



---

## FROM THE GENERAL COUNSEL

---

### RETROSPECTION AND NEW OBSERVATIONS ON THE MOTOR CARRIER SAFETY IMPROVEMENT ACT:

*Can the "Show Me" State Provide Texas Courts with Insight on Masking?*

Ryan Kellus Turner

*General Counsel and Director of Education, TMCEC*

Nothing challenges your understanding of a complex topic like having to talk about it for five hours to an audience of judges, clerks, and prosecutors. Needless to say, I learned a lot while preparing for our one-day clinic, *Commercial Driver's Licenses: Masking and Traffic Safety* (held in Austin at TMCEC on March 13, 2009). Until the clinic, I will confess that I did not fully understand the historical context in which the Motor Carrier Safety Improvement Act (MCSIA) came to exist. (If I had, it would have been easier to explain the enactments of the Legislature to judges and prosecutors in 2004.) Prior to the clinic, I had never taken the time to study in detail Chapter 522 of the Transportation Code, which governs commercial driver's licenses. (Every municipal judge and prosecutor ought to take the time to read it; especially the broad definition of "conviction" in Section 522.003(7).) After nearly a week of preparation and a great day with clinic participants, I better understand why the law exists, why the law came to exist, and the role municipal and justice courts play in the "big picture." Here is the twist. While professionally I am more committed to assisting judges and prosecutors to accomplish the objectives of the MCSIA, to be candid, I have made some discoveries that are likely to reignite some old debates and possibly start some new ones.

#### **Recap: How Did We Get Here?**

It has been nearly six years since the State of Texas joined most other states in enacting laws that prohibited commercial driver's license (CDL) holders from concealing violations of state law or motor vehicle ordinances relating to motor vehicle control by means of either a driving safety course or deferred disposition.<sup>1</sup>

The initial reaction of some to the Legislature's denial of probation to CDL holders accused of motor vehicle control offenses paralleled the Five Stages of Grief: (1) Denial, (2) Anger, (3) Bargaining, (4) Depression, and (5) Acceptance.<sup>2</sup>

In past issues of *The Recorder*, John Vasquez explained the policy behind the MCSIA in an effort to counter "denial" with increased awareness and address the "anger" of those who did not believe that the law as applied to drivers in their personal motor vehicles was fair.<sup>3</sup> Ross Fischer and I have both written about the ways that CDL holders and their attorneys may attempt to "bargain" (e.g., pre-trial diversion or the now classic ditty known to some as "FTA Fraud") and the ethical traps for prosecutors and judges.<sup>4</sup> Finally, many judges and prosecutors have expressed frustration, if not depression, that the Legislature has yet to preclude "leap-frog appeals" of CDL holders from either a municipal or justice

court (where probation is expressly prohibited) to county court (where such defendants have the possibility of getting probation).<sup>5</sup>

While most courts and prosecutors in Texas have gradually come to "accept" the MCSIA and related Texas laws, most of us came to acceptance without understanding the kind of human tragedies that brought about the MCSIA or how the federal requirements make each state an equal stakeholder in traffic safety.

**It does not matter that the CDL holder was in their personal motor vehicle at the time of the offense.**

Why should a CDL holder who is convicted twice within three years of reckless driving in his 1979 Volkswagen Sirocco be entrusted to operate either an 18 wheeler or his company's Dodge minivan when both are used to transport highly toxic tanks of chlorine gas and flammable ammonium nitrite? Why should a CDL holder in their 1984 Honda Civic CRX who is convicted of an offense involving a railroad grade crossing be entrusted to operate a school bus that carries our children to and from home?

The government has a compelling governmental interest in accruing as much data about the driving behavior of commercial drivers, regardless of whether the driver is in a personal

motor vehicle or a “big rig.” As a matter of public policy, the holder of a CDL should not necessarily be allowed to operate a commercial motor vehicle if while driving their own personal motor vehicle (be it a Chevy Cavalier or other make and model) they choose to drive in a cavalier manner which violates traffic laws.

By choosing to be a CDL holder, a person consents to regulation by the Federal Motor Carrier Safety Administration and state and local governments, in essence, consenting to creation of a dossier on every dimension of their driving behavior (regardless of what kind of vehicle the holder is operating) and agreeing that all data collected will be shared among the states. Data sharing requires that all stakeholders (law enforcement, prosecutors, and courts) do their part to ensure that conviction data is collected and shared with other states in a timely manner so that each state can be proactive in getting certain CDL holders off the road (or at least off the road in a commercial motor vehicle). In the interest of public safety, the MCSIA stands for the proposition that public safety on our roadways necessitates more than merely waiting for the worst to happen before taking action against CDL holders who make bad decisions.

When such CDL holders are “disqualified” under Section 522.081 of the Transportation Code, the period of disqualification is typically either 60 or 120 days. Lifetime disqualification is reserved for CDL holders convicted of felonies involving drugs or for refusing to provide a blood, breath, or alcohol sample.

In each hypothetical above, the maximum period of disqualification for the CDL holder would be

60 days. During the period of disqualification, both CDL holders would be prohibited from operating a commercial motor vehicle, however, each could, respectively, continue to drive the Sirocco and CRX.

**When a CDL holder “leap frog appeals” from a municipal court, does granting deferred adjudication in county court constitute “masking?”**

What exactly is “masking?” Texas law contains no definition. Specifically, 49 C.F.R. §384.226 states:

*The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver’s conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the driver’s record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State (emphasis added).*

This regulation clearly prohibits any process that would result in a deferral of judgment or concealment of conviction. Because the goal of the MCSIA is to ensure that a complete snapshot of the CDL holder driving conduct is made part of a driving record that states can see, there is no reason to believe that it should not matter in which court the CDL holder’s “bad conduct” is adjudicated. Otherwise it would be impossible to have a complete picture of the CDL holder’s conduct while behind the wheel. This is the fundamental premise behind the argument that county judges in Texas who grant deferred adjudication to CDL holders accused of traffic offenses are violating the federal “masking”

prohibition.

Such an argument seems nearly irrefutable, until you read the federal definition of “conviction” in 49 C.F.R. §383.5:

Conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a *court of original jurisdiction* or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated (emphasis added).

Combined, these two regulations provide ample ammunition for strict constructionists to assert that the granting of deferred adjudication in county court is not “masking.”

First, in the context of CDL holders accused of Class C misdemeanors, county courts are not “courts of original jurisdiction.” The authority of a county trial court of limited jurisdiction to exercise authority over local trial courts of limited jurisdiction (municipal and justice courts) is known as “incidental appellate jurisdiction.” According to U.S. Department of Justice, Texas is one of only six states in the nation to utilize incidental appellate jurisdiction among its courts of limited jurisdiction.<sup>7</sup>

Second, once appeals are perfected to county court, the underlying convictions in justice courts and non-record municipal courts are, in effect, vacated (See, Articles 44.17 and 45.043, Code of Criminal Procedure).

Could this be the reason that the Texas Legislature has not closed what many of us believe to be a loop-hole in Texas law that allows CDL holders to thwart the intent of the MCSIA? Maybe, but I believe it unlikely, in light of the fact that the Texas definition of "conviction" (Section 522.003, Transportation Code) is more restrictive than the federal definition in that it omits the reference to "court of original jurisdiction."

Clearly, the federal government is not familiar with the interrelationship between local trial courts and county trial courts. The one size fits all approach utilized by the MCSIA is not exactly a perfect fit in the scheme of the Texas judicial system.

**Should the State of Texas ask the Federal Motor Carrier Safety Administration for guidance as to what constitutes "masking?"**

The State of Missouri did (specifically the Missouri Department of Revenue). Scenarios were addressed and responses published on March 20, 2006. I do not know how it came about, and was surprised to learn that the Federal Motor Carrier Safety Administration would respond in writing to questions posed by a state. I am curious which political official has standing to submit additional questions on behalf of the State of Texas (the Governor, the Lieutenant Governor, the Chair of TxDOT, or State Attorney General)? I appreciate Dallas County Criminal Court of Appeals Number 1, Judge Kristin Wade for sharing the Missouri FAQs with us. It is certain to spark a lot of discussion.

The answers given to the "Show Me" State are also likely to make many judges and prosecutors question their fundamental understanding of "masking" and "diversion." While it still remains evident that "masking"

and "diversion" pose serious ethical questions for both judges and prosecutors, after having considered the Missouri FAQs, it appears that Administration's focus is exclusively on process. In other words, do not expect the answers in the Missouri FAQs to delve into either judicial or prosecutorial ethics. Just because the Administration does not believe an act constitutes "masking or diversion," it does not make that act ethical or authorized by law.

The Missouri FAQs affirms that the MCSIA is not intended, nor should it be construed, to limit the authority of prosecutors to plea bargain or amend charges. By the same token, the MCSIA should not be construed as a license for prosecutors to cut deals that fly up in the face of state laws or the rules of professional conduct. First, prosecutors should ask themselves if the course of action being contemplated is "masking" or "deferral?" If the answer is "no," then ask if the course of action being contemplated complies with state law. If yes, then ask if it is ethical.

One thing that the Missouri FAQs does not call into question is the notion, that without a prosecutor playing an active role in charging decisions, judges and clerks are, for the most part, passive participants. ↗

The URL to the "Frequently Asked Questions posed by the Missouri Department of Revenue" is: <http://dor.mo.gov/mvdl/drivers/faq/mcsia.htm>.

**Does granting a CDL holder (in personal motor vehicle) a driving safety course constitute an illegal sentence that can be appealed by the prosecution? While a Texas appellate court has yet to address the issue, the issue has been decided in Tennessee.**

See, *Metropolitan Government of Nashville and Davidson County v. Stark*, 2008 WL 276005 (Tenn. Ct.App.)

URL: <http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/081/starkdOPN.pdf>.

<sup>1</sup> Tex. Sen. 631, 78th Reg. Sess. (September 1, 2003).

<sup>2</sup> Elizabeth Kubler-Ross, *On Death and Dying* (Routledge 1973).

<sup>3</sup> John Vasquez, *The Ethics of CDL Masking*, 15 Municipal Court Recorder 1 (August 2006).

<sup>4</sup> Ross Fischer, *Contemporary Prosecutorial Ethical Dilemmas*, 14 Municipal Court Recorder 1 (June 2005); Ryan Kellus Turner, *Pretrial Distraction*, 14 Municipal Court Recorder 3 (December 2004)

<sup>5</sup> Ryan Kellus Turner, *Coming to Terms with the 80th Regular Legislature*, 16 The Recorder 3 (Summer 2007).

<sup>6</sup> Ryan Kellus Turner, *Waiver of Right to Appeal in Local Trial Courts of Limited Jurisdiction*, 4 Municipal Court Recorder 1 (May 2003); Steve Fagan, *Appeals from Municipal Court Judgments*, 14 Municipal Court Recorder (October 2004).

<sup>7</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Organization* (1998).

## **Frequently Asked Questions - Motor Carrier Safety Improvement Act (MCSIA)**

Courtesy of the Missouri Department of Revenue

On-Line at

<http://dor.mo.gov/mvdl/drivers/faq/mcsia.htm>

1. What is considered “masking” under the MCSIA?
2. Pursuant to federal and state law, commercial driving privileges may be disqualified if the driver leaves the scene of an accident. What is meant by “leaving the scene of an accident?”
3. A CDL holder is convicted of a non-disqualifying offense that occurred in a non-CMV. The driver loses his or her base driving privileges for operating a non-CMV as a result of the conviction. May a state issue a “limited driving privilege” in this instance?
4. A driver has been issued multiple tickets for speeding less than fifteen miles per hour over the posted speed limit in a noncommercial vehicle. The driver’s license is suspended due to the accumulation of points. Does the driver lose all privileges to drive any motor vehicle – noncommercial or commercial?
5. Why can't a driver obtain a limited driving privilege to operate a commercial motor vehicle?
6. If a person is only eligible to receive a limited driving privilege to operate a personal vehicle, does the person have to downgrade the commercial driver license to a non-CDL?
7. A driver is convicted of a serious motor vehicle offense and moves from the state that will disqualify his license. The driver obtains a driver license in another state prior to the license disqualification and avoids being disqualified immediately. The driver subsequently causes a serious motor vehicle accident and fatally injures two people. Pending state license disqualification proceedings, would this situation qualify for the federal imminent hazard disqualification?
8. Why does the state disqualify a driver’s commercial driving privilege when a traffic ticket is received in a personal vehicle?
9. Why is the department so strict with CDL drivers?
10. When individuals apply for a CDL, they must advise the license clerk what states they were previously licensed in. Will there be a problem if the applicant knows what states he/she was previously licensed in but cannot remember the license numbers assigned?

## **1. What is considered “masking” under the MCSIA?**

The state of Missouri requested clarification from the Federal Motor Carrier Safety Administration regarding the masking provisions outlined in the Motor Carrier Safety Improvement Act that became effective on September 30, 2005. The following scenarios were addressed and responses published on March 20, 2006.

**Note) FMCSA:** Generally, for masking or diversion to occur, there first must be a judgment of guilt. For example, masking may occur when the court holds the paperwork on a conviction for some reason and does not allow the State to take appropriate action. Diversion may occur when the court allows a driver – after an adjudication of guilt – to perform alternate services such as traffic school to get the conviction erased.

**Situation #1:** CDL holder issued traffic citation for Driving While Intoxicated in his private vehicle. Prosecutor reviews the records and determines that there is a problem with the evidence and decides not to prosecute the case, so no charges are filed with court. No conviction is entered.

**Response) FMCSA:** No violation of 49 CFR §383/384. The federal CDL regulations require a conviction as defined by §383.5. In this case, the evidence did not support the burden of proof to be properly adjudicated by the prosecutor and there were no excepted actions taken to otherwise circumvent the regulations (i.e., no masking or diversion of the offense or penalty).

**Situation #2:** CMV operator is issued traffic citation for "Careless and Imprudent" driving. Prosecutor files charges for "Careless and Imprudent Driving". Case goes to trial and contrary evidence is presented by operator to show he was not driving in a careless and imprudent manner and court ultimately dismisses the case.

**Response) FMCSA:** No violation of 49 CFR §383/384. Again, the federal regulations require a conviction and in this case the court found flawed or lacking evidence to convict the driver on the offense cited. There were no excepted actions taken by the court to otherwise circumvent the regulations (i.e., no masking or diversion of the offense or penalty). Ultimately, the driver in this case received his/her day in court and prevailed.

**Situation #3:** CMV operator issued traffic citation for "Improper lane change in a CMV". Prior to the citation being filed with the court the prosecutor determines to only file the charge as a "defective muffler". Final conviction is for "defective muffler" and that is the only charge ever signed by the prosecutor or filed with the court.

**Response) FMCSA:** This practice is not in violation of 49 §CFR 384.226 because the violation was reduced before a judgment of guilt was pronounced. Before we can apply the conditions in 49 §CFR 384.226 to determine whether masking has taken place, there

has to be a judgment of guilt (conviction) for a violation. The masking provision in 49 CFR §384.226 do not prevent plea bargaining from taking place.

**Situation #4:** CDL holder is issued a traffic citation for "Excessive Speed" in private vehicle (speeding 75 mph in 60 mph zone). After original charge is filed with court, prosecutor amends original charge to "Speeding 65 mph in a 60 mph zone". Final conviction is for Speeding 65 mph in a 60 mph zone.

**Response) FMCSA:** This practice is not in violation of 49 §CFR 384.226 because the violation was reduced before a judgment of guilt was pronounced. Before we can apply the conditions in 49 §CFR 384.226 to determine whether masking has taken place, there has to be a judgment of guilt (conviction) for a violation. The masking provision in 49 CFR §384.226 do not prevent plea bargaining from taking place.

**Situation #5:** CDL holder operating a non-commercial vehicle and is issued a traffic citation for "Failure to Yield Right of Way". Prosecutor files charges for "Failure to Yield Right of Way". Court convicts person of "Failure to Yield Right of Way" and the conviction is posted in the driver's record, but allows a Driver Improvement Program in lieu of having the director assess points on the Missouri driving record.

**Response) FMCSA:** The failure to assign "points" does not violate 49 CFR §383/384. However, if the federal regulations required the imposition of a disqualification period for the convicted offense and the court then allowed a Driver Improvement Program in lieu of having the director impose a disqualification for the prescribed period of time this would be in violation of 49 CFR §384.215/284.213/384.231 as a diversion deferral program.

**Situation #6:** CMV operator is issued a traffic citation for "Operating a CMV while Suspended/Revoked/ Withdrawn". Prosecutor files charges for "Operating CMV while license suspended/revoked/ withdrawn". Final conviction is for "Operating CMV while license suspended/revoked/withdrawn. Later, court allows attorney for CMV operator to withdraw original plea and conviction and after new court hearing, court ultimately enters a conviction for "Improper CDL Class/Endorsement".

**Response) FMCSA:** This is not in violation of 49 CFR §384.226 because the court vacated (withdrew) the original conviction or adjudication of guilt. By granting the attorney's request to vacate (withdraw) the original plea and conviction, the court has nullified the conviction. The definition of "conviction" in 49 CFR §383.5 defines a conviction to mean "an unvacated adjudication of guilt".

**2. Pursuant to federal and state law, commercial driving privileges may be disqualified if the driver leaves the scene of an accident. What is meant by “leaving the scene of an accident?”**

As used in 40 CFR 383, the disqualifying offense of “leaving the scene of an accident involving a CMV” is all-inclusive and covers the entire range of situations where the driver of the CMV is required by state law to stop after an accident and either give information to the other party, render aid, or attempt to locate and notify the operator or owner of other vehicles involved in the accident.

**3. A CDL holder is convicted of a non-disqualifying offense that occurred in a non-CMV. The driver loses his or her base driving privileges for operating a non-CMV as a result of the conviction. May a state issue a “limited driving privilege” in this instance?**

Yes, but such limited driving privileges cannot include commercial driving privileges.

**4. A driver has been issued multiple tickets for speeding less than fifteen miles per hour over the posted speed limit in a noncommercial vehicle. The driver’s license is suspended due to the accumulation of points. Does the driver lose all privileges to drive any motor vehicle – noncommercial or commercial?**

Yes. When the base privilege is suspended because of too many points, the driver loses the ability to drive any motor vehicle during the period of the suspension. Once the base privilege suspension is reinstated, the driver can resume driving both noncommercial and commercial motor vehicles as long as no commercial disqualification was entered. The driver may obtain limited driving privileges to drive noncommercial vehicles during a period of base license suspension but cannot obtain commercial driving privileges.

**5. Why can't a driver obtain a limited driving privilege to operate a commercial motor vehicle?**

Section 302.309 RSMo. clearly states a CDL driver is no longer able to receive any kind of license to operate a CMV while the driving privilege is under suspension, revocation or disqualification. Limited driving privileges are only available to allow the operation of a noncommercial motor vehicle if the applicant is otherwise eligible.

**6. If a person is only eligible to receive a limited driving privilege to operate a personal vehicle, does the person have to downgrade the commercial driver license to a non-CDL?**

No. The limited driving privilege order states that you are only eligible to operate a class E, F, or M type of vehicle.

**7. A driver is convicted of a serious motor vehicle offense and moves from the state that will disqualify his license. The driver obtains a driver license in another state prior to the license disqualification and avoids being disqualified immediately. The driver subsequently causes a serious motor vehicle accident and fatally injures two people. Pending state license disqualification proceedings, would this situation qualify for the federal imminent hazard disqualification?**

Yes, this situation would fit within the federal definition of imminent hazard.

**8. Why does the state disqualify a driver's commercial driving privilege when a traffic ticket is received in a personal vehicle?**

According to 49 CFR 383.51 and 302.700, RSMo., CDL drivers who are convicted of certain disqualifying offenses while operating their personal vehicle may have their CDL privilege disqualified. There are some offenses that must be committed in a CMV for disqualification action to be taken.

**9. Why is the department so strict with CDL drivers?**

The Motor Carrier Safety Improvement Act (MCSIA) states that CDL drivers are professional drivers and should be held to a higher standard. The state legislature passed a law in 2004 (Senate Bill 1233) to include the changes from MCSIA into state law. The department is only enforcing the state and federal laws.

**10. When individuals apply for a CDL, they must advise the license clerk what states they were previously licensed in. Will there be a problem if the applicant knows what states he/she was previously licensed in but cannot remember the license numbers assigned?**

No. The license office clerk will be able to check the other states' records by your name and birth date.