, Mr. Loving had the following to say about attorneys as bail bondsmen:

> One, I personally feel like attorneys ought not be writing bonds in most of the cases and I personally feel like that a defense attorney himself writes bonds, he is going to develop a conflict of interest that does not serve the defendant very well and does not serve the legal profession very well. And that's a part of this bill. I personally strongly support that. I think - I think we see an erosion of the representation. It doesn't effect [sic] us. We don't see it in the D.A.'s Office. We don't see what goes on. We're almost immune from even observing it. But getting away from my position there and getting involved a little bit. Talking to people, talking to defense attorneys and so on, I believe that's an erosion there that we ought to eliminate.

Id. at 4-5. During another part of his testimony, Mr. Loving contrasted the role of an attorney with that of a bondsman by stating that the "responsibilities of a defense attorney in trying to defend his client are considerably different than the bondsman whose only interest is putting that person in court and going after and chasing him down if he isn't in court, finding him, and dragging him back." *Id.* at 6.

50. *See Regulation of Bail Bond Sureties: Hearings on Tex. H.B. 368 Before the House Comm. on Criminal Jurisprudence*, 67th Leg., R.S. 4-7 (Feb. 11, 1981) (noting Representative Hendricks's responses to Mr. Loving's questions). Representative Hendricks responded to Mr. Loving's question of "do you feel that these conflicts do not develop

The hearings eventually ended with no further action taken on H.B. 368.[51] However, S.B. 727 passed in both the House and, subsequently, the Senate.[52] Although mentioned in subsequent legislative hearings, the attorney exception, later referred to as exemption, received no substantive testimony; in fact, the exception has undergone only two minor changes since 1981.[53] The current attorney exemption, in substance, reflects the measures taken in 1973 and 1981.

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between a defense attorney and his client?" by saying, "No, no, sir. I do not believe that they do." *Id.* at 6. Similarly, Mr. Loving expressed a concern that an attorney's role is separate from a bondsman's role because the bondsman's primary concern is to get the "person in court on time, having this person do whatever he's supposed to do to ensure that the bondsman does not get stuck on the bond." *Id.* at 5. Representative Hendricks responded by asking, "And that's bad?" *Id.* A few exchanges later, Representative Hendricks reiterated "Where-where is the conflict? I don't see the conflict." *Id.*

51. *See* Tex. H.B. 368, 67th Leg., R.S., Master Bill History Report, 85 (1981) (illustrating that H.B. 368 was sent to the subcommittee on February 11, 1981 and did not return to the floor of the House); *see also* Tex. S.B. 128, 67th Leg., R.S., Master Bill History Report, 761 (1981) (noting that S.B. 128 was also referred to a subcommittee that it never left).

52. *See* H.J. OF TEX., 67th Leg., R.S. 3645-46 (1981) (reporting on the House of Representative's passage of S.B. 727); S.J. OF TEX., 67th Leg., R.S. 1167 (1981) (reporting on the Senate's passage of S.B. 727).

53. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 1262, § 7, sec. 1704.163, 2001 Tex. Gen. Laws 2996, 2999 (pointing out the changes made to the section). The 2001 section of the attorney exemption provided as follows:

> (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) represents the other person in *the* criminal case *for which the bond was given.*
>
> (b) A person executing a bail bond or acting as a surety under this section may not engage in conduct involved with that practice that would subject a bail bond surety to license *suspension or* revocation. If the *board* determines that a person has violated this subsection, the person may not execute a bail bond or act as a surety under this section until the person has remedied the violation.
>
> (c) A person executing a bail bond or acting as a surety under this section who has been paid a fee for executing the bond or acting as the surety is not relieved of liability on the bond solely because the person has not been employed to represent the principal on the merits of the criminal case.

Id. (emphasis added to denote changes made by the legislature in 2001); *see also* Act of June 17, 2005, 79th Leg., R.S., ch. 316, § 3, sec. 1704.163, 2005 Tex. Gen. Laws 938, 939 (amending the statute to include a provision that the attorney acting as surety must file "a notice of appearance as counsel of record in the criminal case for which the bond was executed" and clarifying the authority of the local county bail bond board to suspend or revoke the attorney's authorization to act as surety under this exemption).

V. Survey of Statutes and Ethics Opinions of Other Jurisdictions

The prevailing view across the nation is that it is improper for an attorney to act as his client's bondsman.[54] This is exhibited through either statutes enacted prohibiting the behavior or ethics opinions that similarly interpret the rules of professional conduct.[55] The ABA's Model Rules of Professional Conduct (MRPC) serve as the basis for many states' rules of professional conduct. Recently, the ABA released a formal ethics opinion which, although not establishing a per se prohibition against lawyers posting bond for their clients, engaged in a comprehensive analysis of the ethical concerns that may arise when that practice is employed, and concluded that the practice is fraught with ethical pitfalls.[56]

A. *The American Bar Association Speaks*

1. ABA Ethics Opinion

ABA formal opinion 432 discusses the MRPC, specifically whether a lawyer who posts bail for his client violates Rules 1.7 and 1.8.[57] Rule 1.7 of the Model Rules addresses conflict of interest with current clients and states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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54. *See generally* Deborah Markowitz, *The Attorney's Query: May a Lawyer Ethically Post a Bond or Serve As a Surety on Behalf of a Client?*, 18 Geo. J. Legal Ethics 959, 959-60 (2005) (acknowledging the ABA Ethics Committee's disapproval of a lawyer acting as a surety for his client).

55. *See id.* at 961 (classifying into two categories a states' prohibition of lawyers posting bond for a client).

56. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004) (considering "the ethical concerns that arise under the Model Rules of Professional Conduct when a lawyer posts, or arranges for the posting of, a bond").

57. *See id.* (discussing the effects of a lawyer posting bail for a client with regards to Rules 1.7 and 1.8 of the Model Rules of Professional Conduct).

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.[58]

In analyzing Model Rule 1.7(a)(2), the ABA identified that an attorney who posts bail for his client has a "personal interest in avoiding financial loss," thereby calling into question the "significant risk" and "materially limited" aspects of the rule.[59] Further, the ABA argued that "unless the amount at risk is inconsequential to the lawyer, there will be a significant risk that this personal interest will materially limit her ability to exercise her independent professional judgment on the client's behalf."[60] The opinion concludes that in these situations a lawyer, more often than not, would be "prohibited from continuing the representation by Rule 1.7(a)."[61] The ABA addresses the second part of the rule, which provides an exception to the conflict of interest and focuses on the fourth consideration—the client's informed written consent to the representation. The ABA concludes that clients who seek bail from jail are probably not in a position to give informed consent, and:

> In all but the rarest of circumstances, however, the stress and anxiety of confinement and the other pressures and conditions affecting the incarcerated client make it highly unlikely that the client's acquiescence in the conflict, even if obtained, will qualify as sufficiently genuine and voluntary in nature so as to constitute the sort of "informed consent" contemplated by Rule 1.7(b).[62]

Conversely, the ABA found certain circumstances in which an attorney could post bail for his client without violating the letter or

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58. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003).
59. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004).
60. *Id.*
61. *Id.*
62. *Id.*

spirit of the rule. Such circumstances exist when the client is a relative or close friend of the attorney or the bond amount is so negligible that it is of little significance to the attorney.[63] In both circumstances, the ABA determined that a lawyer could "reasonably conclude that her personal interest will not materially limit her representation of the client."[64] While the ABA was careful not to imply that those possible circumstances are exhaustive, it carved out very limited exceptions.

The ABA then considered Rule 1.8, particularly subsection (e), and whether the posting of bond is considered an "inappropriate provision of financial assistance to the client in connection with pending or contemplated litigation."[65] Model Rule 1.8 states, in relevant part:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing [to the client] in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given reasonable opportunity to seek the advice of independent counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
>
> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
>
> . . . .
>
> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

63. *Id.*

64. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004).

65. *Id.*

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.[66]

In contrast to its position concerning the conflict of interest section, the ABA departs from the majority view of states that do not deem the posting of bond as a "court cost or expense of litigation."[67] The ABA argued that the release of a defendant from jail can be a strategic or tactical objective in the course of representation, which may be "legitimately viewed as a cost of litigation."[68] Yet, the ABA does not discuss how entering the business transaction of posting bail for one's client could violate subsection (a) or subsection (b) of Rule 1.8. Ostensibly, the attorney, in the role as attorney, may learn information from his client that may lead him to suspect that the client will flee the jurisdiction. It may be as benign as the client inquiring about the consequences of fleeing the jurisdiction. If the attorney fears that this inquiry promotes the client's interest in flight, the attorney could seek to "jump off" the bond and have the client returned to the custody of the state.[69] In this particular instance, the attorney would have used information obtained through his representation of the client to take action adverse to his client's interests. Alternatively, the attorney may use the information against the client to keep the client from committing a crime, such as fleeing the jurisdiction. A fine line exists between the two arguments, which is probably fact specific, but that would nonetheless, in the abstract if not in actual practice, seem to

66. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2003).

67. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004); *see also* State Bar of Wis. Comm. on Prof'l Ethics, Op. E-96-1 (1998) (opining that "a bail, bond or surety is not a court cost nor an expense of litigation under the exceptions in 1.8(e)"). *But see* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2000-14 (2000) (concluding that "the bonding amounts said to be required in this instance fall within the ambit of 'court costs and expenses of litigation'"). In that instance, the attorney was advancing costs for a supersedeas bond on an eviction for an indigent; failure to post that bond would in essence impede the litigation from proceeding. *See id.* (analogizing the posting of a bond to litigation expenses in cases involving indigent clients). *But see* Or. State Bar Legal Ethics Comm., Formal Op. 2005-4 (2005) (opining that "bail appears to be close enough to court-related costs to constitute 'expense of litigation,' which a lawyer may properly advance as long as the client remains liable therefore").

68. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004).

69. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 2005) (providing the process by which a surety releases himself from financial liability and surrenders the principal to the state).

violate the client's confidence. This Article will later explore this last argument in greater detail in Section VII.

2. ABA Criminal Justice Standards

These ethical concerns are echoed in the ABA's Standards for Criminal Justice 4-3.5. Subsection (a) is a parallel to Model Rule 1.7(a)(2) and prohibits an attorney from allowing "his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."[70] Supporting the prohibition, the ABA opines that the attorney owes the client a duty of zealous representation without his judgment being impaired with competing personal interests:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.[71]

Subsection (j) unequivocally asserts that a criminal defense attorney "should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case."[72] Defending its assertion, the standards recognize that some jurisdictions do not prohibit attorneys from acting as sureties on bonds and emphasize that this practice interjects a limitation that might undermine the objectivity that an attorney should possess:

> It is particularly important that a lawyer not act as surety with respect to a client or another accused in the same or a related case. This limitation enables the lawyer to avoid identification and involvement with the client or codefendants that goes beyond the lawyer's role as advocate and that might undermine the detachment that an advocate should possess.[73]

The standards provide an exception to the prohibition of acting as a surety in cases where the attorney is posting bond for a non-

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70. ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, § 4-3.5(a) (3d ed. 1993).

71. MODEL CODE OF PROF'L RESPONSIBILITY Canon 5-1 (1980).

72. ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, § 4-3.5(j) (3d ed. 1993).

73. *Id.* Commentary Standard § 4-3.5, Lawyer As Surety on Bond.

client not involved with a client's case, or when the principal is a member of the attorney's family.[74] The ABA has consistently discouraged the practice of attorneys acting as a surety for their clients, placing supreme the ethical concerns that could compromise the attorney's ability to provide zealous representation to his client.[75] It has stopped short, however, of determining that being a client's surety is a per se ethical violation.[76]

In acknowledgment of the ethical concerns the American Bar Association has explored, many states have established a prohibition on an attorney's ability to act as surety through state statutes, or discouraged the practice through ethical opinions. The prohibitions vary from an outright prohibition barring an attorney from acting as a surety without regard to his relationship, personal or professional, to the proposed principal, to an attorney only being prohibited from acting as a surety for his client, thereby allowing the attorney to function as a bondsman in certain proscribed circumstances.[77]

B. *States That "Just Say No"*

1. Wisconsin Statute and Delaware Rule

The Wisconsin statute represents the largest group of states that expressly bar the attorney from acting as a surety in any circumstance. The statute explicitly prohibits "[n]o attorney practicing in this state shall be taken as bail or security on any undertaking, bond or recognizance in any action or proceeding, civil or criminal, nor shall any practicing attorney become surety on any bond or recognizance for any sheriff, constable, clerk of court or municipal

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74. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004) (allowing an attorney to post bond for a relative); *cf.* ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, § 4-3.5(j) (3d ed. 1993) (mentioning an attorney may not post bond for an accused client or for any other individual charged in the same or a connected case).

75. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004) (advancing the position that lawyers should only post bond for their clients in rare circumstances); ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, § 4-3.5(j) (3d ed. 1993) (advising that a criminal defense attorney should never serve as surety and attorney for a client in the same matter).

76. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004).

77. *See, e.g.*, ALASKA R. CIV. P. 80(b)(1) (prohibiting the practice in its civil statutes); ALA. CODE § 15-13-159(4)(e) (1975) (prohibiting the practice in its criminal statutes); S.C. CIR. R. 11(d) (prohibiting the practice as a rule of court).

judge."[78] Few states extend the prohibition to include the attorney or any family member from becoming a surety. Rule 83 of the Supreme Court of the State of Delaware states:

> A court of this State shall not accept any cash bail, special bail bond or surety bond in respect of which an attorney or court officers acts, directly or indirectly, as bail or surety. This prohibition shall also apply to any agent, employee, member of the immediate family of any such attorney or court officer, or any corporation in which such attorney or court officer owns a controlling interest. This prohibition shall not apply to any bond in which the attorney . . . or family member may be the principal.[79]

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78. WIS. STAT. § 757.34 (2003). *See* ALA. CODE § 15-13-159(4)(e) (1975) (proclaiming that professional surety companies must submit annually an affidavit certifying that "no agents of the professional surety company who have the authority to execute appearance bonds in its behalf or any person having a financial interest, direct or indirect, . . . is an attorney . . . or an agent of an attorney."); ALASKA R. CIV. P. 80(b) (stating, "no attorney at law, peace officer, clerk of any court, or other officer of any court is qualified to be surety on the undertaking"); ARIZ. R. CRIM. P. 7.1(e) (requiring that a surety file with an appearance bond "an affidavit that he or she is not an attorney or person authorized to take bail"); ARK. CODE ANN. § 16-84-106 (1987) (stating that "no attorney . . . shall become a personal guarantor or surety in any criminal proceeding); IOWA CODE ANN. § 621.7 (West 1999) ("No attorney or other officer of the court shall be received as security in any proceeding in court"); KY. R. CRIM. P. 4.30(2) (stating, "No attorney at law . . . shall be taken as surety on any bail bond, including bail on appeal"); MINN. DIST. CT. R. ANN. 139 (2005 ed.) ("No practicing lawyer shall be accepted as surety on a bond or undertaking required by law."); OR. REV. STAT. ANN. ORCP 82(D)(1) (West 2005) ("No attorney at law . . . is qualified to be surety on the undertaking."); W. VA. CODE R. § 31.01(d) (2005) (stating that no attorney "shall sign as surety on any bond in any criminal case"); V.I. CODE ANN. tit. 5, § 180(e) (2005) ("No attorney, marshal, police officer, clerk of any court, or other officer of any court shall be permitted to become bail in any action."); *cf.* WYO. STAT. ANN. § 33-5-112 (2005) ("No practicing attorney shall be taken on any official bond, or bond in any legal proceeding in the district in which he may reside."); *see also* Ohio & Mississippi Ry. Co. v. Hardy, 64 Ind. 454, 454 (1878) (discussing that a rule of court prohibits its attorneys from being received as surety on appeal, "which prohibits attorneys of this court from being received as security in such cases").

79. DEL. SUP. CT. R. 83; *accord* KAN. STAT. ANN. § 78-101 (1985) (stating that "no practicing attorney shall be taken on any official bond, or bond in any legal proceedings as aforesaid, in the district in which the attorney resides"). Kansas has a corollary rule which extends the prohibition to the attorney's family members. KAN. SUP. CT. R. 114 ("No attorney or the attorney's spouse may act as a surety on a bond in any case in which the attorney is counsel."); OKLA. STAT. ANN. tit. 59, § 1303(B) (West 2001) ("[A]nd it is further provided that licensed attorneys are prohibited from signing any bonds as surety in any civil or criminal action pending or about to be filed in any court of this state."). Title I of Section 11 of the Oklahoma Statutes Annotated prohibits family members or anyone to whom the attorney has conveyed a property interest from being sureties. *See* OKLA. STAT. ANN. tit. 5, § 11 (West 2005) ("Licensed attorneys of this state, their spouses or anyone to whom said attorneys have conveyed property for the purpose of signing bonds for said

2. North Carolina, New York and Michigan Statutes

Some states prohibit the attorney from being a bail bondsman and impose a criminal sanction for violation of that provision.[80] For example, the North Carolina statute does not allow an "attorney . . . or spouse of any such person may in any case [to] become surety on a bail bond for any person other than a member of his immediate family."[81] The family member exception is common in statutes and ethics opinions, presumably because the attorney would have such a close relationship with these members that the familial ties might tend to outweigh the attorney's own personal interest. In comparison, the criminal sanctions provision of the North Carolina statute establishes that, "[a] violation of this section is a Class 2 misdemeanor."[82] Similarly, the New York statute that imposes criminal sanctions appears to be limited to attorneys who profit from issuing a bail bond, thereby implying that if an

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attorneys, are prohibited from signing any bonds as surety in any civil or criminal action."). Most interestingly, this statute even includes a direct prohibition to the clerk of a court or an officer of the court to accept a bond signed by licensed attorneys. *See id.* ("No court clerk or judicial officer of this state shall accept any bonds signed by licensed attorneys, their spouses or anyone to whom said attorneys have conveyed property for the purpose of signing bonds for said attorneys."). Similarly, Virginia prohibits an employee of an office of an attorney for the Commonwealth from obtaining a license as a bondsman. VA. CODE ANN. § 9.1-185.4(B)(6), (8) (2005). The Virginia Code declares:

> B. The following persons are not eligible for licensure as bail bondsmen and may not be employed nor serve as the agent of a bail bondsman:
>
> . . .
>
> 6. Employees of an office of an attorney for the Commonwealth;
>
> . . .
>
> 8. Spouses of or any persons residing in the same household as persons referred to in subdivisions 2 through 7 of this section.

Id.

80. GA. CODE ANN. § 45-11-8(a) (Supp. 2005) ("It shall be unlawful for any elected official, officer of the court, law enforcement officer, or attorney in this state to engage either directly or indirectly in the bail bonds business."). Section 45-11-8(b) of the Georgia code also states that "[a]ny person who violates this Code section shall be guilty of a misdemeanor." *Id.* § 45-11-8(b); *see also* N.Y. INS. LAW § 6804(c) (McKinney 2005) ("Any member of the bar having any financial interest by which he is to profit from the giving of bail shall be guilty of a misdemeanor.").

81. N.C. GEN. STAT. § 15A-541(a) (2005).

82. *Id.* § 15A-541(b); *see also* State v. Rogers, 315 S.E.2d 492, 513 (N.C. 1984) (holding that the revocation and suspension of law license for eighteen months upon conviction for standing bail bond for a person not a member of attorney's immediate family was reasonably related to rehabilitation and was neither improper nor impermissible).

attorney were to provide a surety without charging a fee or premium he may fall outside the scope of that criminal statute.[83]

Still other states specifically prohibit the attorney from becoming a surety for a client rather than banning the practice across the board. For example, the Michigan code states that "[n]o practicing attorney or counselor shall become a surety or post bond for any client in criminal or civil matters."[84] Nonetheless, an attorney may post a bond for a client in probate matters and/or family law matters, so long as the amount of the bond does not exceed one hundred dollars.[85] This exception seems to follow the American Bar Association's contention that if the amount at risk is inconsequential to the lawyer, the lawyer may still be able to proceed in the representation without being conflicted by a financial interest in the case.[86]

3. Colorado Statute

Colorado prohibits an attorney from becoming surety in any bond unless the attorney obtains the consent of the court.[87] This provision gives the district court judge great power in determining whether an attorney should be granted the responsibility of posting

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83. *See* N.Y. INS. LAW § 6804(c) (McKinney 2005) ("Any member of the bar having any financial interest by which he is to profit from the giving of bail shall be guilty of a misdemeanor.").

84. MICH. COMP. LAWS § 600.2665 (2004); *accord* CONN. GEN. STAT. ANN. § 54-67 (West 2005) ("No attorney-at-law may give any bond or recognizance in any criminal action or proceeding in which he is interested as attorney."); FLA. STAT. ANN. § 454.20 (West 2005) ("No attorney shall become surety on the official bond of any state, county, or municipal officer of this state, nor surety on any bond of a client in judicial proceedings."); *see also* FLA. R. JUD. ADMIN. 2.060(f) (announcing that "[n]o attorneys or other officers of the court shall enter themselves or be taken as bail or surety in any proceeding in court."). *But see* State v. Costello, 23 A. 868, 869, 61 Conn. 497 (1892) (holding that an appeal from a conviction was not a criminal action or proceeding, thereby allowing an attorney to post an appeal bond for a client).

85. MICH. COMP. LAWS § 600.2665 (2004).

86. *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004) (detailing the rare circumstances under which an attorney could serve as surety for his client).

87. *See* COLO. REV. STAT. ANN. § 12-5-117 (West 2005). The statute states:

> No attorney- or counselor-at-law shall become surety in any bond or recognizance of any sheriff or coroner, in any bond or recognizance for the appearance of any person charged with any public offense, or upon any bond or recognizance authorized by statute to be taken for the payment of any sum of money into court in default of the principal without the consent of a judge of the district court first had approving said surety.

surety for his client. This approach creates a case-by-case analysis that is determined by a judge who may have reason to know the attorney seeking the authority to become a surety for his client. In these circumstances the judge may be privy to the lawyer's reputation and his standing in the community, including the attorney's trustworthiness and propensity for reaching objective decisions. Conversely, there is also some danger in this approach, in that a judge may not give this request deliberate consideration and pro forma grant attorneys the right to become sureties for their clients.

In contrast, the Colorado Criminal Practice and Procedure Manual discourages the practice of attorneys serving as their client's bail bondsman by arguing:

> Defense counsel should expend maximum effort to obtain release of the client as soon as possible after book-in. Statistics and practical logic indicate that the greatest single handicap to achieving probation or lenient treatment in court is remaining in custody until trial. Furthermore, release on bail will remove the client from the influence of the police and lessen the likelihood that the client might make incriminating statements. In no event, however, should a lawyer use the lawyer's own money to post bail or be the surety for the client, because doing so is unprofessional and, without consent of the district court judge, is illegal. Similarly, it is unprofessional for a lawyer to co-sign a client's bond.[88]

C. *States with Ethics Opinions*

In addition to the statutes, many states have issued ethical opinions discouraging the practice. A review of ethics opinions from around the country reveals a focus on the same ethical concerns regarding violation of client confidences, an attorney's financial interest impairing the attorney's unbiased judgment of his client's case, and the improper solicitation of clients.[89]

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88. Robert J. Dieter, *Lawyer's Entry into the Criminal Case*, 14 COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 1.27 (2d ed. 2005).

89. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility, Formal Op. 1981-55 (1981) (opining that a relatively large bond might place the attorney in a position of acquiring an interest adverse to his client: "We can imagine situations where the lawyer's concern that the client maintain the wherewithal to meet his or her bond obligations might interfere with the attorney's judgment with respect both to the particular case for which the bond is required, and to other matters."). However, the California ethics committee concluded that if the bond is needed for litigation, then "having the bond issue is in the client's best interest because it permits the litigation to go forward." *Id.* It did not, however, opine as

to whether in that case it deemed the bond to be a cost of litigation. *Id.* This appears to be an argument of access to the courts for the client, in which case it would be in the client's best interest; however, the California ethics committee warned, "In light of the potential for acquiring an adverse interest . . . a prudent lawyer will seek to avoid guaranteeing a client's relatively large litigation bond." *Id.*; *cf.* Fla. State Bar Prof'l Ethics Comm., Op. 72-26 (1972) (opining that "a lawyer is not ethically restrained from engaging in business, if he *does not mingle the business with his law practice*, either physically or functionally, and if the business does not operate as a feeder to this law practice" (emphasis added)); Ill. State Bar Ass'n Comm. on Prof'l Ethics, Op. 802 (1983) (opining that "[b]y acting as surety on a client's bond, a lawyer is guaranteeing financial assistance to the client on matters that pertain directly to the pending litigation, . . . the lawyer could be considered to have entered into a business transaction with a client outside the normal scope of representation and this relationship has the potential for conflict between the duties of an attorney and the relationship created as surety"). The Illinois Bar Association Advisory Opinion concludes by determining that "[t]he combination of the potential for conflict, the guarantee of financial assistance and the business nature of the relationship between principal and surety results in the inescapable conclusion that the relationship must be avoided by attorneys representing the personal representative of the estate is precluded [sic] from acting as surety on the bond of his client." *Id.*; *see also* State Bar of Mich. Comm. on Prof'l and Judicial Ethics, Informal Op. RI-65 (1990) (illustrating why a lawyer should not be a surety in a client's case: "[i]n the event of the client's disappearance, or refusal or inability to satisfy the terms of the surety, the lawyer's interest as surety conflicts with what may be the client's interest in staying at large, or pursuing a course of action contrary to that of the surety"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 647 (1993) (stating that since New York has a statute prohibiting the practice of attorneys acting as bail bondsmen for their clients, it is consequently unethical); N.C. State Bar Ass'n Ethics Comm., Op. RPC 173 (1994) (opining that "lending a client the funds necessary to post a cash bond . . . is contrary to the policies prohibiting conflicts of interest and solicitation . . ."); *cf.* Ky. Bar Ass'n Ethics Comm., Op. E-82 (1974) (concluding that "an attorney could not accept employment from those for whom he executed bonds . . . . [But] there would not necessarily be any ethical prohibition against execution of bonds as attorney-in-fact when confined to those not represented by the attorney"). A lawyer acting as a bondsman "has a vested interest in seeing that the client is apprehended if he or she flees the jurisdiction." N.C. State Bar Ass'n Ethics Comm., Op. RPC 173 (1994). That interest conflicts with a lawyer's responsibilities to his client. *Id.* The committee also recognized the "strong likelihood that a lawyer could solicit clients by suggesting that he is willing to lend a criminal defendant bond money in order to solicit the defendant's criminal case." *Id.*; *cf.* Okla. Bar Ass'n Legal Ethics Comm., Op. 271 (1973) (opining that an attorney who executes a recognizance bond for his client is not in violation of the statute prohibiting an attorney from acting as surety by determining that a recognizance bond is not the same as signing a bond as surety); Or. State Bar Legal Ethics Comm., Op. 2005-4 (2005) (concluding that "advancing significant bail funds, especially in the absence of a strong personal or familial relationship, could result in a personal conflict of interest between lawyer and client"); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 92-59 (1992) (warning that a lawyer should not engage in a business interest which might directly or indirectly conflict with those of a client: "In the course of representing a client, incidental matters might arise such as the client's needs for a surety. . . . A lawyer serving or having an interest in any of those businesses is obviously in a conflict-of-interest with his or her client"); State Bar of Wis. Comm. on Prof'l Ethics, Op. E-96-1 (1996) (reiterating that the Wisconsin statute that prohibits an attorney from posting bond for someone who has been

1. Kansas Ethics Opinion

The Kansas Bar Association's Ethics Advisory Committee thoughtfully and deliberately analyzed the potential ethical violations that may arise when an attorney seeks to practice law and engage in the bail bond business.[90] Specifically, it addresses those ethical violations in relation to Model Rules of Professional Conduct 1.6, 1.7 and 1.8. Preliminarily, the ethics opinion addresses the lack of authority on the topic of attorneys as bail bondsmen, and remarks that "[g]iven the long association of bail bonding with the criminal justice system, there is a remarkable lack of authority on this topic."[91] The Kansas statute that addresses the topic of lawyers as bondsmen was enacted in 1867, and remains essentially the same.[92] The committee addresses the antiquity of the statute and establishes that "[w]e believe that even though the statute is old, it applies regarding bonds the attorney may want to issue within the judicial district where the attorney resides . . . . [S]tate statutes prevent the attorney from directly acting as a bail bondsman to anyone, client or non-client."[93] The opinion analyzes MRPC 1.8, which deals with prohibited transactions and determines that being a client's bail bondsman can materially affect the lawyers interest, concluding that "[t]he obligations of a bondsman on a bail bond is [sic] considerable. And if the client skips on the bond, it 'materially' affects the lawyer's own financial interests in the bond business."[94] The Kansas Supreme Court reiterated the high degree of fiduciary duty owed to the client, holding that "business transactions between attorney and client are subject to strict and crucial

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arrested indicates that the conduct would also violate the rules of professional conduct). Moreover, the Wisconsin Supreme Court has held that there are no exceptions to the statute, and that "it applies to all attorneys whether or not an attorney-client relationship is involved." *Id.* (citing Gilbank v. Stephenson, 30 Wis. 155 (Wis. 1872)).

90. Kan. Bar Ass'n Ethics-Advisory Comm., Op. 98-12 (1998).

91. *Id.*

92. *See* KAN. STAT. ANN. § 78-101 (2005) (stating that "no state or county officers, or their deputies, shall be taken as surety on the bond of any administrator, executor, or other officer, from whom, by law, bond is or may be required"). The statute also provides that "[n]o practicing attorney shall be taken on any official bond, or bond in any legal proceedings . . . in the district in which the attorney resides." *See generally* Sherman v. State, 4 Kan. 570 (1868) (explaining that the 1867 statute had been enacted in part because lawyers were officers of the court, and the courts were not allowed to take bonds from their own officers that benefited private litigants).

93. Kan. Bar Ass'n Ethics-Advisory Comm., Op. 98-12 (1998).

94. *Id.*

scrutiny, and such agreements are construed in a manner most favorable to the client."[95] Ultimately, the ethics committee opined that the provisions in the rules of professional conduct "preclude lawyers from handling both the criminal representation and writing the bail bond for the same client."[96]

2. South Carolina Ethics Opinion

The South Carolina Ethics Advisory Committee used an actual case to illustrate how an attorney can get into a compromising position by guaranteeing repayment of a client's debts.[97] In *Grievance Committee, Charleston County Bar Ass'n v. Lempesis*,[98] an attorney had personally guaranteed to repay the expenses his clients had incurred from a car collision,[99] but at some point during the representation he forged his clients' signatures on a settlement agreement.[100] In discussing the dangers of an attorney acquiring a financial interest in a case, the Ethics Advisory Committee pointed to the *Lempesis* case as:

> [I]llustrative of the possible effect such an arrangement might have on the attorney's professional judgment reserved for his client. By obtaining a financial stake in the handling of a particular case, an attorney might be tempted to push his client into accepting a settlement offer which the attorney would ordinarily advise be turned down.[101]

While acknowledging that not all attorneys would, given the same set of circumstances, behave in the same way as the attorney in *Lempesis*, the committee cautioned that "the possibility remains that numerous clients will be denied real representation if an attorney stands to be sued on a guaranty."[102] The committee concluded that "the practice of guaranteeing financial assistance to clients with a case contemplated or pending should be prohibited as un-

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95. Phillips v. Carson, 731 P.2d 820, 832 (Kan. 1987) (citing DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 1.5, at 9 (1980)).

96. Kan. Bar Ass'n Ethics-Advisory Comm., Op. 98-12 (1998).

97. S.C. Bar Ethics Advisory Comm., Op. 90-02 (1990).

98. 148 S.E.2d 869 (S.C. 1966).

99. Grievance Comm., Charleston County Bar Ass'n v. Lempesis, 148 S.E.2d 869, 871 (S.C. 1966).

100. *Id.* at 872.

101. S.C. Bar Ethics Advisory Comm., Op. 90-02 (1990).

102. *Id.*

ethical and clearly beyond the scope of the Code of Professional Responsibility."[103] The practice of acting as surety for a client in a criminal defense matter is analogous to an attorney taking a financial interest in the outcome of a case, as in *Lempesis*, because a criminal defense attorney can only be released from his financial obligation when a client has attended all court hearings or is returned to the custody of the state, and therefore the opportunity for a client to default exists throughout the duration of the representation, or stated differently, until there is an outcome.

3. Virginia Ethics Opinion

Elaborating on the myriad potential conflicts that may arise when an attorney engages in providing bond for a client, a Virginia Ethics Opinion suggests that attorneys should not engage in the practice of becoming surety for a client:

> A lawyer engaged in criminal defense work may not also own stock in a professional bail bond company that provides bail bonds to the lawyer's clients. Disclosure and consent cannot cure the conflict between the lawyer's duty as an advocate and his own interest in avoiding a forfeiture should the client fail to appear in court. Additionally, this type of business transaction with a client might easily be viewed as unconscionable, unfair, or inequitable. The issue of client confidentiality is also raised by the vision of a lawyer torn between his own financial interests and preserving the clients confidences and secrets, particularly where the client's whereabouts are the crux of the matter.[104]

4. Iowa Ethics Opinion

The Iowa Supreme Court Board of Professional Ethics and Conduct issued an ethics opinion in 1986 addressing the question of whether a lawyer could personally post bond for a criminal defendant-client.[105] In reaching its decision, the board identified three potential instances of conflicts, including an interesting dilemma

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103. *Id.*

104. Va. Opinion 1343, [1986-1990 Transfer Binder] Lawyers' Manual on Prof'l Conduct (ABA/BNA) § 901:8771 (1990).

105. Iowa State Bar Ass'n Comm. on Prof'l Ethics and Conduct, Formal Op. 86-04 (1986).

which has not been addressed by many jurisdictions.[106] Aside from the arguments that it might improperly provide a "feeder" to his law practice and that the client and attorney may have different goals for the outcome, the Iowa Board found an attorney serving simultaneously as a surety could also hinder a client's ability to seek another attorney if the attorney-client relationship terminates due to a dispute between the attorney and client.[107] While the board did not elaborate on why the client's freedom to seek alternate counsel might be affected, it implies the Sixth Amendment right to counsel argument.[108] For instance, in circumstances where the criminal case is close to trial, the judge may de facto deny a client's ability to fire his attorney by denying a continuance of the trial. In doing so, the court would not afford the client time to seek new counsel and grant that new attorney time to properly prepare for a trial. In that situation, if the relationship with the client's attorney-bail bondsman has deteriorated because of a dispute, then the client would have no choice but to proceed to trial with that attorney, in whom she may no longer have any confidence. Similarly, if the client has paid for the legal representation in a flat fee, and possibly also a premium or fee on the bond, the client may not be in a financial position to terminate her attorney's services and hire another attorney and/or bail bondsman—in effect, denying her right to counsel of her choosing. Ultimately, the Iowa board concluded that "there does exist the appearance of impropriety when, without some special circumstance a lawyer does post personal bond for a criminal defendant."[109] While it does not encourage the practice, the board does acknowledge that there could be instances where it would be appropriate without expanding on what those instances could be.[110]

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106. *See id.* (indicating that one potential conflict of interest could occur when a client may wish to appeal or seek a delay while an attorney might want to have funds returned to him as soon as possible, yet if the attorney follows the client's wishes, those funds will be held for a longer period of time).

107. *Id.*

108. U.S. CONST. amend. VI.

109. Iowa State Bar Ass'n Comm. on Prof'l Ethics and Conduct, Formal Op. 86-04 (1986).

110. *Id.*

5. Colorado Ethics Opinion

The Colorado Bar Association (CBA) Ethics Committee engaged in a comprehensive analysis of the rules of professional conduct when addressing concerns about attorneys engaging in a dual practice, a combination of legal and nonlegal occupations. It evaluated whether involvement in a second occupation would violate the improper solicitation of legal services rule by considering three factors: (1) whether the second occupation is conducted from the law office premises; (2) whether the second occupation is related to the practice of law; and (3) whether the lawyer provides both legal and nonlegal services in the same transaction.[111] With regard to whether the second occupation is conducted from the law office premises, the committee explored the possibility that it could give rise to a violation of the improper solicitation rule, also known as the "feeder" rule.[112] In the case of a bail bondsman, if during the course of seeking a bail bond and clients noticed that the bondsman was also an attorney and consequently retained him as an attorney for the underlying criminal matter that necessitated the bond, then an appearance of impropriety arises that the bail bond business "fed" the law practice. As for the relationship of the second occupation to the practice of law, the committee addressed the heightened ethical risk if the second occupation is law-related.[113] Specifically, the committee stated:

> In carrying on law-related occupations and professions the lawyer almost inevitably will engage to some extent in the practice of law, even though the activities are such that a layman can engage in them without being engaged in the unauthorized practice of law. If the second occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law the lawyer is considered to be engaged in the practice of law while conducting that occupation. Accordingly, he is held to the standards of

111. Colo. Bar Ass'n. Ethics Comm., Formal Op. 98 (1996).

112. *Id.* (citing COLO. RULES OF PROF'L CONDUCT R. 7.2(c), 7.3(a) (1996)).

113. The concern arises that an attorney would be held accountable for his actions under the Rules of Professional Conduct if the second occupation was closely related to the practice of law. "Lawyers engaged in a second occupation unrelated to the lawyer's law practice are nevertheless required to follow the Rules, except those Rules applicable only to lawyers acting as lawyers." Colo. Bar Ass'n. Ethics Comm., Formal Op. 98 (1996).

> the bar while conducting that second occupation from his law offices.[114]

Additionally, relating to the second criterion, the committee discussed the problem of a client erroneously assuming "that the attorney-client privilege attaches to their communications [regarding the second occupation] or inadvertently waiving the privilege if it does apply in the first instance."[115] In a related matter, the committee also discussed the flip side of that dilemma: the problem of an attorney using the information against a client that was gained "in performing the services related to the second occupation."[116] The committee discussed the practicality of distinguishing under what "profession" the information was obtained:

> [A]s a practical matter it may be difficult or even impossible to distinguish between information learned in the lawyer's capacity as an attorney and in operating a law-related business from the same office. This information is not limited to client confidences or secrets but applies to "all information to the representation, whatever its source."[117]

In addressing the last criterion, the second occupation being carried out in the same transaction as the practice of law, the committee warned that this posed "the greatest ethical risk of all, particularly if the second occupation is law-related and conducted from the law office."[118] This should be particularly poignant to attorneys who engage in the issuance of bail bonds. For example, a client seeking to be released from jail may come to a bail bondsman who is also a criminal defense attorney. If both businesses operate out of the same location, the client may see the issuance of bond to be law-related and the attorney's subsequent representation on the underlying criminal matter to be part of the same business transaction. This grey area is made murkier when the

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114. *Id.* (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 328 (1972)).

115. *Id.* (citing to Dennis J. Block, Irwin H. Warren & George F. Meierhofer, Jr., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739, 760-62 (1992)).

116. *See* Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996) (citing COLO. RULES OF PROF'L CONDUCT 1.8(b), 1.9 (c) (1996)).

117. Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996) (citing COLO. RULES OF PROF'L CONDUCT 1.6 cmt. (1996)).

118. Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996).

attorney agrees to apply the bond premium, or fee, to his legal fees.[119] In that situation, the attorney all but erases the line between the first and second occupations. The Colorado ethics committee analyzed this last criterion using the rules of professional conduct regarding conflicts of interest and entering into business transactions with a client.[120] In that analysis, the first determination is whether there is "another client," that is, whether the attorney's loyalties will be owed to a third party.[121] If there is no other client, then the attorney must determine whether the representation of the client will be materially limited by the lawyer's responsibility to a third party or by the lawyer's own interests.[122] The client must be informed of this potential conflict and the advisability of seeking independent counsel, and must be "given a reasonable opportunity to seek the advice of such independent counsel."[123] Finally, the client must consent in writing to the representation.[124]

Referring to the last criterion, the ethics committee unequivocally stated its disapproval of lawyers acting as a lawyer and engaging in another business capacity in the same transaction.[125] Further, it stated that "[s]ome dual occupation transactions are so fraught with ethical risk that the CBA Ethics Committee discourages them even with the informed consent of the client, such as transactions in which a lawyer acts both as lawyer and real estate broker."[126] In the context of a criminal defense attorney simulta-

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119. *See* GREATER SAN ANTONIO SOUTHWESTERN BELL YELLOW PAGES 313-318, § BAIL BONDS (2005) (providing advertisements that attorneys will apply the bond fee toward legal fees).

120. *See* Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996) (noting the relevance of ethical rules dealing with conflicts of interest and business transactions, but acknowledging the prevalence of other ethical dilemmas in this area as well).

121. COLO. R. PROF'L CONDUCT 1.7.

122. *Id.* 1.7(b).

123. *Id.* 1.8(a).

124. *Id.* Although Texas does not require consent to be in writing, it does mandate that if a disinterested attorney is informed of the specific facts and determines that a client could not possibly consent under those facts, the attorney seeking that opinion is prohibited from seeking the consent of the client. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (establishing that although an attorney should decline representation when an impermissible conflict is determined before representation, if the same conflict is only discovered or develops during representation then the attorney must take steps to eliminate the conflict or seek withdrawal, if necessary).

125. Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996).

126. *Id.*

neously serving as the client's bail bondsman, the lawyer must be extremely cautious with the handling of these inherent, and oftentimes irreconcilable, competing interests.

VI. TEXAS OPINES, BUT SAYS LITTLE

In stark contrast, while the vast majority of the states specifically prohibit attorneys from acting as bail bondsmen, or severely limit the extent to which an attorney can post bail, Texas permits its attorneys to simultaneously engage in the practice of commercial sureties.[127] Texas ethics opinions provide only a cursory review of the ethical issues that arise from this dual representation, and yet Texas has what is likely the only statutory provision allowing attorneys to serve in this dual role without providing a detailed analysis to help guide the attorney through the mire of ethical quicksand. The ethics opinions also seem contradictory at times.

The Texas ethics committee noted that "[t]he question of whether or not it is unethical for an attorney to act as surety on a criminal bond has been raised several times, and the opinions concerning this question are somewhat confusing."[128] Arguably, not only does Texas permit the practice, but through its enactment of the attorney exemption statute and the subsequent ethics opinions, it tacitly encourages it. There is little to discourage a criminal defense attorney in Texas from becoming a bail bondsman for his client, and frankly, plenty of incentives to becoming one.[129] Historically, Texas prohibited the practice of attorneys acting as

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127. TEX. OCC. CODE ANN. § 1704.163 (Vernon Supp. 2005).

128. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969).

129. By serving as the client's bail bondsman, the attorney can generate an additional source of income and essentially guarantee payment of fees if the client fears that failure to timely pay bond fee installments will cause the attorney to "jump off" the bond, thereby subjecting the client to recapture and detention in jail. In the case of our client, Stephanie, she consistently checked in every Monday with her criminal defense attorney's office by personally appearing and paying on her bail bond fee. In the nearly year and a half that she had been released on bail, she had paid her criminal defense attorney approximately $7500 as her bail bond fee for her bond (which had been set at $75,000). *See* Letter from Stephanie Smith, client, to Donna Bloom, co-author (Dec. 13, 2005) (on file with the *St. Mary's Law Journal*) (providing details of her experience as a criminal defendant client with an attorney also acting as her bail bondsman).

bail bondsmen for their clients.[130] Ethics opinions since the 1950s vacillate between determining that an attorney ethically may not serve as surety to concluding that there is no ethical violation if the attorney is to act as surety.[131] The lack of a brightline rule prohibiting an attorney from acting as surety, juxtaposed with the duties and obligations owed a client, as codified in the Disciplinary Rules of Professional Conduct, has caused Texas attorneys to inquire whether the practice of acting as bail bondsmen for their clients is ethical.[132]

These ethics opinions analyzed seven canons of ethics, with an emphasis on Canon 6, which deals with Adverse Influences and Conflicting Interests, and Canon 24, which deals with Solicitation,

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130. The statute authorizing attorneys to serve as their client's bondsman was enacted in 1959; prior to that the practice had vacillated between being allowed and prohibited, primarily through ethics opinions.

131. *Compare* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 46 (1952) (opining that an attorney may sign his name as surety for individuals indicted for felonies), *and* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962) (opining that "[i]t is not unethical for a member who does not practice criminal law to accept appointment as attorney-in-fact for a surety company"), *and* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962) (opining that it is not a violation of the canons of ethics for an attorney to act as surety in his client's criminal bond), *and* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (opining that "[a]n attorney may act as surety on his client's criminal bond so long as an attorney client relationship exists prior to signing" as surety), *with* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (opining that an attorney may not act as surety on his client's bond in a criminal case), *and* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (opining that an attorney practicing criminal law may not engage in the business of making bail or other bonds in criminal cases).

132. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (containing multiple inquiries as to whether an attorney can be a bondsman and for whom); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962) (questioning whether it is ethical for an attorney who does not practice criminal law to accept appointment as attorney-in-fact for a surety company); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962) (questioning whether it is a violation of the canons of ethics for an attorney to act as surety in his indigent client's criminal bond); *see also* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (inquiring as to whether it is a violation of the rules of conduct for an attorney to be surety for a criminal defense client); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (questioning whether it is a violation of the canons of ethics for a criminal defense attorney to engage in the business of making bail or other bonds in criminal cases) Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 46 (1952) (questioning whether an attorney can sign as surety for clients or friends charged with crimes).

direct or indirect.[133] These ethics opinions predate the adoption of both the Texas Code of Professional Responsibility and the subsequent Texas Disciplinary Rules of Professional Conduct; hence, they rely on the canons of ethics which were in place before the rules used today. Notably, the canon most discussed in the ethics opinions is Canon 24.[134] Texas Canon 24 states:

> A member should not solicit professional employment by circulars or advertisements, or by personal communications or interviews not warranted by personal relations, or endeavor to procure such employment through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills, or offering retainers in exchange for executorships or trusteeships to be influenced by a member. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments about causes in which the member is engaged or the importance of the member's position, and all other like self-laudation should be avoided.[135]

A. *Opinions 140 and 141*

For example, Opinion 140, issued in 1957, addresses the question of whether an attorney may act as surety on his client's bond in a

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133. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977) (analyzing Canons 4, 5, and 7); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 366 (1974) (analyzing Disciplinary Rules 1-201 through 2-105); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 351 (1970) (analyzing Canons 6, 31 and 35); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 46 (1952) (analyzing Canon 6).

134. Five of the nine ethics opinions referenced above use Canon 24 as the basis for their ethical analyses. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (analyzing Canon 24).

135. STATE BAR OF TEX., RULES AND CANONS OF ETHICS, Canon 24 (1957, superseded 1971).

criminal case.[136] The ethics committee confirmed that there was no specific canon of ethics that would be violated if an attorney acted as surety.[137] The committee referred to Rule 142 of the Texas Rules of Civil Procedure, which stated in relevant part: "No attorney . . . shall be surety in any cause pending in the Court, except under special leave of Court."[138] Acknowledging that the rule applied to civil cases, the committee nonetheless determined that if an attorney were to act as a surety on his client's criminal case he would be in violation of the spirit of the rule and of Canon 24.[139] Similarly, Opinion 141 determined that an attorney who engaged in the practice of criminal law violated Canon 24 if he simultaneously posted bail or bonds for individuals accused of crimes.[140] The committee opined:

> All members of the committee are of the opinion it is a violation of Texas Canon of Ethics 24 for an attorney who practices criminal law to engage in the business of making bail or other bonds in criminal cases, whether he makes such bonds under his own name or an assumed name, or to be in any way connected with, or have any interest in, any company which is engaged in the business of making bail or other bonds in criminal cases, regardless of where such company maintains its office, and regardless of whether it advertises its business.[141]

B. *Opinions 248 and 251*

Conversely, Opinion 248 analyzed whether it was ethical for an attorney who does not practice criminal law to accept an appointment as an attorney-in-fact for a surety company who writes bail

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136. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957).

137. *Id.*

138. *Id.* However, Rule 142 has since been amended with the 1988 amendments to the Texas Rules of Civil Procedure and replaced with a new rule which appears to allow attorneys to serve as sureties for trial and appellate costs. William W. Kilgarin, George Quesada & Robin Russell, *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 886 (1988).

139. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957).

140. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957). The committee did not provide an analysis when reaching this decision; it merely determined that it did violate Canon 24.

141. *Id.*

bonds.[142] The committee determined that such conduct would not be unethical, although it is undesirable.[143] The ethics committee noted that the bail bond practice "may or may not feed the practice of a civil law attorney," and therefore would not violate Canon 24.[144] However, if the attorney used the bail bond business to solicit legal work he would then be in violation of Canon 24.[145] Reaching the same conclusion in Opinion 251, the committee determined that an attorney who acts as a bondsman for a criminal defense client is not in violation of the rules of ethics.[146] To determine whether the attorney would be improperly soliciting legal work, the committee stated that the crux of the analysis revolves around the attorney's motivation in seeking the bond work; if his motivation is to solicit legal work then the attorney might be in violation of Canon 24.[147]

C. *Opinion 347*

In Opinion 347 the committee engaged in its most thorough analysis, while still cursory compared to opinions from other jurisdictions,[148] regarding an attorney acting as bail bondsman.[149] The fact situation related by the inquirer seeking the opinion is, in relevant part:

> A practicing attorney habitually engages in the practice of acting as surety on bail bonds in criminal cases, thereafter representing the individuals upon whose bond he acts as surety. The Judge of the District Court of the county where the above practice occurs has en-

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142. *Id.*

143. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962).

144. *Id.*

145. *Id.*

146. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962).

147. *Id.*

148. *See generally* Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996) (dedicating over thirteen pages to the discussion of the ethical concerns associated with engaging in dual practice); California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1995-141 (1995) (detailing a "lawyer's ethical responsibilities when providing non-legal services to a client").

149. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969).

tered an order, which is filed with the District Clerk, authorizing the lawyer-bondsman to engage in the practice as acting as surety.[150]

The committee stated that "[t]he business of acting as surety on criminal bonds could very easily be a feeder to the attorney's practice of law."[151] Further, the committee warned about the unethical nature of an attorney advancing funds to a potential client in order to obtain the case.[152] Conversely, once an attorney-client relationship has been established, the attorney may advance funds to the client so long as he does not do so "with such notoriety as to constitute indirect solicitation."[153] The committee concluded:

> After the attorney client relationship has come into existence, it is not unethical for an attorney to sign as surety on his client's criminal bond, so long as he does not do so with such notoriety as to constitute indirect solicitation. If the attorney-client relationship has not come into existence, it is unethical for an attorney to sign as a bondsman and thereafter represent the principal on the bond in a criminal case. This is true even if the attorney has been given authority by the Court to sign as bondsman.[154]

D. *Opinion 366*

The last opinion to address Canon 24, at least tangentially, is Opinion 366.[155] The committee posed the question of whether an attorney could have a financial interest in a bail bond business if he did not participate in the actual business and did not accept employment from a client of the bail bond business.[156] In its discussion the committee made reference to six prior ethics opinions, all revolving around the question of whether it is unethical for an attorney to be in any way connected to the practice of bail bonds.[157] In contrast to the six prior opinions, the committee made its determination using the Disciplinary Rules, which replaced the canons,

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150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969).
155. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 366 (1974).
156. *Id.*
157. *Id.*

thereby making the wording in Canon 24 obsolete.[158] Specifically, the committee stated:

> The primary basis for the above [six] opinions has been that the operation of the bail bond business constituted "indirect solicitation" and served as a "feeder" to the law practice. These phrases have been entirely omitted from the Code of Professional Responsibility indicating an intent not to rely on such vague phrases as standards by which to judge the outside activities or occupations of attorneys. Such activities are now governed by several comprehensive but specific disciplinary rules, particularly DR 1-201 through DR 2-105.[159]

Utilizing Disciplinary Rule 2-102(E) as the basis for its conclusion, the committee determined that an attorney may engage in both the practice of law and another business as long as he does "not so indicate on his letterhead, office sign or professional card, nor . . . identify himself as a lawyer in any publication in connection[ ] with his other profession or business."[160] The committee also opined that a lawyer who has a financial interest in the bail bond business but neither participates in the business nor accepts employment through clients of that business in doing so will not violate the rules of ethics.[161] Interestingly, the committee commented that the bail bond business was so law-related that if an attorney were to participate in that practice he would in essence be considered to be engaging in the practice of law and accordingly would be expected to comply not only with Disciplinary Rule 2-102(E), but also with all other provisions of the Code of Professional Responsibility.[162]

E. *Opinion 46*

It is axiomatic that Texas has chosen to analyze these ethical quandaries in the ambit of solicitation rather than one which safeguards the inviolate loyalties owed to a client. For example, of the nine Texas ethics opinions discussed herein, five were reached by utilizing Canon 24 addressing solicitation, while only two utilized

158. *Id.*
159. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 366 (1974).
160. *Id.*
161. *Id.*
162. *Id.*

Canon 6, which addresses adverse influences and conflicting interests.[163] Specifically, Canon 6 addresses the duties owed to clients and seems the most relevant provision when determining whether an attorney can ethically represent a client in a criminal defense matter when he is her bondsman.[164]

Moreover, Opinion 46, which is based on Canon 6, does not discuss why the practice of being a bondsman for a client would not violate it; rather, it merely states, without discussion or interpretation, that "[a] majority of the members of the committee are of the Opinion that becoming such sureties is not a violation of the law or any Canon of Ethics."[165]

F. *Opinion 388*

Notably, only one Texas ethics opinion considers the attorney as bondsman business enterprise from the perspective of protecting the client rather than merely protecting the image of the legal profession.[166] In Opinion 388, the ethics committee analyzed the question of whether an attorney who serves as his criminal defense client's bail bondsman violates the Code of Professional Responsi-

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163. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 46 (1952) (analyzing Canon 6); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 351 (1970) (analyzing Canons 6, 31 and 35); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 366 (1974) (analyzing Disciplinary Rules 1-201 through 2-105); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977) (analyzing Canons 4, 5, and 7). Five of the nine ethics opinions referenced *supra* note 133 use Canon 24 as the bases for their ethical analysis. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962)(analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962) (analyzing Canon 24); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (analyzing Canon 24).

164. STATE BAR OF TEX., RULES AND CANONS OF ETHICS, Canon 6 (1957, superseded 1971).

165. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 46 (1952).

166. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

bility if he subsequently, during the representation, "goes off" the bond, resulting in the client being jailed.[167] In a thoughtful opinion, the committee analyzed Canons 4, 5 and 7, which concern preserving the confidence and secrets of a client, exercising independent professional judgment on behalf of a client, and zealously representing a client within the bounds of the law, respectively.[168] The committee began its analysis with a determination that, based on the fact situation before it, the attorney had engaged in both the practice of law by establishing an attorney-client relationship and in a separate business transaction. In doing so, the attorney subjected himself to the Rules of Professional Conduct for the actions he took in each of his two roles.[169] Further, the committee placed a higher burden on an attorney who seeks to "go off" his client's bond by stating that if Canons 4, 5 and 7 are viewed conjunctively, it would "strongly indicate that a lawyer could turn his client in and relieve himself from the obligations of the bond only in the event that the client is about to commit an act contrary to the law" and that the lawyer knows this as a matter of fact.[170] The opinion considers Disciplinary Rule 7-101, which states in relevant part, "a lawyer shall not intentionally: . . . prejudice or damage his client during the course of the professional relationship,"[171] and determines that it would be "clearly apparent that a lawyer who turns his client in to the authorities for any other reason than that provided in Disciplinary Rule 7-102[172] would be in violation of Dis-

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167. *Id.*

168. TEX. STATE BAR R., art. XII, § 8, Canon 4 (Tex. Code of Prof'l Resp.), 34 TEX. B.J. 765 (1971, superseded 1990); TEX. STATE BAR R., art. XII, § 8, Canon 5 (Tex. Code of Prof'l Resp.), 34 TEX. B.J. 766 (1971, superseded 1990); TEX. STATE BAR R., art. XII, § 8, Canon 7 (Tex. Code of Prof'l Resp.), 34 TEX. B.J. 768 (1971, superseded 1990).

169. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

170. *Id.*

171. *See id.* (citing TEX. STATE BAR. R., art. XII, § 8, DR 7-101 (Tex. Code of Prof'l Resp.), 34 TEX. B.J. 768 (1971, superseded 1990)).

172. *Id.* Texas State Bar Rule DR-7-102 states, in relevant part:

> In his representation of a client, a lawyer shall not:
>
> . . ..
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent
>
> (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
>
> (B) A lawyer who receives information clearly establishing that:

ciplinary Rule 7-101(A)(3)."[173] Moreover, the committee considered the ethical requirements that a lawyer be sensitive to the rights and wishes of his clients and not use information obtained in his professional relationship, and that information should not be used to disadvantage a client or to benefit the lawyer's own purpose without the client's consent.[174] Ultimately, the committee cautions attorneys that they are under the "onus of a higher responsibility to the client than would be a professional bondsman."[175]

Being that a client is owed the highest duty of loyalty and zealous representation, and attorneys must preserve the client's confidences inviolate, a thorough review under the Texas Professional Rules of Disciplinary Conduct must be undertaken when determining whether it is proper for an attorney to act as his client's bail bondsman.

VII. Risk Analysis: Texas Disciplinary Rules of Professional Conduct

An attorney's uncompromising loyalty to his client's interests forms the very foundation of the attorney-client relationship in the United States. This loyalty can only be properly carried out if a lawyer fully comprehends that any other interest of the lawyer, whether personal or professional, has the potential to compromise, if not destroy, the lawyer's necessary dedication to "vindicating the client's legal position."[176] In Texas, courts have asserted that the attorney-client relationship is one of "most abundant good faith; [which requires] absolute and perfect candor . . . openness and honesty; [and] the absence of any concealment or deception

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(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify same, and if his client refuses or is unable to do so he shall reveal the fraud to the affected person or tribunal.

Tex. State Bar R., art. XII, § 8 DR 7-102 (Tex. Code of Prof'l Resp.), 34 Tex. B.J. 768 (1971, superseded 1990).

173. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

174. *Id.*

175. *Id.*

176. *See* Charles W. Wolfram, Modern Legal Ethics 146 (Hornbook Series Practitioners ed. 1986) (discussing the expectation of loyalty a client has of her lawyer).

. . . ."[177] Furthermore, "[t]he relationship existing between attorney and client is characterized as 'highly fiduciary,' and requires proof of 'perfect fairness' on the part of the attorney."[178] When a lawyer's separate interest threatens to compromise the interests of his client, "the Disciplinary Rules come into play."[179] If an attorney chooses to avail himself of the statutory attorney exemption providing the opportunity to serve in the role as both bail bondsman and legal advocate for his criminal defendant client, he likewise exposes himself to scrutiny under the Texas Disciplinary Rules of Professional Conduct.[180] In fact, the ethics committee for the State Bar of Texas has spoken on this very issue and explained that those legal rights statutorily provided to a surety or bondsman "[do] not override the ethical responsibilities and considerations of a lawyer who has accepted the responsibilities imposed upon him by the attorney-client relationship."[181] Therefore, the practice of acting as bail bondsman for a criminal defendant client raises ethical concerns in four areas: (1) conflict with the client involving the lawyer's own potentially adverse pecuniary interest; (2) protection

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177. Hefner v. State, 735 S.W.2d 608, 624 (Tex. App.—Dallas 1987, writ ref'd) (quoting State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.)).

178. Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (citing Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1965) and Montgomery v. Kennedy, 669 S.W.2d 309, 312-14 (Tex. 1984)).

179. Tex. Comm. on Prof'l Ethics, Op. 555, 68 TEX B.J. 228 (2004).

180. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977) (recognizing the potential violations of the Rules of Professional Conduct if an attorney were to act in the dual capacity of attorney and bail bondsman); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10 cmt. g (1998) (identifying that an attorney may ethically operate an ancillary business, such as a real estate agency, insurance agency, consulting enterprise, or similar business along with a law practice, so long as the dual practice is "conducted in accordance with applicable legal restrictions, including those of the lawyer codes"). When the services offered as a part of the ancillary business are not distinct and understood as separate by the client, the ancillary service could be considered as part of the legal services rendered for purposes of adherence to the lawyer code. *Id.* Determining the distinctive nature of the ancillary services depends on a variety of factors, including the client's understanding of the separateness of the services, the location where the services are offered (same location would suggest less distinction), and the identities of the personnel working on the matter (whether each enterprise relies on separate staff). *Id.* Therefore, an attorney acting as bail bondsman from one office with one set of staff members is likely to be subjected to the Texas Rules in both enterprises.

181. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

of client confidentiality; (3) improper solicitation of clients; and (4) financial relationships between a lawyer and his client.[182]

A. *Conflict of Interest: General Rule*

Under the Texas Disciplinary Rules, a lawyer is expected to "act with competence, commitment and dedication" regarding the interests of the client and to advocate zealously on the client's behalf.[183] When an attorney acts as his client's bail bondsman, he enters into a written undertaking with the state to guarantee the appearance of his client at all subsequent hearings on the matter.[184] And, as surety, he will be free of the obligation under the contract only when the terms of the bond have been met: in other words, when the pending criminal matter has been resolved.[185] This undertaking constitutes "a contract between the surety and the state."[186] Delivering the criminal defendant to court is at the heart of the bargain. If the attorney-bail bondsman fails to deliver on his promise, he will likely be subject to a significant personal financial

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182. *See* California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1995-141 (1995) (detailing a lawyer's ethical responsibilities when providing nonlegal services to a client); Fla. State Bar Prof'l Ethics Comm., Op. 90-1 (1990) (explaining the hardship placed on the attorney-client relationship when a lawyer breaches client confidence to inform the court about a client's intent to jump bail); N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. 647 (1993) (discussing the concern that an attorney providing bail could place his own recovery over that of the client's interest); N.C. St. Bar Assoc. Ethics Comm., Op. RPC 173 (1994) (indicating the strong likelihood that an attorney could use the offer of bail bond assistance as a means to solicit the defendant's criminal case); *see also* Kan. Bar Assoc. Ethics-Advisory Comm., Op. 98-12 (1998) (advancing the position that although an attorney is permitted to enter into a business transaction with a client, he may not do so if the interest acquired is adverse to the interests of the client). Kansas further prohibits a lawyer from representing a client if he would be materially limited by his own interest. *Id.* Because the Kansas Bar considers the "obligations of a bondsman on a bail bond" to be considerable, especially "if the client skips on the bond," attorneys in that state are precluded from handling both the criminal matter and the bail bond for the same client. *Id.*

183. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 6.

184. *See* TEX. CODE CRIM. PROC. ANN. art. 17.02 (Vernon 2005) (stating that a "bail bond" is a written agreement by the defendant and his sureties guaranteeing his appearance before some court).

185. 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 16.24 (2d ed. 2001).

186. Op. Tex. Att'y Gen. No. JC-0121 (1999) (addressing whether a county judge may act as a surety on a bail bond in the county where he presides); *accord* Morin v. State, 770 S.W.2d 599, 599 (Tex. App.—Houston [14th Dist.] 1989), *pet. dism'd, improvidently granted*, 800 S.W.2d 552 (Tex. Crim. App. 1990) (en banc); Keith v. State, 760 S.W.2d 746, 747 (Tex. App.—Fort Worth 1988), *aff'd*, 802 S.W.2d 690 (Tex. Crim. App. 1990) (en banc).

loss in the form of bond forfeiture.[187] This contract with the state is a business arrangement separate and distinct from the legal representation the attorney is bound to provide the criminal defendant.[188] Moreover, the contract provides a financial obligation where the lawyer's interests could potentially conflict with the interests of the client.[189]

Texas Disciplinary Rule 1.06 clearly prohibits a lawyer from representing a client where he has potential or actual conflicting interests with that of his client.[190] And at least one Texas ethics opinion has recognized that "[w]hen an attorney personally executes a bail bond for and on behalf of a client accused of a crime, he, at such time, is both rendering a service to the client and creating a potential area of conflict between himself and his client."[191] In most cases, an attorney may cure the evil of conflicting interests with the informed consent of the client.[192] However, consent does not simply involve disclosure of the conflict and potential risk involved,

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187. *See* Matt Joyce, *Lawyer Contests Bond Tab*, WACO TRIBUNE-HERALD, Oct. 29, 2005, at 1B (covering an attempt by a Waco lawyer also serving as his client's surety to avoid a $50,000 forfeiture when the client "went underground").

188. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

189. *See* Tex. Comm. on Prof'l Ethics, Op. 555, 68 TEX. B.J. 228 (2004) (discussing the permissibility under the Rules for a lawyer to enter into a business arrangement with a chiropractor where the lawyer owns a portion of the chiropractor's practice, the lawyer refers his clients to the chiropractor, and the lawyer receives a share of the profits, including those profits attributable to the clients referred by the lawyer).

190. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2) (emphasizing that "a lawyer shall not represent a person if the representation of that person . . . reasonably appears to be or become adversely limited . . . by the lawyer's . . . own interests"); Tex. Comm. on Prof'l Ethics, Op. 555, 68 TEX. B.J. 228 (2004) (illustrating the analysis necessary when considering the permissibility under the Rules for a lawyer to enter into a business arrangement that could conflict with his client's interests); *see also* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 71 (1953) (indicating that where there would be even a possible conflict of interest, the representation would be improper).

191. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

192. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c)(1), (2). This rule states that:

> A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Id.

but requires the lawyer to consider, independent of the client's consent, whether "a disinterested lawyer would conclude that the client [should or] should not agree to the representation under the circumstances."[193] If the lawyer concludes the client should not agree, then he "should not ask for such agreement or provide representation on the basis of the client's consent."[194] It is also possible to conclude that given the vulnerability of one accused of a crime and under the traumatic influence of a recent arrest and detention, the disclosure will not obviate the conflict, which would also require the attorney to avoid the dual role notwithstanding the client's consent.[195] Judicial decisions addressing "nonconsentable"

193. *Id.* 1.06 cmt. 7; *accord id.* 1.06 cmt. 1 (establishing that although an attorney should decline representation when an impermissible conflict is determined before representation, if the same conflict is discovered or develops during representation then the attorney must take steps to eliminate the conflict or seek withdrawal, if necessary).

194. *Id.* 1.06 cmt. 7.

195. *See* N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. 647 (1993) (providing reasons behind the position that lawyers may not post bond for those persons they represent); Va. Opinion 1343, [1986-1990 Transfer Binder] Lawyers' Manual on Prof'l Conduct (ABA/BNA) § 901:8771 (1990) (asserting that "disclosure and consent cannot cure the conflict between the lawyer's duty as an advocate and his own interest in avoiding a forfeiture should the client fail to appear in court"); *cf.* Tex. Comm. on Prof'l Ethics, Op. 555, 68 TEX. B.J. 228 (2004) (contending that a lawyer who owns a portion of a chiropractor's practice may not refer his clients to the chiropractor in exchange for a share of the latter's profits, even with full disclosure and client consent, because the conflict of interest involved is not one for which it would be proper to seek client consent); Tex. Comm. on Prof'l Ethics, Op. 547, 66 TEX. B.J. 430 (2003) (clarifying that a lawyer may not enter into an arrangement with a group of medical professionals pursuant to which the group would fund the law firm's television advertisements with the expectation, but not the obligation, that the law firm would refer clients to the medical group, even with full disclosure to any client so referred, because "the law firm could never meet the requirements of Rule 1.06(c)(1) with respect to the conflict of interest involved"); Tex. Comm. on Prof'l Ethics, Op. 543, 65 TEX. B.J. 763 (2002) (expressing that lawyer could not enter into an arrangement to serve as in-house counsel for a health-care provider at a reduced fee in return for the provider's referral of its clients suffering from personal injuries to the lawyer, because lawyer could not meet Rule 1.06(c)(1)'s standards); Tex. Comm. on Prof'l Ethics, Op. 536, 64 TEX. B.J. 694 (2001) (opining that a lawyer may not receive a fee from an investment adviser for referring his clients to the adviser for investment advice, even with full disclosure and informed client consent, because "the standards of Rule 1.06(c) cannot be met under these circumstances"); Tex. Comm. on Prof'l Ethics, Op. 535, 64 TEX. B.J. 78 (2001) (noting that a lawyer cannot participate in a court-sponsored lawyer-for-a-day program, whereby lawyers volunteer to represent indigent criminal defendants, but are paid for their services only if their client pleads guilty that day, because "there could never be an adequate basis for a determination that both requirements of Rule 1.06(c) are met" in those instances); Tex. Comm. on Prof's Ethics, Op. 500, 58 TEX. B.J. 380 (1995) (opining that a lawyer cannot represent multiple plaintiffs in an automobile accident once it becomes clear that the funds available to satisfy their claims is substantially less than the reasonable value of those

conflicts frequently involve facts establishing that the client, who is often less than sophisticated in hiring an attorney, was not adequately informed or was not capable of fully appreciating the threat involved in the conflict.[196]

It is not difficult to imagine circumstances in which a lawyer's own interest in avoiding the financial loss of forfeiture would interfere with the attorney's otherwise good judgment, candor, and loyalty owed to his client. For example, the attorney may desire to release himself from financial liability on the bond (getting "off the risk")[197] based on concerns and conclusions reached as a result of confidential client communications (an ethical dilemma, in and of itself).[198] The attorney may be reluctant to disclose his intention to "jump off" the bond to his client, fearing that this information may encourage the client's failure to appear and place the attorney's financial position in further jeopardy.[199] This fear may not be mis-

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claims because, in effect, the lawyer's clients are very much like opposing parties in litigation within the meaning of Tex. Rule 1.06(a)). Other jurisdictions have occasionally concluded that conflicts of types deemed "nonconsentable" in Texas can be waived by a lawyer's clients, provided those clients are given sufficient disclosure of the conflicting interests involved and it does not otherwise appear that the lawyer's representation or exercise of independent professional judgment on their behalf will be impaired. *See* State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 05-01 (May 2005) (explaining that dissenting members of the committee recommended following the prophylactic approach followed in Texas).

196. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g(iv) (1998).

197. *See* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE, CRIMINAL PRACTICE & PROCEDURE § 16.24 (2d ed. 2001) (explaining the professional bondsman's role in pretrial release, including the process by which a surety may "get off the risk" by absolving himself of financial liability on the bond).

198. *See* Fla. State Bar Prof'l Ethics Comm., Op. 90-1 (1990) (relating that "[c]riminal defendants when talking with their lawyers . . . often think out loud about skipping out, or come right out and say that they plan not to show up for court again; and yet, in a great majority of these cases, when the time comes, they do show up for court, in spite of what they have said"). If lawyers, after receiving this type of client communication, felt obligated to inform the court of the client's disclosure, the end result could be the destruction of the attorney-client relationship. *Id.*; *see also* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977) (emphasizing that an attorney executing a bail bond on behalf of his client "creat[es] a potential area of conflict between himself and his client" and may not "go off such bond and thereby cause his client to be placed in jail, unless such attorney *knows as a matter of fact* that his client is planning to commit a crime, a fraud, or is about to refuse to comply with the terms of the bond") (emphasis added).

199. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 2005) (providing the process by which a surety releases himself from financial liability and surrenders the principal to the state).

placed, given that the likely result of the attorney's release of surety is subsequent arrest and detention of his client.[200]

However, the attorney contemplating release of the bond and arrest of his client would do well to explore the provisions of Disciplinary Rule 1.03 detailing the obligation of an attorney to "keep a client reasonably informed about the status of a matter."[201] Indeed, the comment section of this Rule unequivocally asserts that a "lawyer may not, however, withhold information to serve the lawyer's own interest or convenience."[202] Even a commercial bail bondsman is required to provide notice to the defendant's attorney of her intention to surrender the defendant to authorities.[203] The attorney wearing both the hat of a bondsman and that of an advocate could certainly be torn regarding his strategy when faced with potential or actual noncompliance of a client with the terms of a surety agreement. It is entirely possible that an attorney's concern that his client maintains the wherewithal to satisfy his obligations under the terms of the bond may interfere with the lawyer's judg-

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200. *See id.* (detailing when a judge finds "cause for the surety to surrender his principal," the court is required to issue an arrest warrant so the defendant may be taken back into custody).

201. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a).

202. *Id.* 1.03 cmt. 4.

203. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19(a)(6) (Vernon 2005) (providing the process and requirements involved in surrendering the bond and acquiring an arrest warrant). Presumably, the statute's requirement of notice to the principal's attorney is an attempt to provide due process to the principal, so that he may contest the surrender if he believes it to be unreasonable. This requirement of notice begs the question of what notice, if any, an attorney is required to provide his client when he intends to surrender the bond. An attorney, it seems, would not be forced to swear to the requirement that he provided notice to himself. Conceivably, a defendant would lose at least some due process protection if his attorney is also his bail bondsman and the attorney fails to inform his client of his plan. *Cf.* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84 (1988) (asserting that "[a]n elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections"). For example, Stephanie, our client, was taken completely by surprise. She met her attorney at his office first thing on a Wednesday morning to discuss the plea bargain conference scheduled for the next day, and by noon she was in the custody of "bounty hunters," being transferred to the county jail on order of her attorney—who never disclosed his intention to surrender her bond. *See* Telephone Interview with Emile Harmon, Student Attorney, St. Mary's University School of Law Center for Legal and Social Justice (Jan. 3, 2005) (explaining the details that led up to Stephanie's plea bargain).

ment when advising his client on the criminal matter.[204] But there is no dilemma for a nonlawyer bail bondsman; when faced with the same set of facts she would not hesitate to pursue surrender. In fact, she would merely be doing her job.[205] An attorney, on the other hand, has a higher calling and a greater duty that rises above that of his interest as a bail bondsman. One state ethics committee put it this way:

> So long as there remains any possibility that counsel may be able to effect a court appearance by a client, in spite of the client's claims that the client will not be going to court when required, experience teaches and ethics requires that effectuating the client's appearance is what counsel must spend his or her energies trying to accomplish. Working towards resolving the anticipated problem [with the client] . . . rather than telling the court about the anticipated problem, is what is ethically required of the lawyer.[206]

In a Texas ethics opinion addressing the very subject of the propriety of an attorney jumping off the bond of his client, the committee spoke to the right of a bail bondsman to surrender the principal under the Texas Code of Criminal Procedure, adding that "[t]his right, however, seems to speak to the legal right of a surety or bondsman, but does not override the ethical responsibilities and considerations of a lawyer who has accepted the responsibilities imposed upon him by the attorney-client relationship."[207]

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204. *See* California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1981-55 (1981) (exploring the adverse effect of an attorney guaranteeing a bond on the representation provided to the client).

205. *See* Telephone Interview with Helen Allred, Owner, A-Tex Bonding Co. (Jan. 5, 2006) (commenting on the role she believes a bail bondsman plays when performing on his contract with the state to deliver the defendant to court). Ms. Allred is also a member of the board of directors of Professional Bondsmen of Texas. It should be noted, however, that in surrendering the principal, Ms. Allred is required to provide notice of her intention to the principal's attorney and swear to completion of this requirement in the affidavit to the court seeking an arrest warrant. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19(b) (Vernon 2005) (explaining that the court must determine that cause exists for the surrender before issuing an arrest warrant). Conceivably, a defendant would lose at least some due process protection if his attorney is also his bail bondsman.

206. Fla. State Bar Prof'l Ethics Comm., Op. 90-1 (1990) (explaining the hardship placed on the attorney-client relationship when a lawyer breaches a client confidence to inform the court about the client's intent to jump bail).

207. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977). This opinion asserts that a "lawyer is under the onus of a higher responsibility to the client than would be a professional bondsman." *Id.*

The nature of the relationships between a bail bondsman and his customer and a lawyer and his client are entirely distinct. The business of commercial bail bonding is "a cross between insurance and law enforcement."[208] The commercial bail bondsman effectively steps into the shoes of the state to guarantee the defendant appears in court on his criminal matter when requested.[209] The bail bondsman "may do whatever is necessary, to insure [sic] that the defendant will return to court, including taking collateral, requiring the defendant to report in phone or in person, requiring a defendant to be monitored and even placing a guard on the defendant, if necessary to insure [sic] their return."[210] In essence, a bail bondsman is "an arm of the criminal justice system."[211]

In stark contrast to that of a bail bondsman, an attorney's "basic duty . . . is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[212] When an attorney engages in both occupations simultaneously there is the danger that the two will be blurred in the experience of the client.[213] And, "[t]he common thread in the legal authority on this subject is a concern that lawyers avoid creating . . . a likelihood of confusion in the mind of the client about whether services are being performed within the lawyer's role as a lawyer or within the lawyer's role in the second occupation."[214] "If an attorney is to represent his client [with diligence,] he should [be well informed] of the circumstances surrounding the client's [al-

208. Kan. Bar Assoc. Ethics-Advisory Comm., Op. 98-12 (1998).

209. *See* TEX. CODE CRIM. PROC. ANN. art. 17.42 (Vernon 2005) (relating the responsibilities of a county's personal bond office, which provides a similar service as bail bondsman for those defendants the court releases on personal bond). A personal bond is a means by which a defendant is released from detention pretrial without sureties or other security. TEX. CODE CRIM. PROC. ANN. art. 17.03 (Vernon 2005).

210. *See* Professional Bail Agents of the United States, What is Bail?, http://www.pbus.com/displaycommon.cfm?an=1&subarticlenbr=1&printpage=True (last visited Jan. 5, 2006) (providing information and resources about commercial bail) (on file with the *St. Mary's Law Journal*).

211. Telephone Interview with Helen Allred, Owner, A-Tex Bonding Co. (Jan. 5, 2006) (commenting on the role she believes a bail bondsman plays when performing on the contract with the state to deliver the defendant to court).

212. JOHN M. BURKHOFF, CRIMINAL DEFENSE ETHICS 2d 754 (2005).

213. *See* Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996) (concerning the ethical propriety of lawyers practicing law and being actively involved in one or more separate professions or businesses).

214. *Id.*

leged criminal conduct]." Often the client will not understand what information she possesses is relevant. Therefore, it is critical to disclose everything she knows to her attorney. If the client screens this information because of worries about what the attorney may choose to disclose to the court, she may censor relevant information. The veracity of the adversary system relies on a client's trust in her attorney and the confidentiality inherent in their relationship.[215] Given the necessity for complete candor between the criminal defendant client and her lawyer, any confusion about the attorney's role influencing the client to withhold information is a serious risk and could have life-altering consequences.[216]

B. *Confidentiality*

The Texas Supreme Court stated that "[a] lawyer has a solemn obligation not to reveal privileged and other confidential client information, except as permitted or required in certain limited circumstances as provided in the rules."[217] Violating the confidentiality of a client is at the heart of the ethical quagmire faced by an attorney acting as his client's bail bondsman. An attorney has a duty to cautiously guard the confidences and secrets of his client,[218] whereas a bail bondsman has only his financial investment to protect. When an ethical attorney inhabits both roles si-

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215. *See* Timothy J. Miller, Note, *The Attorney's Duty to Reveal a Client's Future Criminal Conduct*, 1984 DUKE L.J. 582, 593 (1984) (exploring questions concerning an attorney's duty to reveal his client's intent to commit a criminal act).

216. Stephanie often expressed concerns to her student attorneys representing her in a family law matter about the quality of her criminal representation, but believed she could not discuss them openly with her attorney because, as her bail bondsman, he had the power to return her to jail. Telephone Interview with Emile Harmon, Student Attorney, St. Mary's University School of Law Center for Legal and Social Justice (Jan. 3, 2005).

217. Duncan v. Bd. of Disciplinary Appeals, 898 S.W.2d 759, 761 (Tex. 1995); *see generally* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 (detailing the provision of an attorney's duty of confidentiality to her clients).

218. *See* JOHN M. BURKHOFF, CRIMINAL DEFENSE ETHICS 2d 143 (2005) (citing MODEL RULES OF PROF'L RESPONSIBILITY EC 4-1 (1983) for the following:

> [T]he fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed him or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and his lawyer must be equally free to obtain information beyond that volunteered by his client . . . . [t]he observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client . . . facilitates the full development of facts essential to proper representation . . . .).

Id.

multaneously, he does so on a wing and a prayer that he will not find himself in the midst of a sticky situation.[219] But, given the statutory requirements regulating the business of bail bonding, a very real possibility exists that he will be forced to consider violating his client's confidence at some point in his attorney-bail bondsman career.[220]

If a bail bondsman wishes to be released from financial responsibility on the bond and surrender the principal back into the custody of the sheriff, he is required to seek an arrest warrant by filing an affidavit of his intention "before the court or magistrate" where the prosecution is pending.[221] This affidavit must include, among other things, "the name of the defendant; . . . the date of the bond; [and] the cause for the surrender."[222] In the facts supporting the cause for surrender, an attorney will face the most troublesome ethical challenges because he will likely breach his client's confidence in an effort to end his liability on the bond. For example, an attorney who wishes to reduce his risk on the bond and place his client back in jail may need to include in the affidavit certain state-

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219. *See* Matt Joyce, *Lawyer Contests Bond Tab*, WACO TRIBUNE-HERALD, Oct. 29, 2005, at 3B (covering an attempt by a Waco lawyer, also serving as his client's surety, to avoid a $50,000 forfeiture when the client "went underground"); *see also* Akridge v. State, 13 S.W.3d 808, 809 (Tex. App.—Beaumont 2000, no pet.) (urging the court to consider that attorney's representation resulted in a conflict of interest because he also served as her bail bondsman); Mendez v. State, No. 05-00-01743-CR, 2001 WL 946824 at *1 (Tex. App.—Dallas 2001) (not designated for publication) (arguing his counsel was ineffective due to an undisclosed conflict of interest from serving as both lawyer and bail bondsman).

220. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 2005) (providing the process by which a surety releases himself from financial liability and surrenders the principal to the state). This statute requires the surety to submit an affidavit to the court with jurisdiction in the criminal matter, relating the cause for the surrender of the principal. *Id.* It is the responsibility of the court to determine from the affidavit that the surety has sufficient cause to release himself from the financial risk of the bond and deliver the principal back into custody. *Id.*; *see also* TEX. OCC. CODE ANN. § 1704.202(d) (Vernon 2004) (requiring bonding business's client files to be made available to the county bail bond board for inspection on demand); *Id.* § 1704.252(4) (making it a violation of bonding business regulations to refuse to answer questions about a bail bondsman's conduct when posed by the county bail bond board during a hearing relating to the revocation or suspension of privilege to write bail bonds); *Id.* § 1704.053(5) (identifying the district attorney or assistant district attorney as a permanent member of the county bail bond board).

221. TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 2005); *see also* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 16.24 (2d ed. 2001) (relating the process by which a surety may "get off the risk" of a bond).

222. TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 2005).

ments made by the client that suggest she is planning to run.[223] Additionally, he may need to describe specific actions taken by the client that create concern in his mind about future bail jumping.[224] In some cases, a bail bondsman may want to be released from liability on the bond simply because the principal is not complying with the terms of the contract entered into between herself and the principal when the bail bond was executed.[225]

As a bail bondsman, when a client is noncompliant or unreliable, the only question needing an answer is what would be the best time to catch the judge at the courthouse. In contrast, an attorney acting also as a bail bondsman, with a similar client problem, must consult Texas Disciplinary Rule 1.05 before putting the final touches on his affidavit to surrender the principal. Rule 1.05 details the scope of the protection of a client's confidential information and provides, in part, that "a lawyer shall not knowingly [r]eveal confidential information of a client . . . to a person that the client has instructed is not to receive the information; or *anyone else*, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."[226] The rule requires a lawyer to protect not only communication subject to the attorney-client privilege, but also any other "information relating to a client or furnished by the client . . . [and] acquired by the lawyer during the course of or by reason of the representation of the client."[227] Upon review of these provisions of the rule, it should appear clear to a reasonable attorney that he is prevented from making any disclosure in the affidavit needed to establish the required cause to surrender. He should conclude that any information about a client's action or inaction, any information he gathered from family and friends about the client, and certainly, any

223. *See* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 16.24 (2d ed. 2001) (providing examples of what may constitute cause under the statute).

224. *Id.*; *see also* Fla. State Bar Prof'l Ethics Comm., Op. 90-1 (1990) (relating unfounded attorney concerns over criminal defendants not showing up for court).

225. *See* Telephone Interview with Helen Allred, Owner, A-Tex Bonding Co. (Jan. 5, 2006) (explaining that she will seek to be released from responsibility on the bond when the client fails to comply with the terms of the contract, which may include provisions about payment and checking in on a weekly basis).

226. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b) (emphasis added).

227. *Id.* 1.05(a).

statements made by his client to him, are all protected under this rule.

A lawyer wishing to jump off the bond badly enough will scrutinize Rule 1.05 for any exceptions providing him an opportunity to disclose client secrets. A closer examination will reveal a variety of exceptions including client consent and the crime-fraud exception.[228] Since most clients are not likely to agree to return to jail, the lawyer will likely look to the crime-fraud exception. This exception allows an attorney the discretion to reveal client confidences "[w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act."[229] Since bail jumping is a crime[230] and the lawyer's action to surrender his client into custody will prevent this criminal act, the bail bondsman lawyer may believe this makes the submission of an affidavit including client secrets ethical under the Rule. However, he would be wise to dig a little deeper before rushing to the courthouse with affidavit in hand. The lawyer considering how and when to exercise the discretion conferred by paragraph (c) of this Rule should consider a number of variables. First, the comment to Rule 1.05 on the subject of a discretionary disclosure adverse to the client indicates that only "[w]hen the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information."[231] Additionally, "such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question" should inform the attorney's exercise of discretion.[232] The comment continues with a warning that "a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose."[233] It would require a fairly creative attorney to argue successfully that the injury of bail jumping is grave

228. *Id.* 1.05(c)(2), (7).

229. *Id.* 1.05(c)(7).

230. *See* TEX. PEN. CODE ANN. § 38.10 (Vernon 2003) (describing the penalties associated with jumping bail or failing to appear).

231. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 13.

232. *Id.* 1.05 cmt. 14.

233. *Id.*

or is a crime of magnitude with a victim to protect, other than possibly the defendant himself, in the event of capture, and her bail bondsman, who will suffer a financial loss when she fails to appear at the appropriate hearing.

Importantly, subsections (d) and (e) of the Texas Disciplinary Rules suggest that before an attorney entertains the notion of revealing a client confidence, he is first obligated to attempt to dissuade the client from running by clearly explaining the consequences of such an action.[234] Further, the attorney can avoid any concerns he may have about assisting the client in her crime or fraud by withdrawing from the representation. In adopting this approach, the attorney is able to keep the client's confidences and free himself of concerns he may have of participating in any way in the client's possible future failure to appear in court. Of course, this approach will do nothing to protect the financial risk associated with serving as surety in the matter. And recent amendments to the attorney exemption statute clarify that "[a] person executing a bail bond or acting as surety under . . . [the exemption] . . . is not relieved of liability on the bond solely because the person [attorney] is later replaced as attorney of record in the criminal case."[235]

A final cautionary note is in order as it pertains to the lawyer's duty to maintain his client's confidences. Rule 1.05(b)(2) affirmatively prohibits an attorney from "[using] confidential information of a client to the disadvantage of the client unless the client consents after consultation."[236] It is difficult to imagine a greater disadvantage than one's own attorney playing a significant part in returning her to confinement. Additionally, the further disadvantage resulting from the loss of one's bail bond fee is to be left in a position to scrape together another fee (if that is even possible).[237] And, finally, the ultimate disadvantage is that of losing trust and confidence in one's attorney, as well as the legal system as a

234. *Id.* 1.02.

235. TEX. OCC. CODE ANN. § 1704.163(c) (Vernon Supp. 2005).

236. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(2).

237. Letter from Stephanie Smith, client, to Donna Bloom, co-author, 1 (Dec. 13, 2005) (on file with the *St. Mary's Law Journal*) (providing details of her experience as a criminal defendant client with an attorney also acting as her bail bondsman). Stephanie's bond was set at $75,000 and she paid a total of $7500 in a surety fee to her attorney, all of which he applied to her legal fees. She was able to pay this amount in installments over approximately 18 months. At the time her attorney surrendered her back into the custody of the sheriff, she owed $360 on the fee. *Id.*

whole.[238] It seems unlikely a client would sign up for that, so consent is probably out of the question. Finally, Rule 1.05(b)(4) specifically prohibits an attorney from the "[u]se [of] privileged information of a client for the advantage of the lawyer . . . unless the client consents after consultation."[239] When an attorney acting as a bail bondsman submits his affidavit to the court detailing his cause for surrendering the principal (his client), he is most likely relying on privileged information he acquired in the course of his representation.[240] In so doing, he is seeking an advantage for himself on the weight of the information provided. In other words, he has gained the fee negotiated at the initial execution of the bail bond and has used the protected information to relieve himself of any further liability. This appears to violate the letter and spirit of the law.

C. *Prohibited Solicitations and Payments*

"Why pay for a Bondsman when you can get a Lawyer? 'I will get you out of jail and defend you' All Bail Bond Fees Apply to Attorney Fees"[241]

"Why pay twice? Your bond fee goes towards your legal representation"[242]

"Jail Release - We are attorneys, call us first! All bond fees apply to attorney fees"[243]

Texas Disciplinary Rule 7.03(c) directs that "[a] lawyer, in order to solicit professional employment, shall not pay, give, advance, or

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238. *See* Timothy J. Miller, Note, *The Attorney's Duty to Reveal a Client's Future Intended Criminal Conduct*, 1984 DUKE L.J. 582, 596 (1984) (detailing the significance of an attorney keeping his client's secrets to a client's impression of the legal system as being fair).

239. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(4).

240. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 2005) (providing the process by which a surety releases himself from financial liability and surrenders the principal to the state). This statute requires the surety to submit an affidavit to the court with jurisdiction in the criminal matter relating the cause for the surrender of the principal. *Id.* It is the responsibility of the court to determine from the affidavit that the surety has sufficient cause to release himself from the financial risk of the bond and deliver the principal back into custody. *Id.*

241. *See* GREATER SAN ANTONIO SOUTHWESTERN BELL YELLOW PAGES 313-14, § Bail Bonds (2005) (listing three attorneys' advertisements for bail bond services).

242. *See id.* at 317 (listing five attorneys advertising bail bond services).

243. *Id.*

offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client."[244] Advertisements similar to the ones above pepper both the "Bail Bonds" and "Attorneys" sections of the Greater San Antonio Southwestern Bell Yellow Pages.[245] Although advertising in the yellow pages is a type of permissible solicitation under the Rules,[246] the offers suggested in advertisements like these pose serious questions of impropriety.[247]

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244. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.03(c).

245. *See* GREATER SAN ANTONIO SOUTHWESTERN BELL YELLOW PAGES 313-18, § Bail Bonds (2005) (advertising sixteen attorneys who provide bail bond services). These advertisements contain attorney-bail bondsmen offers and enticements that extol the benefits of retaining their services such as: "Why pay twice? Your bond fee goes towards your legal representation," and "Bond fee applied toward legal fees." *Id.* In one advertisement, an attorney-bondsman suggests, "Why pay for a Bondsman when you can get a Lawyer? 'I will get you out of jail and defend you' — All Bail Bond Fees Apply to Attorney Fees." *Id.* It is not uncommon to find advertisements with the promise, "Jail Release — We are attorneys, call us first! All bond fees apply to attorney fees," or "Attorney Bail Bonds — Jail Release 24/7 — All bail bond fees apply to attorney fees — Why pay twice?" and "Bond/ Jail Release — Payment Plans Available." *Id.*; *see also* GREATER SAN ANTONIO SOUTHWESTERN BELL YELLOW PAGES 105-216, § Attorneys (2005) (advertising thirty-seven attorneys who also provide bail bond services). Information provided in these advertisements includes offers of the following: "Bail Bonds — Bond posting for clients," and "Bail Bonds — Free Information — Client's Bonds Posted." *Id.* One ad features the phrase, "Locked up?" and offers "24 Hour Service" and "Payment Plans." *Id.* Significant attention is given to the service of bail bonding through the use of bold-faced type indicating, "Criminal Law — Bail Bonds." *Id.* Another attorney markets the following benefits to acquiring his representation: "Bail Bond Service — I Write Your Bonds — Bond Fees Applied to Attorney's Fees." *Id.*

246. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04(d) (stating that "a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, or television").

247. *Cf.* Fla. State Bar Prof'l Ethics Comm., Op. 72-26 (1972) (reminding attorneys that "[t]he Committee has several times advised that a lawyer is not ethically restrained from engaging in business, if he does not mingle the business with his law practice, either physically or functionally, and if the business does not operate as a feeder to his law practice"); *see also* Kan. Bar Assoc. Ethics-Advisory Comm., Op. 98-12 (1998) (announcing that "[b]ecause mixing the ads for law services and bonding services leaves the customer unsure what service the firm may be providing, separate advertising for each business is the better ethical route"); Ky. Bar Assoc. Ethics Comm., Op. E-82 (1974) (advising that the problem of indirect solicitation and feeding law practice is best avoided when the attorney is prohibited from accepting employment from those for whom he executed bonds); *accord* N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. 647 (1993) (declaring that a bail bond business operated by an attorney "may not be used to solicit clients for the lawyer's law practice"); Okla. Bar Assoc. Legal Ethics Comm., Op. 36 (1932) (concerning the appearance of improper solicitation of legal business when operating a lay business of furnishing bonds).

Texas ethics opinions on the question of an attorney also acting as his client's bail bondsman date back to the early 1950s, and the analysis found in many of them focuses on the concern of improper solicitation.[248]

While it is true that with the adoption of the Texas Code of Professional Responsibility and later Texas Disciplinary Rules of Professional Conduct the terms "indirect solicitation" and "feeder" to the law practice were abandoned,[249] it seems clear that Rule 7.03(c) continues to concern itself with a means by which an attorney can improperly solicit business and feed his law practice.[250] Although historical, the following Texas ethics opinions provide some pearls of wisdom on the subject that should be reconsidered. Opinion 347 does not assert that acting as bondsman and attorney is per se prohibitive, but it does require the attorney-client relationship to exist *before* the signing of the bond.[251] The committee writing this opinion was particularly concerned with the potential for the business

248. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 366 (1974) (summarizing former opinions on the topic of the propriety of attorneys "engaging in the business of making bail bonds" and concluding that the former language, "indirect solicitation" and "feeder to the law practice," has been abandoned by the disciplinary rules as being too vague); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969) (classifying acting as surety as ethical before the attorney-client relationship has come into existence, but improper after the relationship has formed). This classification is based on the concept that an attorney may not use a separate nonlegal service to solicit business for his law practice. *Id.*; *see also* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1952) (regarding an attorney who, by acting as a surety, does so with the intention to solicit business or "feed" his law practice); *cf.* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 248 (1962) (opining that it is improper for an attorney to act as attorney-in-fact for a surety company and use this position to solicit business for his criminal practice); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 141 (1957) (determining that it is improper under Texas Canon 24, which governed solicitation before the adoption of Texas's modern rules, to act as both criminal defense attorney and bail bondsman); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 140 (1957) (requiring leave of court before an attorney may act as a surety in his client's criminal matter because an attorney would otherwise violate the spirit of Canon 24, which governed solicitation in the past).

249. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969).

250. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.03(c).

251. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969). It should be noted that the recent amendments to the attorney exemption include a requirement that an attorney file notice of appearance "at the time the bond is executed." TEX. OCC. CODE ANN. § 1704.163(a)(2) (Vernon Supp. 2005). This would not have likely satisfied the 1969 ethics committee as evidence of a relationship existing before the execution of the bond.

of acting as surety on criminal bonds to easily become a "feeder to the attorney's practice of law."[252] The committee argues that providing the service of surety before a attorney-client relationship exists is analogous to loaning money to an individual to obtain the individual's case.[253] The committee drafting Opinion 251 advances the position that it is the attorney's motive at the time of the execution of the bond that matters.[254] For this committee, if the attorney's goal is to obtain subsequent legal work from the individual, then his motive is tainted and providing the bond is improper. Like Opinion 347, Opinion 251 emphasizes the significance of the nature of an existing relationship between the client and the lawyer in defining the ethical nature of the surety transaction.[255] The committee believes it is not unethical for an attorney to act as surety where:

> [T]here is a close, pre-existing relationship between the attorney and client sufficient to indicate clearly that the attorney is not at all motivated by a desire to advertise or to solicit . . . this or subsequent legal work. Such close relationship might include close kinship by consanguinity or affinity, a long-term close, personal friendship, or a substantial, pre-existing, attorney-client relationship. There can be no merit in saying that, for example, a lawyer cannot himself ethically bail out his father-in-law, his next-door neighbor, or his main client.[256]

To determine whether offers made in the attorney-bail bondsman advertisements violate the Rules, an examination of what exactly is being offered is essential. Basically, the attorney is offering an alternative to the traditional commercial surety or bail bondsman. In other words, the attorney himself is offering to serve as surety on the bond. A surety is defined as "[a] person who is pri-

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252. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 347 (1969).

253. *Id.*

254. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 251 (1962).

255. *Id.*

256. *Id.* This position is remarkably similar to the position taken recently by the ABA in which the ABA rejected a per se prohibition on an attorney acting as a surety, but instead embraced an approach of limited circumstances when it is appropriate, including some of the relationships discussed in this Texas opinion. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004) (advancing the position that lawyers should only post bond for their clients in rare circumstances).

marily liable for the payment of another's debt or the performance of another's obligation . . . . A surety differs from a guarantor, who is liable to the creditor only if the debtor does not meet the duties owed to the creditor; the surety is directly liable."[257]

Thus, the attorney is offering to assume the liability of bail due to the creditor (the state) based on the terms of the bond, which require the criminal defendant to appear at all related hearings on the matter. If the defendant does not appear, the state will collect and the surety will be responsible for the entire amount of bail.[258] The obvious value in the offer is the psychological value of being free from confinement and the actual financial value associated with the transaction. Additionally, there is the reality that a surety of this nature is compensated for the risk in the form of a fee.[259] Here, many attorneys sweeten the offer by proposing to apply the bond fee to the legal fees in the corresponding criminal case.[260] This implies that if one wants the attorney to post the bond, he must also be retained as the attorney providing representation in the criminal matter. This caveat is consistent with the condition in the attorney exemption statute requiring an attorney who writes a bond under the exception to also be counsel of record for the defendant in the criminal case.[261] Therefore, it seems possible and even likely that providing bonds is an effective, albeit questionable, method of building and sustaining a criminal law practice. Adherence to the ABA's position that "the issuance of bail bonds and matters pertaining thereto are not considered the practice of

257. BLACK'S LAW DICTIONARY 1482 (8th ed. 2004).

258. *See generally* TEX. CODE CRIM. PROC. ANN. art. 22.01 (Vernon 1989) (providing statutory authority for the state to take forfeiture of bail when the defendant fails to appear in any court in which his case is pending); *see also* Matt Joyce, *Lawyer Contests Bond Tab*, WACO TRIBUNE-HERALD, Oct. 29, 2005, at 1B (covering an attempt by a Waco lawyer also serving as her client's surety to avoid a $50,000 forfeiture when the client "went underground").

259. *Cf.* BLACK'S LAW DICTIONARY 1482 (8th ed. 2004) (defining the term "compensated surety" as someone who acts as surety for a fee).

260. *See, e.g.*, GREATER SAN ANTONIO SOUTHWESTERN BELL YELLOW PAGES 317, § Bail Bonds (2005) (listing five attorneys advertising bail bond services). In these advertisements, the attorneys solicit business with offers such as: "Jail Release — We are attorneys, call us first! — Bail bond fees apply to attorney fees," "Attorney bail bonds & criminal defense — My bond fee applied towards legal fees," and "Attorney Bail Bonds — Jail Release 24/7 — All bail bond fees apply to attorney fees — Why pay twice?" *Id.*

261. TEX. OCC. CODE ANN. § 1704.163(a)(2) (Vernon Supp. 2005).

law"[262] makes it simple to conclude that this offer is too good to be true; it comes with strings attached.

Even so, the attorney-bail bondsman does not have to close shop just yet. The question remains whether or not this offer of bond assistance can be saved by the exception in Rule 7.03(c) allowing attorneys to engage in this transaction if it involves "actual litigation expenses and other financial assistance as permitted by Rule 1.08(d)."[263] Rule 1.08 deals with prohibited transactions between a lawyer and a client and describes in more detail the exceptions referred to in Rule 7.03(c).[264] However, it is important to note that even if it is determined that the cost and interest associated with a bail bond is a cost of litigation, the attorney would be wise to follow the precautionary measures required in Rule 1.08(a).

D. *Prohibited Transactions*

Texas Disciplinary Rule 1.08 embraces the traditional principle that lawyers are forbidden from obtaining a proprietary interest in the general subject matter of their client's litigation.[265] Attorneys entering into a business transaction with a client must do so "in a manner which can be reasonably understood by the client" and where the "terms on which the lawyer acquires the interest are fair and reasonable."[266] The client must also be afforded ample time "to seek the advice of independent counsel" and the client must consent to the business transaction in writing.[267] Rule 1.08 also addresses the issue of a lawyer providing financial assistance to a client in relationship to pending or contemplated litigation. Generally, an attorney may not provide financial assistance to a client. However, the Rule provides that "[a] lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter."[268] There is no clear answer on whether a bail bond should be classified as an expense of litigation appropriate for an

262. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1193 (1971).
263. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.03(c).
264. *Id.* 1.08(d).
265. *Id.* 1.08 cmt. 7.
266. *Id.* 1.08(a).
267. *Id.*
268. *Id.* 1.08(d).

attorney to advance to his client, and the jurisdictions addressing this issue are split. One jurisdiction argues that when a bond is necessary for litigation to proceed, having a bond issue is in the client's best interest.[269] But this jurisdiction also cautions that a prudent lawyer will seek to avoid guaranteeing a large bond.[270] Of course, a criminal defendant does not require a bail bond in order for her matter to advance to trial, so presumably this jurisdiction would not consider a bail bond financial assistance covered by the disciplinary rules. Other jurisdictions reject the notion that a bail bond is a cost of litigation based solely on their conclusion that engaging in such a transaction with a client is "contrary to the policies prohibiting conflicts of interest and solicitation."[271] However, at least one jurisdiction believes "bail appears to be close enough to court-related costs to constitute 'expenses of litigation,' which a lawyer may properly advance as long as the client remains liable therefore."[272] As discussed, if an attorney is able to successfully argue his bail bonding service is not improper solicitation because it is considered a cost of litigation, he would still be wise to meet the reasonableness and consent requirements of 1.08(a). However, if he is unable to establish why a bail bond should be considered a cost of litigation, it could be held that offering this type of service is an improper solicitation under Rule 7.03.

Despite the importance of making this cost determination, the more significant inquiry (which one Texas court has examined) regarding the prohibitions found in Rule 1.08 is whether the posting of bond on behalf of a client is a "business transaction" requiring compliance under the provisions of this Rule. At least one Texas court has addressed this question and determined it is not.[273] This

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269. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility, Formal Op. 1981-55 (1981) (discussing the propriety of an attorney posting a litigation bond for a client); *see also* Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2000-14 (2000) (considering the propriety of an attorney posting a supersedeas bond in a client's eviction matter).

270. Cal. State Bar Standing Comm. on Prof'l Responsibility, Formal Op. 1981-55 (1981).

271. N.C. St. Bar Assoc. Ethics Comm., Op. RPC 173 (1994); State Bar of Wis. Comm. on Prof'l Ethics, Op. E-96-1 (1996).

272. Or. State Bar Legal Ethics Comm., Formal Op. 2005-4 (2005).

273. *See* Akridge v. State, 13 S.W.3d 808, 809 (Tex. App.—Beaumont 2000, no pet.) (holding that a lawyer acting as a surety on an appearance bond is not per se a conflict of interest).

conclusion, however, is disputed by Texas ethics opinions on the subject, an ABA ethics opinion, and a number of ethics opinions from a variety of states.

In *Akridge v. State*,[274] the defendant argued that by serving as her bondsman, her attorney entered into a business transaction with her that resulted in a conflict of interest.[275] The defendant asserted that her attorney did not gain her written consent regarding the transaction, and in not doing so failed to comply with Rule 1.08.[276] The court rejected her assertion and instead held that "trial counsel acted as surety on Akridge's bond as part of his legal representation of her, not as a separate business transaction."[277] The conclusion of the court here seems curious. When an attorney acts as a surety it is likely he creates a contract with the client detailing the conditions under which he will continue to act in this role. For instance, like a traditional bail bondsman, he may require the client to report weekly, maintain employment, keep him informed of changes in address or place of employment, and make payments on a particular schedule.[278] At first glance these requirements do not appear too cumbersome, and in fact, could easily be required of an attorney in the scope of his representation. Yet, there is a significant difference between the action an attorney may take if the client fails to comply with his terms and the action a bail bondsman may take under the same set of facts. An attorney may request to withdraw from representation, leaving the client without a lawyer. Though certainly inconvenient, this pales in comparison to the alternative. When a bail bondsman is dissatisfied with the defendant's performance on the contract, she may seek to surrender the bond, placing the client back in jail. Clearly, the court's determination that the attorney in this case was simply providing an additional legal service when he posted bond (for a fee) is imprecise at best. At worst, the court deprived the defendant of her constitutionally protected right to conflict-free counsel when it determined that her attorney had no competing pecuniary interest during the

274. 13 S.W.3d 808 (Tex. App.—Beaumont 2000, no pet.).

275. *Akridge*, 13 S.W.3d at 809.

276. *Id.* at 810.

277. *Id.*

278. *See* Telephone Interview with Helen Allred, Owner, A-Tex Bonding Co. (Jan. 5, 2006) (discussing the terms of an appearance bond contract she enters into with each client).

litigation of her criminal matter.[279] It is likely that the *Akridge* court would have come to a different conclusion had they considered the business of bail bonding through the lens of Rule 1.08.

The first comment to Rule 1.08 explains that the "rule deals with certain transactions that per se involve unacceptable conflicts of interests," requiring the attorney in some instances to take precautions to protect the interests of the client.[280] Although the rule does not specifically define "business transaction," it does define the phrase by exclusion, stating that business transactions do not include "standard commercial transactions between the lawyer and the client for products or services that the client generally markets

279. *See* Cuyler v. Sullivan, 446 U.S. 335, 346 (1980) (holding that unless the conflict is patent, the trial judge is under no obligation to initiate an inquiry, and on postconviction attack the defendant is required to demonstrate specifically that an actual conflict adversely affected his lawyer's performance); Akridge v. State, 13 S.W.3d 808, 810 (Tex. App.—Beaumont 2000, no pet.) (applying the *Cuyler* standard for determining whether an actual conflict of interest existed which would result in a violation of the Sixth Amendment right to effective assistance of counsel). In this case, the criminal defendant attempted to establish that her attorney acting as her bail bondsman resulted in an actual conflict of interest. *Id.* at 809. The court rejected her contention and relied on the fact that her attorney never withdrew the bond, and the court further rejected her argument that she entered into a plea agreement because of the pressure applied by her attorney to pay her bond and legal fees. *Id.* at 810-11. The court concluded that Akridge failed to meet the burden of establishing an actual conflict, the first prong of the *Cuyler* test. And in support of this conclusion, the court stated that "it [cannot] be said that counsel's interest in being paid for his services adversely affected his performance, as he continued to represent Akridge even though his fee had not been fully paid." *Id.* Although the result here could give an attorney-bail bondsman encouragement that his actions would not be deemed a conflict of constitutional proportions, he should be cautious of that conclusion. In fact, what is significant in this decision is not the outcome, but the court's application of *Cuyler*, requiring a lower threshold for a criminal defendant to meet, that of adverse effect, than that of the competing standard requiring a showing that a Sixth Amendment violation occurs if, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 683, 694 (1984); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 415 (Hornbook Series Practitioners ed. 1986) (asserting that the United States Supreme Court "has uniformly condemned representations in which the [criminal] defense lawyer operates under a conflict of interest"). Wolfram further explains that if the conflict is "blatant and substantial," the accused is permitted to attack the conviction in subsequent proceedings even if the defendant was silent at the time. *Id. But see* Beets v. Scott, 65 F.3d 1258, 1260 (5th Cir. 1995) (limiting the application of the *Cuyler* standard to those special cases of attorney conflicts that arise in cases involving multiple client representation).

280. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08 cmt. 1.

to others."[281] The reasons for excluding these transactions from the restrictions of the rule provides a clue as to what evil Rule 1.08 intends to prevent, and also assists in developing the scope of the term "business transaction." In explaining the purpose of this exclusion, comment 2 provides that "[i]n such transactions, the lawyer has no advantage in dealing with the client, and the restrictions . . . are unnecessary and impracticable."[282] Therefore, it reasonably follows that Rule 1.08 is concerned with transactions between a lawyer and his client where the lawyer has an advantage over his client in the dealing. Rule 1.08(h) further develops the scope of the term "business transaction" with its requirement that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client," with the exception that the lawyer may seek a judicial lien to secure his unpaid fees or enter into a contingent fee arrangement in certain civil matters.[283]

In stark contrast to the *Akridge* court's conclusion that providing bonding services is not a separate business transaction between an attorney and his client requiring written informed consent, Texas ethics opinion 366 addresses the practice as a "second business or profession,"[284] and Texas ethics opinion 388 states:

> When an attorney personally executes a bail bond for and on behalf of a client accused of a crime, he, at such time . . . [has] . . . [o]n the one hand . . . [established] . . . the attorney-client relationship . . . and on the other hand . . . has involved himself in a 'business relationship' with the client and an overriding obligation to the Court.[285]

These opinions are particularly important given the timing of their release. Both opinions represent the last words spoken on this issue in Texas from an ethics perspective and each was released after the attorney exemption was codified in 1973. In other words, no significant changes have occurred involving this practice to

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281. *See id.* 1.08 cmt. 2 (identifying transactions such as banking or brokerage services, medical services, products manufactured or distributed by the client or utility services as examples).

282. *Id.*

283. *Id.* 1.08(h) cmt. 7.

284. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 366 (1974).

285. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 388 (1977).

render the positions expressed in these opinions invalid or inapplicable. As further support that bail bonding is indeed a "second profession," one must only review the Texas statutory regulations governing all those who provide bail bond services for a premium (including attorneys)[286] and the ABA's contention that "[g]enerally speaking, the issuance of bail bond and matters pertaining thereto are not considered the practice of law. There are many nonlawyers engaged in the bail bond business."[287] The ABA clearly considers bail bonding a non-legal service, albeit a service that attorneys in Texas may choose to offer. However, the provision of this service should be considered separate from the legal representation.

The California State Bar addressed the lawyer's ethical responsibilities when rendering non-legal services to a client that are either offered outside the scope of legal representation, or connected with the lawyer's representation of the client. The position taken in this ethics opinion is that "[t]he provision of non-legal services to a client . . . is a business transaction subject to [the comparable rule to Texas Rule 1.08]."[288] Similarly, the Colorado Bar Association, in dealing with the ethical propriety of lawyers practicing law and concurrently participating in a second occupation, strongly discourages lawyers from acting in another business capacity in the same transaction. The opinion cautions that "[s]ome dual occupation transactions are so fraught with ethical risk that the . . . [c]ommittee discourages them even with the informed consent of the client."[289] Moreover, several jurisdictions dealing directly with the question of lawyer-bail bondsmen in their ethics opinions label the provision of bail bonding services as a business transaction that is wholly distinct from the legal services unique to the attorney-client relationship.[290] The Kansas Bar Association (KBA) directly

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286. *See generally* TEX. OCC. CODE ANN. §§ 1704.001-.306 (Vernon 2004 & Supp. 2005) (providing all the regulations applicable to licensed bail bondsmen and attorneys acting under the exemption).

287. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1193 (1971).

288. Cal. State Bar Standing Comm. on Prof'l Responsibility, Formal Op. 1995-141 (1995).

289. Colo. Bar Assoc. Ethics Comm., Formal Op. 98 (1996).

290. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility, Formal Op. 1981-55 (1981) (requiring written consent from the client when an attorney acts as his client's surety); *see also* Kan. Bar Assoc. Ethics-Advisory Comm., Op. 98-12 (1998) (indicating the committee's conclusion that "bail bonding, when performed by a lawyer in the active practice of law, is an ancillary business," and that "[t]he purchase of a bail bond from lawyer

answers the central inquiry pondered and answered poorly by the *Akridge* court when it opined, "[t]he purchase of a bail bond from a lawyer who also represents the client is a business transaction. Full disclosure is required if the attorney is to avoid conflicts of interest."[291] The *Akridge* court would have likely reached a different (and more correct) conclusion had it considered KBA's contention and struggled with the conclusion of the KBA on this matter. Following the determination that a business transaction has occurred requiring full disclosure and client consent, the KBA determines that "a bail bond is purchased by one accused of a crime, [and because] [s]uch persons are especially vulnerable . . . [they] ordinarily will not be in a position to give informed consent."[292] The Virginia Bar Association (VBA) takes a similar view that "[d]isclosure and consent cannot cure the conflict between the lawyer's duty as an advocate and his own interest in avoiding forfeiture should the client fail to appear in court."[293] But the VBA speaks with an even stronger voice on the topic and declares that "this type of business transaction with a client might easily be viewed as unconscionable, unfair, or inequitable."[294] This position seems to strike at the very heart of why our rules of professional conduct require attorneys to carefully evaluate their dealings with clients and classify some business transactions as utterly prohibited.

In making the decision to act as a lawyer-bail bondsman, a Texas attorney should consider the bargaining position the transaction gives him in relation to his client. One of the few Texas cases addressing the disciplinary rule on business transactions with a client embraced the position that "[b]usiness relationships between lawyers and clients are beset with conflicts of interest and will often involve situations in which the lawyer occupies a dangerously supe-

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who also represents the client is a business transaction"); State Bar of Mich. Comm. on Prof'l and Judicial Ethics, Informal Op. RI-65 (1990) (discussing the propriety of an attorney entering into a business transaction with the client for the attorney to act as surety); Va. Opinion 1343, [1986-1990 Transfer Binder] Lawyers' Manual on Prof'l Conduct (ABA/BNA) § 901:8771 (1990) (recognizing the service of bail bonding as a separate business transaction between lawyer and client).

291. Kan. Bar Assoc. Ethics-Advisory Comm., Op. 98-12 (1998).

292. *Id.*

293. Va. Opinion 1343, [1986-1990 Transfer Binder] Lawyers' Manual on Prof'l Conduct (ABA/BNA) § 901:8771 (1990).

294. *Id.*

rior bargaining position."[295] It is difficult to conjure a more dangerously superior position than that of one held by an individual who has the complete authority to pluck you from a free life and place you back behind bars. An attorney-bail bondsman should proceed with caution understanding that a lawyer may not deal with a client at arm's length, treating her as a stranger. Indeed, the law imposes a fiduciary standard that is demanding of attorneys and often forgiving of clients. In *State Bar of Texas v. Dolenz*,[296] the court applied the common law rules governing transactions between fiduciaries and their clients. The court held that "because of the[ ] lawyer's presumed superior professional knowledge and skill . . . . [t]he strict scrutiny standard applies to all business dealings between lawyer and client."[297] Basically, the common law doctrine of strict scrutiny provides that a client who challenges the validity of a business transaction with a lawyer is required only to show that the disadvantageous transaction was entered into with her attorney.[298] The burden then shifts and requires the attorney to prove that he did not take advantage of the relationship with his client.[299] At the very least, an attorney would be expected to prove the existence and extent of the disclosure to his client, which is mandated by Rule 1.08(a).[300] However, it is also possible that a court could agree with the position taken by many other jurisdictions and hold that this type of business transaction is completely prohibited and both violates the disciplinary rules and breaches the fiduciary relationship an attorney has with his client, especially when an unscrupulous attorney is acting as his client's bail bondsman. This represents a risky business for both the attorney and his criminal defendant client.

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295. State Bar of Tex. v. Dolenz, 3 S.W.3d 260, 265 (Tex. App.—Dallas 1999, no pet.) (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 479 (Hornbook Series Practitioners ed. 1986)).

296. 3 S.W.3d 260 (Tex. App.—Dallas 1999, no pet.).

297. *Dolenz*, 3 S.W.3d at 266.

298. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 481 (Hornbook Series Practitioners ed. 1986).

299. *Id.*

300. *See Dolenz*, 3 S.W.3d at 268 (requiring an attorney to prove his client "consented to the transaction after full disclosure").

VIII. Righting the Wrong: Repercussions for the Attorney Bondsman

A client whose attorney-bail bondsman has jumped off her bond without reasonable cause, causing her to be rearrested and jailed, has few options to redress the wrong. Her immediate concern may be to be released from jail to await her trial. She would then need to seek a new bail bondsman, pay that bondsman another fee or premium, and once released seek to pursue one or more of the following remedies available in Texas. However, she may also be seeking a modicum of, as she may see it, justice against her attorney bondsman whom she will deem has put her in a bad position. Attorneys should consider the types of redress the client may seek when considering whether to jump off the bond.

A. *Complain to County Bail Bond Board*

A client may seek to file a complaint against her attorney-bail bondsman with the Bail Bond Board of her county.[301] The process is initiated by the client completing an affidavit detailing the specific facts and allegations concerning the alleged misconduct of her bondsman.[302] After a subsequent investigation by the board, which can include a hearing where both the bondsman and client testify, it will reach a determination as to whether the bondsman acted appropriately.[303] If the board determines that the bondsman acted inappropriately, it will then determine what can be done by the bondsman to remedy the situation.[304] If there is a remedy, the board will provide the attorney-bondsman sufficient time to repair

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301. *See generally* Tarrant County Bail Bond Rules & Regulations: Complaints/Hearings, http://www.tarrentcounty.com/esheriff/cwp/view.asp?A=785&Q=436180 (last visited Feb. 23, 2006) (detailing the process for filing a complaint through hearing phase) (on file with the *St. Mary's Law Journal*). Some counties do not have a bail bond board. In those situations, a complaint may be filed against the bail bondsman through the sheriff's department.

302. *See id.* (providing that the district attorney's office shall advise the bail bond board whether a complaint received by the board states probable cause).

303. *See id.* (indicating that the bail bond board may hear testimony and must send written notice to the parties of its decision); Price v. Carpenter, 758 F. Supp. 403, 409 (N.D. Tex. 1991) (holding that an attorney-bail bondsman's due process rights were not violated after a hearing was held wherein her attorney exemption was revoked).

304. *See* Tex. Occ. Code Ann. § 1704.163(b) (Vernon Supp. 2005) (providing that an attorney, after committing a violation, may be barred from acting as a bail bondsman until he has remedied the violation).

the damage his actions have caused, during which time the board shall order the Sheriff of that county to suspend the attorney's power to make bonds under the "attorney exception" pursuant to Section 1704.163(b) of the Texas Occupations Code.[305] Misconduct on behalf of a bail bondsman can impair or prevent his ability to renew his license, or in the case of an attorney, qualify his ability to remain a bondsman pursuant to the attorney exception provided by statute. Moreover, if there has been misconduct on the part of the attorney bail bondsman, the board reserves the right to refer the misconduct to the State Bar of Texas Grievance Committee.

B. *Complain to the State Bar of Texas*

The client can, independent of the Bail Bond Board, file a complaint against her attorney-bail bondsman with the State Bar of Texas Grievance Committee. The grievance committee can review allegations of attorney misconduct, that is, whether the attorney in his representation has violated either the Rules of Professional Conduct or the Rules of Disciplinary Procedure.[306] The committee does not have the authority to review allegations of attorney malpractice.[307] Similar to a complaint filed with the Bail Bond Board, to initiate a grievance the client must complete a form which asks for the specific facts and allegations surrounding the complaint.[308] After the grievance committee receives the complaint form, it will conduct its own investigation, the results of which can either proceed to a grievance panel for disposition or be used to bring an action against the attorney through litigation.[309] This remedy may not provide the client with anything other than a sense of satisfaction that her attorney has been reprimanded and next time may

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305. *See id.* (providing that an attorney-bail bondsman's license that has been suspended due to a violation may stay suspended until he has remedied that violation).

306. *See* State Bar of Texas, Client Assistance and Grievance, www.texasbar.com/Template.cfm?Section=Client_Attorney_Assistance&CONTENTID=3367&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Feb. 23, 2006) (commenting that "[a]llegations of misconduct by an attorney are very serious, and are reviewed by the Chief Disciplinary Counsel") (on file with the *St. Mary's Law Journal*).

307. *See id.* (indicating that malpractice by an attorney may be committed without violating the disciplinary rules, and that competent advice should be sought by clients to decide what remedies are available to them).

308. *See id.* (stating that the "[f]irst step in filing a grievance is to complete a grievance form and mail it to the State Disciplinary Counsel's office").

309. *Id.*

give serious consideration to his motivation before he jumps off a client's bond. For an attorney, however, any referral to the Grievance Committee should invoke a fear that he may be reprimanded, and depending on the nature, severity, and rate of occurrence may ultimately face disbarment.

C. *Contest the Surrender of the Bond*

In addition, the client may seek to contest her surrender which was authorized by the court after it reviewed the affidavit of surrender filed by the bail bondsman.[310] The reviewing court must be the same court which issued the warrant for arrest or capias.[311] In some counties, this is the same court in which the underlying criminal action is pending. In the affidavit for surrender, the attorney-bail bondsman must allege facts establishing cause to surrender the principal and establishing that she should be recaptured and returned to the custody of the state.[312] Both the Texas Occupations Code and the Texas Code of Criminal Procedure require that a court find cause to grant the arrest warrant or capias.[313] If a client is contesting the affidavit, she must prove that it did not allege "reasonable" cause, thereby requiring a higher burden of proof for her attorney to meet at that stage.[314] If she prevails in the contest, she is eligible to receive a refund of her bond premium or fee, or can possibly receive even a higher amount.[315] This may be a shallow victory since she will need that money to give to another bail bondsman in order to secure another bond to be released from jail to await her trial. Moreover, she may not be able to hire another

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310. *See* TEX. OCC. CODE ANN. § 1704.207 (Vernon 2004) (authorizing a bail bondsman to surrender the principal under certain circumstances).

311. *Id.* § 1704.207(b).

312. *See id.* § 1704.207(a)(2)(A)-(G) (listing the requirements for the affidavit of surrender).

313. *See id.* § 1704.207(b) (implying that the court must find reasonable cause to allow for the principal to be surrendered by providing penalties against the bail bondsman if it is later found that reasonable cause did not exist).

314. *See id.* (allowing the surrender of the principal to be challenged if "the principal of the attorney representing the state or an accused in the case determines that a reason for the surrender was without reasonable cause").

315. *See* TEX. OCC. CODE ANN. § 1704.207(c) (Vernon 2004) (authorizing a court which finds that the surrender was without reasonable cause to award the principal "all or part of the fees paid for the execution of the bond," and "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").

attorney to represent her at trial and will need to remain with the attorney against whom she obtained a money judgment, and whose ability or desire to zealously advocate for her may not be what it was at the beginning of the representation. Nonetheless, if the client were to take this approach, the attorney-bondsman would have to justify himself before the judge who granted the warrant for arrest, and if the judge finds that the attorney inappropriately jumped off the bond, he risks his reputation before that or other judges. Further, the attorney-bail bondsman may also have to refund the bail bond premium or fee, thereby causing a financial loss for the attorney.

D. *File a Breach of Fiduciary Duty Claim*

Finally, a client who believes her attorney improperly jumped off her bond may file a civil action in court against him for breach of fiduciary duty and seek monetary damages. The attorney-client relationship "is characterized as 'highly fiduciary,' and requires proof of 'perfect fairness' on the part of the attorney."[316] Therefore, the attorney owes his client a higher duty in his representation of her. In fact, the attorney-client relationship is one of "'most abundant good faith,' requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception."[317] The focus of a breach of fiduciary duty action is "whether an attorney obtained an improper benefit from representing a client."[318] This can occur by an "attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, . . . improper use of client confidences, . . . [or] engaging in self-dealing."[319] An attorney has an "affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits and mistakes."[320] Consequently, failure to do so may leave him liable in a

316. Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (citing Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1965)).

317. Perez v. Kirk, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) (citing Hefner v. State, 735 S.W.2d 608, 624 (Tex. App.—Dallas 1987, pet. ref'd)).

318. Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied) (citing Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied)).

319. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

320. *Jackson*, 37 S.W.3d at 22.

breach of fiduciary duty action, particularly if the court finds that the attorney intentionally concealed any information. In *Jackson Law Office, P.C. v. Chappell*,[321] the Twelfth Court of Appeals asserted that the "breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment."[322] If the client alleges that her attorney jumped off her bond, and in doing so was motivated by his own financial interests, the court may consider that the attorney was self-dealing, which implies a presumption of unfairness in favor of the client.[323] Once an allegation of self-dealing is raised, the burden of proof then shifts to the attorney to prove: "(a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal."[324] While there are various remedies for a client seeking redress against her attorney-bail bondsman, they are oftentimes of little comfort because the greater harm of the client being incarcerated and potentially placed at a disadvantage for her trial far outweigh any restitution the client could receive. Of course, this could pose the biggest inconvenience for an attorney now that he is a named defendant in a suit for monetary damages, which if the court deems the attorney's conduct sufficiently egregious, could also render the court's *sua sponte* referral to the State Bar of Texas Grievance Committee.

IX. RECOMMENDATION

In his oft-cited treatise on professional responsibility and legal ethics, Professor C. Wolfram clearly asserts that "[i]n the course of representing a client, incidental matters might arise such as the client's need for a surety . . . . A lawyer serving or having an interest in [that] business is *obviously* in a conflict of interest with his or her client."[325] Apparently, this conflict is not so obvious to the State of Texas. However, outside of the circle of attorneys who market the service of bail bonds to criminal defendants, it is difficult to find

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321. 37 S.W.3d 15 (Tex. App.—Tyler 2000, pet. denied).

322. *Jackson*, 37 S.W.3d at 22 (citing Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)).

323. *Id.*

324. *Id.* (citing Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1974)).

325. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 483 (Hornbook Series Practitioners ed. 1986) (emphasis added).

anyone who disagrees with the authors on this topic. In fact, the most common response to this dual practice is, "an attorney can do *that*?" Most are stunned to learn that not only can an attorney act in this capacity for his client, but also that the Occupation Code carves out a statutory exemption to enable and facilitate it. It is refreshing to find legal ethicists, the majority of states, and even the ABA call a spade a spade by addressing the obvious conflict in such a direct manner. It is now time for Texas to do the same. And, fortunately for Texans, there are a variety of options to consider and from which to select.

Undoubtedly, the most comprehensive and protective approach parallels one taken by many states—that of a statutory prohibition.[326] While some states prohibit the attorney from acting as a bail bondsman and impose a criminal sanction for violation of that provision,[327] others have a more measured response and specifically prohibit an attorney from becoming a surety for his own clients.[328] The latter approach is the superior approach for Texas to take at this time.

Given the history of the practice of attorney-bail bonding in Texas, it seems unrealistic to pursue an enactment of a complete prohibition. Many attorneys have come to rely on the income associated with the bail bond business and Texas does not discourage attorneys from engaging in ancillary occupations; therefore, allowing attorneys to compete for a percentage of the available bail bond business seems fair while keeping with the free-market sys-

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326. *See* cases cited *supra* note 78.

327. *See* GA. CODE ANN. § 45-11-8(a) (Supp. 2005) ("It shall be unlawful for any elected official, officer of the court, law enforcement officer, or attorney in this state to engage either directly or indirectly in the bail bond business."). Section 45-11-8(b) of the Georgia code also states that "[a]ny person who violates this Code section shall be guilty of a misdemeanor." *Id.* § 45-11-8(b). N.Y. INS. LAW § 6804(c) (McKinney 2005) ("Any member of the bar having any financial interest by which he is to profit from the giving of bail shall be guilty of a misdemeanor.").

328. *See* CONN. GEN. STAT. ANN. § 54-67 (West 2001) ("No attorney-at-law may give any bond or recognizance in any criminal action or proceeding in which he is interested as attorney."); FLA. STAT. ANN. § 454.20 (West 2001) ("No attorney shall become surety on the official bond of any state, county, or municipal officer of this state, nor surety on any bond of a client in judicial proceedings."); *see also* MICH. COMP. LAWS SERV. § 600.2665 (LexisNexis 2004) (providing that "[n]o practicing attorney or counselor shall become a surety or post a bond for any client," but that the rule "shall not apply to any bond of $100.00 or less required to be filed by a fiduciary in the probate court or the family division of circuit court").

tem embraced in the United States. This Article does not address the larger issue of the implications and equity of the bail bond system on criminal defendants; rather, this Article addresses the sanctity of the attorney-client relationship and the tarnishing of that relationship, as well as the profession, when an attorney acts as his client's bail bondsman. Therefore, we recommend that Texas repeal the attorney exemption and enact a statute that prohibits an attorney from acting as a bail bondsman for his own clients. With this approach, lawyers will be free to engage in the business of bail bonding with non-clients, subject to the licensing, security, and regulatory requirements of the Occupation Code; clients will be protected from the harm of the transaction; and the profession of lawyering will stand taller because we chose to respect the delicate nature and profound responsibility of the attorney-client relationship.

X. Conclusion

In the meantime, there remain myriad ethical considerations an attorney must carefully consider when determining whether to become a bail bondsman for his criminal defendant client. It is not enough for an attorney to rely solely on Texas statutes and ethics opinions to resolve the quandary, because they do little in regards to providing a proper analysis of the ethical duties he owes his client. With his heightened fiduciary duty to his clients, it should not be enough that he is doing the minimum to ensure he is not *de jure* violating his duties, but rather, he should focus on whether in effect he is *de facto* violating his duties. He should also look to other states' opinions and other resources available. He must maintain the highest professional integrity if he is to do right by his clients and ensure an unquestionable dedication to both the letter and spirit of the law.