

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 08-49

Propriety of bonding company acting as surety requiring defendant to deposit full amount of bond

QUESTION

May a professional bail bondsman acting as surety for a criminal defendant require the defendant to pay, in addition to the one-time bond initiation fee of up to \$25 and the 10 percent premium fee for the bond, a deposit totaling the full amount of the bond?

OPINION

Yes. Under Tenn. Code Ann. § 40-11-126(8), the surety may accept a deposit for “collateral security or other indemnity” in an amount that is “reasonable in relation to the amount of the bond,” and a deposit up to or including the full amount of the bond could be held reasonable.

ANALYSIS

Article I, § 15, of the Tennessee Constitution guarantees that “all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.” “Under the foregoing constitutional provision [a defendant] is entitled to bail as a matter of right” in all criminal cases except capital cases. *Wallace v. State*, 193 Tenn. 182, 245 S.W.2d 192, 193 (1952). Once the amount of the defendant’s bail bond has been set, “[t]here are four different types of bail a defendant may post to obtain his or her release pending trial.” *State v. Clement*, 925 S.W.2d 223, 225 (Tenn. 1996). The first type of appearance bond is a cash or deposit bond, as authorized under Tenn. Code Ann. § 40-11-118, in which the defendant personally deposits with the clerk “a sum of money in cash equal to the amount of the bail.” *Id.* The other three types of appearance bonds are bonds secured by:

- (1) Real estate situated in this state with nonexempt unencumbered equity owned by the defendant or the defendant's surety worth one and one-half (1 ½) times the amount of bail set. If the bail bond is secured by real estate, the defendant or the defendant's surety shall execute a deed of trust conveying the real estate in trust to the clerk who shall immediately file the deed of trust in the office of the register of the county in which the real estate is situated. The costs of preparation of the deed of trust and recordation shall be paid by the defendant;

- (2) A written undertaking signed by the defendant and at least two (2) sufficient sureties, and approved by the magistrate or officer. Such sureties under this section shall not be professional bondsmen or attorneys; or
- (3) A solvent corporate surety or sureties or a professional bail bondsman as approved, qualified or regulated by §§ 40-11-101— 40-11-144 and part 3 of this chapter. No bond shall be approved unless the surety thereon appears to be qualified.

Tenn. Code Ann. § 40-11-122. As this Office has previously opined, a court may not require a defendant to secure his or her bail bond with a cash deposit instead of with real estate or a surety. *See Op. Tenn. Att’y Gen. 03-054 (April 30, 2003)*. Once the amount of bail has been set by the court, the defendant has the “option as to how he will provide the security required.” *Lewis Bail Bond Co. v. Gen. Sessions Ct. of Madison County*, No. C-97-62, 1997 WL 711137 (Tenn. Ct. App. Nov. 12, 1997).

If a defendant elects to secure his or her appearance bond through a professional bail bondsman, the surety may charge the defendant a one-time bond initiation fee of no more than \$25.00. Tenn. Code Ann. § 40-11-316(b). The surety may charge a premium on the bail bond, but the surety “shall not assess more than ten percent (10%) of the amount of the face value of the bond for premium fee and related charge or charges.” After twelve months, the surety may charge a renewal fee of up to 20 percent of the amount of the original fee and charges. If there is an appeal, the surety may charge an additional fee that is no more than ten percent of the face value of the bond. Tenn. Code Ann. § 40-11-316(a). The surety may not “[a]ccept anything of value from a principal except the premium.” Tenn. Code Ann. § 40-11-126(8). Thus, a professional bail bondsman who agrees to act as surety on a defendant’s appearance bond under Tenn. Code Ann. § 40-11-122(3) may not accept fees from the defendant more than those authorized by Tenn. Code Ann. § 40-11-316.

However, the surety is permitted to “accept collateral security or other indemnity from the principal which shall be returned upon final termination of liability on the bond.” Tenn. Code Ann. § 40-11-126(8). The amount of “collateral security or other indemnity” must be “reasonable” in relation to the amount of the defendant’s bond. *Id.*; *see State v. Conrad*, No. W1999-00650-CCA-R3-CD, 2000 WL 33288751, at *3-*4 (Tenn. Crim. App. June 28, 2000).

While the statute does not provide any definition of what would be “reasonable” security, it is the opinion of this Office that a surety likely would be permitted to require and accept a deposit for “collateral security or other indemnity” in an amount up to and including the full amount of the bond. Although dependent upon the facts of each case, a deposit of this amount would likely be deemed reasonable in relation to the amount set for the defendant’s bond, as the surety would be obligated to forfeit the full amount of the bond to the court, plus costs, should the defendant abscond. Tenn. Code Ann. § 40-11-139. We note, however, that, if a defendant has the resources to provide a bondsman with cash collateral in the full amount of the bond, he could instead post a cash bond

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with the court under Tenn. Code Ann. § 40-11-118 and thereby avoid the extra expense of an initiation fee and premium charged by a professional bail bondsman.

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