



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2019-3

The Honorable Dave Rader
Oklahoma State Senate, District 39
2300 N. Lincoln Blvd.
Oklahoma City, OK 73105

January 29, 2019

Dear Senator Rader:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. May an individual, working on behalf of a non-profit entity, pay cash bail to secure the pre-trial release of persons lawfully arrested if the individual is not qualified and licensed as a bail bondsman pursuant to 59 O.S.2011 & Supp.2018, §§ 1301 – 1341?**
- 2. If the answer to Question #1 is yes, is the individual limited under 59 O.S.Supp.2018, § 1303 to paying cash bail on no more than ten occasions per year?**

I.
BACKGROUND

Unless charged with an offense that has been deemed unbailable, all persons arrested for a crime in Oklahoma have a constitutional right to pretrial release from incarceration through bail. OKLA. CONST. art II, § 8(A). Bail is the “means of procuring the release of one charged with an offense, by insuring his future attendance in court, and compelling him to remain within the jurisdiction of the court.” *Manning v. State ex rel. Williams*, 1942 OK 8, ¶ 7, 120 P.2d 980, 981. The right to bail is based on the premise that “a person accused of a crime is presumed to be innocent of the charged offenses and shall be admitted to bail until his or her guilt is determined.” *Brill v. Gurich*, 1998 OK CR 49, ¶ 3, 965 P.2d 404, 405.

Bail can be made in one of two ways. First, a defendant or someone acting on his or her behalf may deposit the full amount of bail in cash with an authorized official. *See* 22 O.S.2011, § 1106 (“A deposit of the sum of money mentioned in the order admitting to bail is equivalent to bail and upon such deposit the defendant must be discharged from custody.”). Alternatively, the defendant

or someone acting on his or her behalf may post a bond,¹ pledging some amount of cash or property as security with the same officials. *See* 59 O.S.2011, §§ 1323, 1324. When a third party is involved, the bail bond agreement is in essence a form of surety contract: “the surety is the bail bondsman, the principal is the defendant whose appearance is being guaranteed by the surety, and the creditor is the court or the state.” *State v. Vaughn*, 2000 OK 63, ¶ 10, 11 P.3d 211, 214. “By the written undertaking, the bondsman (surety) agrees to insure the appearance of the defendant (principal) before the court and, in the event the defendant fails to appear, to pay the court (creditor) the amount of money specified in the order fixing bail.” *Id.*

In Oklahoma, the issuance of bail bonds and conduct of bail bondsmen is regulated by the Insurance Commissioner (the “Commissioner”). *See* 59 O.S.Supp.2018, § 1302. Statutory provisions also govern many aspects of bond requirements and the bail bond process. For the purposes of your request, the relevant statute is the licensing provision:

No person shall act in the capacity of a bail bondsman or perform any of the functions, duties or powers prescribed for bail bondsmen under the provisions of Section 1301 et seq. of [Title 59], unless that person shall be qualified and licensed as provided in Section 1301 et seq. of [Title 59] or as authorized pursuant to the Bail Enforcement and Licensing Act.

Id. § 1303(A). Based on this provision, you have asked whether a person working on behalf of a non-profit entity that pays cash bail to secure a defendant’s pre-trial release is required to first obtain a bail bondsman license.²

II. DISCUSSION

A. **An individual working on behalf of a nonprofit entity may post cash bail to secure the pretrial release of a defendant without first obtaining a bail bondsman license.**

Because only those who “act in the capacity of a bail bondsman or perform any of the functions, duties or powers prescribed for bail bondsmen under the provisions of Section 1301 et seq. of [Title 59]” must be “qualified and licensed” by the Commissioner, we must ascertain what that phrase means. The statute does not define what it means to “act in the capacity of a bail bondsman,” but it does define “bail bondsman” as meaning one of the following categories:

“Surety bondsman” means any person who has been approved by the Commissioner and appointed by an insurer by power of attorney to *execute or*

¹ The relevant statute defines a “bond” as “an appearance bond for a specified monetary amount which is executed by the defendant and a licensed bondsman pursuant to the provisions of Section 1301 et seq. of [Title 59] and which is issued to a court clerk as security for the subsequent court appearance of the defendant upon release from actual custody pending the appearance[.]” 59 O.S.Supp.2018, § 1301(B)(12).

² For purposes of this opinion, we assume that individuals who work on behalf of nonprofits to provide cash bail on behalf of criminal defendants are *not* authorized bail enforcers under the Bail Enforcement and Licensing Act. The provisions of that statute are beyond the scope of this opinion.

countersign bail bonds for the insurer in connection with judicial proceedings and charges and receives money for his or her services;

“Professional bondsman” means any person who has been approved by the Commissioner and who *pledges cash as security for a bail bond* in connection with a judicial proceeding *and charges and receives money for his or her services;*

“Property bondsman” means any person who has been approved by the Commissioner and *who pledges real property as security for a bail bond* in a judicial proceeding *and charges and receives money for his or her services;*

“Cash bondsman” means any person who has been approved by the Commissioner and *who deposits cash money as security for a bail bond* in a judicial proceeding *and charges and receives money for his or her services;*

“Multicounty agent bondsman” means a *professional bondsman* who has been approved by the Commissioner and who otherwise complies with the provisions of Section 1306.1 of [Title 59].³

59 O.S.Supp.2018, § 1301(B) (emphasis added). As the emphasized language shows, two characteristics are common to each category, and together demonstrate what it means to act in the capacity of a bail bondsman. *First*, the bondsman posts a bond as security for the defendant’s subsequent court appearance, which is guaranteed by a deposit or pledge of cash or some other property. *Second*, the bondsman “charges and receives money for his or her services.” Where both are present, the person is acting “in the capacity of a bail bondsman” and therefore must “be qualified and licensed” by the Commissioner. *Id.* § 1303(A). If one or both are absent, the person is not acting “in the capacity of a bail bondsman.”

In the case of a person working on behalf of a non-profit entity who pays cash bail to secure a defendant’s pre-trial release, neither characteristic is present.

First, as noted above, a bail bondsman is a surety who assumes responsibility for insuring the defendant’s subsequent appearance in court, which is guaranteed by some form of security. *State v. Vaughn*, 2000 OK 63, ¶ 10, 11 P.3d at 214. By contrast, the mechanics of cash bail are fundamentally different in the eyes of the law:

In cash bail *the law looks to the money as surety* for the appearance of the defendant rather than to the surety. This follows from the fact that *the money deposited with the court insures the defendant’s appearance*, and there is no promise by a surety to pay money in the future if the defendant fails to appear. The money in a cash bail is held by the court as trustee on the terms that if the defendant appears as required, the money will be returned to the depositor, and if the defendant fails to appear, the money shall be given to the appropriate authority . . .

³ Section 1306.1 requires a multicounty agent bondsman to be a licensed professional bondsman continually in Oklahoma for at least two years prior to becoming a multicounty agent bondsman, to submit annual financial statements to the Commissioner, to show a net worth of at least \$250,000 on his or her initial application, and to deposit a minimum of \$100,000 with the Commissioner. 59 O.S.Supp.2018, § 1306.1(A).

[But t]he depositor of bail money has no obligation for the custody or appearance of the defendant.

State v. Echols, 850 S.W.2d 344, 346-47 (Mo. 1993) (emphasis added) (citing *People v. Castro*, 464 N.Y.S.2d 650, 655-56 (N.Y. Sup. Ct. 1983)); *see also The Royal Consulate of the Kingdom of Saudi Arabia v. Pullan*, 373 P.3d 1283, 1285 (Utah 2016) (citing *Castro* and *Echols*). On at least one occasion, the Oklahoma Supreme Court appears to have recognized this distinction. *See State v. Ford*, 1977 OK 233, ¶ 9, 573 P.2d 257, 259 (differentiating between “recognizance, bond or undertaking of bail” and “money deposited instead of bail” for the purposes of bail forfeiture under Title 22, Section 1108). Accordingly, a person who pays cash bail for the release of a criminal defendant is not providing security for a bail bond and, therefore, is not acting “in the capacity of a bail bondsman.”

Second, our understanding of the scenario you describe is that the person working on behalf of a non-profit entity that pays cash bail to secure a defendant’s pre-trial release is *not* charging or receiving any money for that service. A person who does not charge or receive money for such services does not “act in the capacity of a bail bondsman.”⁴

B. An individual who posts cash bail to secure the pretrial release of a defendant while working on behalf of a nonprofit is not limited to posting such bail ten times per year.

Your next question implicates the following explicit carve-out to Section 1303(A)’s licensing requirement:

[N]one of the provisions or terms of [Section 1303] shall prohibit any individual or individuals from . . . [p]ledging real or other property as security for a bail bond for himself, herself or another in judicial proceedings who does not receive, or is not promised, a fee or charge for his or her services provided *such person shall not be permitted to make in excess of ten bonds per year.*”

59 O.S.Supp.2018, § 1303(A)(1) (emphasis added). Having found that a person working on behalf of a non-profit entity who pays cash bail to secure a defendant’s pre-trial release is *not* required to be a licensed bondsman, you ask whether the above language would limit such a person to paying cash bail no more than ten times per year.

Section 1303(A)(1) applies to persons who “pledg[e] real or other property as security for a bail bond.” As used in this context, a “pledge” of property refers to “something given or considered as a security for the performance of an act and usu[ally] liable to forfeiture in case of nonperformance.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1739 (3d ed. 2002). Thus, Section 1303(A)(1) permits an unlicensed person to secure the release of a defendant by providing, without compensation, real or other property as security for the defendant’s subsequent

⁴ As noted at the outset, Section 1303(A) also requires those who “perform any of the functions, duties or powers prescribed for bail bondsmen under the provisions of Section 1301 et seq. of [Title 59]” to be qualified and licensed. 59 O.S.Supp.2018, §1303(A). However, for the reasons discussed, a person that pays cash bail to secure a defendant’s pre-trial release, and does not charge or receive money for that service, is not performing any such “functions, duties or powers.” The act of paying cash bail to secure a defendant’s release without receiving consideration for doing so is not addressed in Title 59, but is instead permitted by Title 22, Section 1106.

appearance in court. That property would ultimately be subject to forfeiture in the event of the defendant's failure to appear. This arrangement is similar to the surety-principal-creditor relationship that exists among a bail bondsman, the defendant, and the court as described in *State v. Vaughn, supra*, but because the pledging party is not compensated, the licensing requirement does not apply. According to the Oklahoma Insurance Department, this carve-out allows friends and families to post a bond on behalf of a defendant in order to secure the defendant's release from custody without having to use a bondsman. *See Okla. Ins. Dept. Bulletin No. 2013-02.*

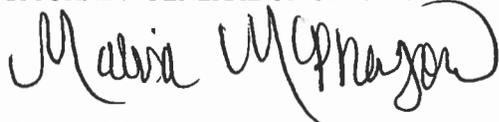
This carve-out—including the ten-bond-per-year limitation—does *not* apply to a person who pays cash bail to secure a defendant's pretrial release. Section 1303(A)(1) applies only to those who "pledg[e] real or other property as security for a bail bond." As discussed above, the payment of cash bail does not involve bail bonds at all. Rather, in the case of cash bail it is "the money deposited with the court [that] insures the defendant's appearance." *Echols*, 850 S.W.2d at 347; *see also* 22 O.S.2011, § 1106 ("A deposit of the sum of money mentioned in the order admitting to bail is equivalent to bail[.]"). The cash deposit provides the court with the full amount of security needed to obtain a defendant's release and, as such, is fundamentally different from a bail bond that is secured by a person's pledge to provide real or other property if a defendant fails to appear as required at a later time.

It is, therefore, the official Opinion of the Attorney General that:

- 1. An individual, working on behalf of a non-profit entity, who pays cash bail to secure the pretrial release of persons lawfully arrested and does not charge or receive money for doing so is not required to obtain a bail bondsman license pursuant to 59 O.S.Supp.2018, § 1303(A). Such an individual is not "act[ing] in the capacity of a bail bondsman or perform[ing] any of the functions, duties or powers prescribed for bail bondsmen under the provisions of Section 1301 et seq. of [Title 59.]" *Id.***
- 2. An individual, working on behalf of a non-profit entity, who pays cash bail to secure the pretrial release of persons lawfully arrested and does not charge or receive money for doing so is not limited by 59 O.S.Supp.2018, § 1303(A)(1) to making ten or less such payments per year. That provision applies only to those "[p]ledging real or other property as security for a bail bond," which is different from paying cash bail. *See State v. Echols*, 850 S.W.2d 344 (Mo. 1993); *The Royal Consulate of the Kingdom of Saudi Arabia v. Pullan*, 373 P.3d 1283 (Utah 2016).**



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