## Opinion No. 69-93

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**BY:** OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson III, Assistant Attorney General

**TO:** Mr. R. F. Apodaca, Superintendent of Insurance, New Mexico Department of Insurance, Santa Fe, New Mexico 87501

## QUESTIONS

FACTS

An individual has been advertising himself as a bail bondsman in a southeastern New Mexico county and is placing cash deposits in lieu of bail for accused persons, charging the accused a fee of 10 per cent of the amount of the cash deposit. This individual does not write bonds for bail and does not have a licensed insurance business.

QUESTIONS

Is the business of the posting of a cash deposit in lieu of bail for an accused person and charging a fee for the use of the money transacting any business of insurance?

CONCLUSION

Yes.

## OPINION

*{*147}* ANALYSIS

The term insurance is defined in the New Mexico Statutes to mean "any form of insurance, bond or indemnity contract, the issuance of which is legal in the State of New Mexico . . ." Section 58-1-1, N.M.S.A., 1953 Compilation. Under the statute classifying the forms of insurance which are legal in the State of New Mexico we find that insurance includes "becoming a surety or guarantor for the performances of any person, copartnership or corporation of any lawful obligation, undertaking, agreement or contract of any kind except contracts or policies of insurance . . ." Section 58-18-25 (f), N.M.S.A., 1953 Compilation.

It would appear that, analytically, the conduct of the so-called bail bondsman, as described above, would be that of one who is a surety for the accused person. The fact that he puts up the entire amount of cash required by the court rather than merely making a promise to pay in the event of non-appearance of the accused would not change the result.

Surety is defined as "a person who undertakes some specific responsibility on behalf of another who remains primarily liable; one who makes himself liable for the default or miscarriage of another, or for the performance of some act on his part (e.g. payment of a debt, appearance in court for trial, etc.); a bail: = Security." 10 Oxford English Dictionary 230. That same dictionary defines security as: "One who pledges himself (or is pledged) for another, a surety." 9 Oxford English Dictionary, 370.

The legal authorities agree with this historical interpretation. Black's Law Dictionary defines surety as "one who undertakes to pay money or to do any act in event that his principal fails therein." Black's Law Dictionary, 1611. See **Philco Fin. Corp. v. Mehlman,** 245 S. C. 139, S. E. 2d 475 (1964); **Roberts v. Hawkins,** 70 Mich. 566, 48 N.W. 575 (1888).

We should note that the difficulties in regulating this type of activity have been solved in many states by the enactment of comprehensive bail bond regulatory schemes. See generally, Annot., 13 A.L.R. 3d 618 (1967). For example, both Illinois and California regulate the persons who put up cash deposits for a fee in addition to the more traditional bondsmen who write a bond for the accused's release. See Ill. Rev. Stat. ch. 16, § 51 (1967) and Cal Ins. Code § 1800.4.

The difficulty in analyzing the present problem in absence of a comprehensive regulatory statute stems from the use and misuse of the phrases "making bail", making bond", "release on recognizance", etc. As stated by the Oxford English Dictionary in its historical definitions of the word **bail,** "in consequence of the transition of meaning . . . many phrases are current which are not easily identified." 1 Oxford English Dictionary 624.

Unfortunately, the New Mexico Statutes contribute to the misunderstanding. Section 41-4-7 says that "when the indictment is for a bailable offense, the defendant may be let to bail. . . ." Section 41-4-8 says that "recognizance in criminal proceedings may be taken in open court . . ." And the statute under which the individual in question is operating, states that "the defendant may, in the place of giving bail, deposit with the clerk of the court . . . the sum of money mentioned in the order . . ." Section 41-4-10, N.M.S.A., 1953 Compilation. Finally, the New Mexico Statutes provide that:

"If money has been deposited instead of bail, and the defendant at any time before the forfeiture thereof shall give sufficient special bail or shall surrender himself in open court, or to the sheriff, *{*148}* or be in any manner legally discharged, the courts shall order a return of the deposit to the defendant, or to the person who deposited it for him." Section 41-4-11, N.M.S.A., 1953 Compilation.

Technically speaking, bail is not the same as placing security for the appearance of the accused. "Bail is a delivery, or bailment, of the person to his sureties upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail." **Territory ex rel Thacker v.**

**Conner,** 17 Okla. 135, 87 P. 591 (1906); see also 4 W. Blackstone, Commentaries *297.

A California court recognized the technical meaning of the term **bail** but indicated that its popular and probably universal meaning is "simply that it is 'the security given for the due appearance of a prisoner in order to obtain his release from imprisonment.' . . . when used in this sense, bail can mean either cash or bond." **Sawyer v. Barber,** 142 Cal. App. 2d 827, 300 P. 2d 187 (1956). Of course, cash can mean a check or certificate of deposit. For example, see **State v. Hart,** 209 Iowa 119, 227 N.W. 650 (1929).

Bail and bail bond are not the same in spite of the use of the terms interchangeably. "A bail bond is a contract between the surety therein and the State to the effect that the accused, the principal in the bond, will appear in court when required and that he will comply with all the conditions of the bond." **State v. Liakas** 165 Neb. 503, 86 N.W. 2d 373 (1957). Likewise, a bond and cash are not the same for a bond is not cash. It is a promise to pay cash." **State ex rel Ferguson v. American Saving Stamp Co.** 194 Kan. 297, 398 P.2d 1011 (1965). The term implies a written obligation. **Gutta Percha & Rubber Mfg. Co. v. Attalla,** 39 So. 719 (Ala. 1905); **Town of Koshkonog v. Burton,** 104 U.S. 668, 26 L. Ed. 886 (1882).

The placing of a cash deposit in lieu of bail would appear to be similar to a recognizance. Again, turning to the Oxford English Dictionary, we find that recognizance is "A bond or obligation, entered into and recorded for a court or magistrate, by which a person engages himself to perform some act or observe some condition (as to appear when called on, to pay a debt, or to keep peace); also, a sum of money pledged as a surety for such performance and rendered forfeit by neglect of it." 8 Oxford English Dictionary 252.

Although one court has found that a recognizance and a bail bond are not really distinguishable except in form, **State v. Bradsher,** 189 N.C. 401, 127 S.E. 349 (1925), most courts have found that a recognizance creates an automatic debt, whereas a bail bond is merely evidence of a debt. See **Cole v. Warner,** 93 Tenn. 155, 23 S.W. 110 (1893).

"A recognizance is where the prisoner and his recognizors appear before the court of justice and acknowledge themselves to be indebted to the state in a certain sum, upon a certain condition, which is entered upon the record, and thereby becomes a part of it. . . . A recognizance certainly, whether it assume the form of a bond, or the usual form of a recognizance, should be acknowledged before the court or officer taking it. 'A recognizance is an obligation of record, entered into before some court or magistrate duly authorized to take it, with condition to do some particular act. In criminal cases the usual condition is for the accused to appear and stand trial. A bail bond is an obligation under seal given by the accused with one or more sureties, and made payable to the proper officer, with condition to be void upon performance by the accused of such acts as he may legally be required to perform. A recognizance differs from a bail *{*149}* bond

merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation.'" **State v. Door,** 59 W. Va. 188, 53 S.E. 120 (1906).

We conclude, therefore, that the so-called bail bondsman is a recognizor for the accused and is pledging a sum of money as a surety for the performance of the accused's obligation to appear for trial and when done as a business, the bail bondsman is transacting an insurance business. See **People v. Adams,** 351 Ill. 79, 183 N.E. 810 (1932).

It follows that, if this business is carried on without a license, it is contrary to the New Mexico Statutes and is punishable as a misdemeanor under Section 58-9-1, N.M.S.A., 1953 Compilation. In addition, the advertisement of the business is that of bail bondsman is an attempt to solicit insurance without a license, which is also punishable as a misdemeanor. Section 58-9-2, N.M.S.A., 1953 Compilation.