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Commissioner's Opinion

On February 16, 2001, a Department of Insurance attorney responded to a letter from private counsel requesting an opinion regarding the application of provisions of the Insurance Code and the Insurance Commissioner's regulations to the practice of posting bail agent signboards in jails and other detention facilities. The written response of the Department's attorney was widely distributed within the bail industry and to local governmental agencies responsible for the administration of justice. With such broad dissemination, the response was treated as an official opinion of the Insurance Commissioner, which it was not.

This matter has generated substantial public interest, concern and widely divergent opinions as to the applicable law and its proper interpretation. Accordingly, the Insurance Commissioner has directed the Department to revisit the issue for purposes of establishing and disseminating a formal policy determination. This opinion is that formal determination.¹

Background

A number of jails and detention facilities throughout the state provide criminal detainees with access to bail agent information. In some facilities access may be as simple as providing the local telephone yellow pages. In others, custodial authorities prepare and post lists of local bail agent's names and telephone numbers taken from the yellow pages, or post originals or copies of the yellow page advertisements themselves. Over the past several years, some custodial authorities have allowed or contracted with private third parties for the posting of informational signboards within the facilities. The preparation of these signboards may involve costs to and the active participation of licensed bail agents or associations of licensed agents, and may involve the payment of fees from the third party contractor to the local governmental agency. In most, if not all of these arrangements, the form, content and process for composition of the signboards is determined by the contract between the third party vendor and the governmental agency.

¹ This opinion shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation, as those terms are described in Sections 11340.5 and 11342.600 of the Government Code.

Questions Presented

The questions presented are primarily with reference to the commercial signboards described above, where licensed bail agents pay to be included on a signboard, or otherwise exercise some control or discretion for the purpose of being included on a signboard. The questions are the following:

Are the described jail signboards prohibited by the provisions of the Insurance Code and/or administrative regulations of the Insurance Commissioner regulating the transaction of the business of bail?

Are bail licensees or other persons subject to administrative or criminal sanctions, or both, for participating in the establishment and posting of the described jail signboards?

Discussion

A jail signboard is a printed presentation providing basic contact information regarding the name, address and telephone number of licensed bail agents, and/or an advertisement or compilation of the individual advertisements of licensed bail agents. Insurance Code sections 1800 and 1800.75 clearly authorize licensed bail agents to make such written presentations and to advertise. The questions for consideration are thus reduced to a determination as to whether the Insurance Code or regulations of the Insurance Commissioner found in Title 10 of the California Code of Regulations prohibit such presentations or advertisements in jails or other detention facilities.

The specific statutory provisions regarding the licensing of bail agents and the regulation of the transaction of bail are found in Insurance Code sections 1800 through 1823. None of these provisions directly address the propriety of printed informational presentations or advertisements in jails or other detention facilities. These bail statutes do, however, provide the Insurance Commissioner with the authority to adopt regulations “necessary, advisable or convenient” to the enforcement of the statutes themselves. (Insurance Code section 1812). Insurance Code section 1800.6 also delegates to cities and counties the power to enact “other and further regulations concerning, and not in conflict with,” Insurance Code sections 1800 through 1823.

The Insurance Commissioner has exercised the statutory rulemaking authority provided in Insurance Code section 1812 in adopting Sections 2053 through 2104 of Title 10, California Code of Regulations. Although these regulations address the conduct of licensed bail agents and their representatives in or around jails and other places of detention, both generally and specifically, the regulations do not specifically address advertising or the printed informational presentations under consideration.

Previous analysis of this issue has concentrated on Section 2074, which provides as follows:

“Except as provided in Section 2074 and 2079.5 [sic], no bail licensee shall solicit any person for bail in any prison, jail, or other place of detention of persons, court or public institution connected with the administration of

justice; or in the halls or corridors adjacent thereto; provided that a bail licensee may in such halls, corridors or in other rooms or areas where not prohibited by local rule or ordinance transact bail with persons specified in Section 2079 who have prior to transaction, requested his services.”

It is argued that the term “solicit” necessarily includes the presentations and advertising found on the described jail signboards. In support of this argument, its advocates rely upon the definition of “solicit” provided in Insurance Code section 1800(b). Subdivision (b) of Section 1800 provides:

“For purposes of this section, "solicit" shall include any written or printed presentation or advertising made by mail or other publication, or any oral presentation or advertising by means of telephone, radio, or television which implies that an individual is licensed under this chapter and any activity in arranging for bail which results in remuneration to the individual conducting that activity.”

While Insurance Code section 1800(b) does, in fact, incorporate printed presentations and advertising into its definition of “solicit,” it does so solely for its purposes of defining what licensed bail agents may do, and what unlicensed persons may not. While the Insurance Commissioner could have adopted the specific definition of subdivision (b) of Section 1800 in the body of Section 2074 or in reference thereto, that was not done. As well, where the Insurance Commissioner seeks to prohibit conduct that is otherwise specifically authorized by statute, he or she should do so directly and unequivocally. That was not done.

Some would argue that Section 2054 of the regulations provides the required reference in indicating that “Insofar as they are applicable, the definitions contained in the General Provisions and in Chapter 7, Part 2, Division 1 of the Insurance Code² are applicable to this article.” The simple answer with regard to Section 2074 is that the definition of Section 1800(b) is inapplicable for the reasons set forth above, and as well for the reason that Section 2074 is by its terms directed to that active conduct that may effect the orderly administration of justice in the designated facilities. Section 2074 is not directed at the passive conduct reflected in the described jail signboards.

Determination

For the reasons set forth in the above discussion, the answer to both questions presented is no. Specifically:

The described jail signboards are not prohibited by the provisions of the Insurance Code and/or administrative regulations of the Insurance Commissioner regulating the transaction of the business of bail.

² Insurance Code sections 1800 through 1823.

As such,

Bail licensees or other persons are not subject to administrative or criminal sanctions, or both, for participating in the establishment and posting of the described jail signboards.

The above determination should be considered as an opinion to the effect that the described signboards are not unlawful, *per se*. There may be instances where a particular signboard and/or its use may violate the provisions of the Insurance Code or the regulations of the Insurance Commissioner. Although not exhaustive, examples of possible violations would include the composition, positioning or use of a signboard pursuant to arrangements between bail agents and law enforcement authorities or third party vendors that would provide an unfair advantage to a particular licensee or group of licensees, or which would disparage a particular licensee or group of licensees.³

The Department of Insurance does have the continuing authority to investigate and prosecute violations of the Insurance Code and the Insurance Commissioner's regulations that may occur in connection with the use and posting of bail agent signboards. The Department will investigate complaints regarding their use, and will take appropriate action where necessary.

Conclusion

In adopting this policy determination, the Insurance Commissioner is mindful of the fact that the jail signboards at issue serve an important and fundamental function in the criminal justice system. Many defendants are unaware of their bail rights and the process for obtaining bail. The signboards contain basic information that will assist them in this regard.

The Insurance Commissioner is mindful as well that advertising prohibitions raise issues of Constitutional import. The Legislature, the Insurance Commissioner and cities and counties, pursuant to Insurance Code section 1800.6, may place reasonable restrictions on the time, place and manner of advertising. Neither the Legislature nor the Insurance Commissioner has done so, and no information has been provided to the Insurance Commissioner in connection with the jail signboards at issue which would justify the intervention of the State. As long as bail licensees have substantially equal access to posting on the signboards, so as not to provide an advantage to or disadvantage any one licensee or group of licensees, and as long as the local governmental agencies reasonably control the content and administrative process for preparation of the signboards, the determination as to whether the signboards comport with the effective and orderly administration of justice should be left to the cities and counties.

³ Such arrangements solely between law enforcement authorities and vendors would be equally objectionable.