NEWSLETTER
Fall 2016

SERVICE OF THE SUMMONS AND PRETRIAL HEARINGS IN TRUANCY CASES

BY RANDALL L. SAROSDY
GENERAL COUNSEL

One of the advantages of our 10-hour workshops is that we often have time to discuss issues relating to a single topic in greater detail and learn how different courts are dealing with recurring problems. One such issue came up at our Truancy and Juvenile Law workshop in Galveston on April 4-5, 2016, and we thought it would be worthwhile to explain the problem and the possible solutions.

The problem arises from the procedures relating to service of the summons on both the child and parent or guardian in a truancy case. The Family Code is quite specific as to what must occur and in what order:

- First, after a truancy petition is filed, "the truancy court shall set a date and time for an adjudication hearing." Section 65.056(a), Family Code

- Second, after setting the date and time of an adjudication hearing, "the truancy court shall direct the issuance of a summons" to the child and the child's parent or guardian (among others). Section 65.057(a), Family Code.

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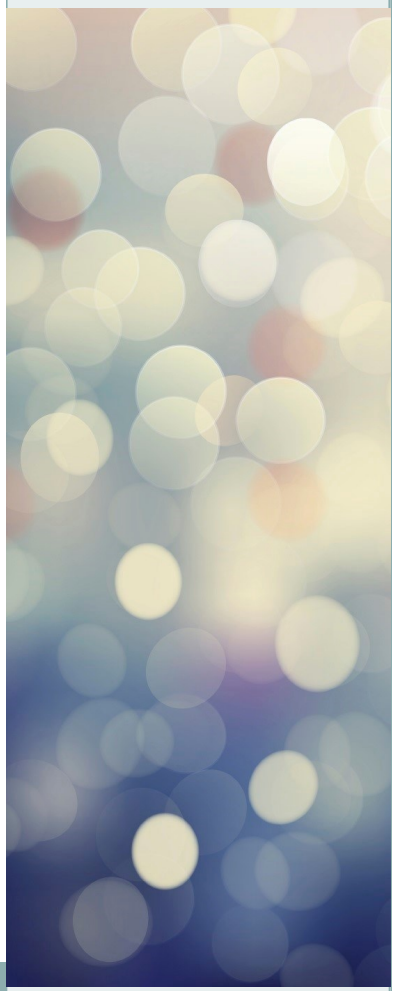

From The

TRAINING CENTER

By Randall L. Sarosdy
General Counsel

Greetings from the Justice Court Training Center!

As we approach the start of another year of judicial education I thought it would be a good time to take stock of some of the highlights of the past year and share some of our plans for the upcoming year.

As you are probably aware the Training Center has seen some significant personnel changes with the retirement of Roger Rountree and the passing of the baton to our new Executive Director Thea Whalen who has hit the ground running! Bronson Tucker has become our Director of Curriculum and I have signed on as General Counsel. We have a new Program Attorney, Rebecca Glisan, starting in September. We will be pleased to finally have three attorneys working for you full time again. Our program administrators, Jessica Foreman, Jennifer Morales and Heather Hidalgo, continue to do an outstanding job to keep all of our many programs running smoothly. Our accountant, Gabe Ayson, is retiring on August 31, so we will soon be hiring a new accountant to replace Gabe. In the meantime Laura Villarreal is helping to keep the accounts balanced. Angie Varela and Jeff Grajek provide invaluable administrative and IT support. The goal of the Training Center is to provide you with first rate judicial education as well as the help and support you need on a daily basis to enable you to serve all who come before you fairly and impartially. The Justice Courts are truly the front line of our judicial system and it is a privilege and honor for us to be able to work with you in serving the citizens of Texas.

The past year has been a busy one. The Training Center has conducted 30 seminars (five 20-hour justice of the peace seminars, six 16-hour court personnel seminars, seven civil process seminars, three new judge seminars, eight 10-hour workshops and the Impaired Driving Symposium) and 22 webinars. We have answered over 1360 written legal questions on the Legal Board and over 1570 legal questions over the phone. We have updated the legal forms on our website and distributed five newsletters and periodic e-blasts.

We will offer an equally ambitious program of judicial education in the coming year. Please see our schedule of judicial education programs on page 6 and our schedule of webinars on page 14. As 2017 will be a legislative year we will prepare a Legislative Update handbook and offer a series of one-day Legislative Update seminars in July and August in addition to our many seminars and webinars. We are currently upgrading our website and expect to have additional useful features up and running over the next year. We are also in the process of revising and updating our desk books and hope to roll those out over the next year as well.

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DRIVING TEST AND OCCUPATIONAL DRIVER LICENSES: THE JUSTICE COURT'S ROLE

By Bronson Tucker
Director of Curriculum

Recently, the Training Center has received dozens of inquiries from around the state concerning a letter that has begun circulating regarding driving tests. The letter originates from DPS and informs a petitioner for an Occupational Driver License (ODL) whose license has been expired for more than two years that they must go to DMV to receive testing at their local driver's license office. The letter says the petitioner will need a court order authorizing DPS to administer the testing and in order to obtain such a court order it may be necessary for the petitioner to visit the court that issued the ODL order. Otherwise DPS will be unable to issue an ODL. This raises several questions: Why is DPS issuing this letter? Can the justice court issue such an order? Should the justice court issue such an order?

Why is DPS issuing this letter?

To start with the most obvious item, Transportation Code Sec. 521.021 provides that a person needs a driver's license issued under Chapter 521 to operate a motor vehicle on a highway in the state of Texas, barring certain exemptions (such as license holders from other states, and Texas residents in their first 90 days of residency). Sec. 521.061 provides that all applicants for driver's licenses must be examined by DPS, to include vision, written and driving tests. This examination is waived for holders of licenses from other states and Canadian provinces. Subchapter L of Chapter 521 covers Occupational Driver Licenses and is completely silent on driving tests. So where is DPS finding this requirement?

To locate this regulation, one must turn to the Texas Administrative Code (found on the Texas Secretary of State's website, located at www.sos.state.tx.us/tac). Under Title 37, Part I, Chapter 15, Subchapter B, you can find Section 15.35, which states: "Any person whose Texas driver license has been expired over two years must apply as an original applicant and pass all required examinations." This means that the requirements of 521.061 apply to people applying for a renewal of a license that has been expired for more than two years, and they must pass the vision, written and driving examinations just like a brand new applicant.

Can the justice court issue an order to take a driving test?

So now that we agree that petitioners for an ODL who have a license which has been expired for over two years must be re-examined, the next question is where does the justice court come in? DPS appears to have authority to mandate the examination solely based on the Transportation Code and the Texas Administrative Code. DPS has stated that they need the order from the court to include the driving test requirement, or else they will be "forced" to just issue the ODL, without having the person examined, simply because they have a court order to do so. However, the law also requires the petitioner to pay $10 to DPS for the ODL. If they fail to do so, DPS will not issue the ODL, despite the court order to do so. This seems to indicate that DPS does have discretion to which ODL petitioners they will grant actual ODLs to.

The troubling aspect of the letter is that nothing in Subchapter L authorizes a justice court to include such an order in its order granting an ODL. Additionally, as you likely know, justice courts are prohibited from issuing injunctive orders, unless there is explicit statutory authority. Injunctive orders are orders for a party to take some specific action, or to not take some specific action. An example of statutorily allowed injunctive orders would be orders for landlords to make repairs in a repair and remedy case. Ordering DPS to examine a license applicant would appear to be an injunctive order, and in the absence of any statutory authority, is outside the jurisdiction of the justice court.

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- Third, the "summons shall be served on the person personally or by registered or certified mail, return receipt requested, at least five days before the date of the adjudication hearing." Section 65.058(a), Family Code.

But it is often difficult to serve a summons in this way because the persons to be served may not be home during the day and most people have neither the time nor the inclination to go to the post office to sign for and pick up a registered or certified letter. So the result is that an adjudication hearing has been set but the child and parent or guardian (or others) may not actually be served with the summons at least five days before the hearing.

To address this problem some courts have considered using pretrial hearings in truancy cases. The procedure works as follows. After a petition is filed the court sends a letter by regular mail to the child and parent or guardian inviting them to come to the court on a specified date for the purpose of having a pretrial hearing. Many recipients respond and appear in court. At that time they are informed of their rights and the child is given the opportunity to answer the allegations of the petition. If the child admits that he or she engaged in truant conduct, the court proceeds to the remedial stage. If a person does not respond to the court's invitation to appear for the pretrial hearing, a summons may be issued and served as provided in Section 65.058 (a).

The use of a pretrial hearing in this manner has the benefit of promptly reaching a majority of the children and parents or guardians who are prepared and willing to respond to the allegations of truancy and appear in court and the majority of cases are promptly resolved. But is the procedure authorized under the new truancy laws?

The primary obstacle to the use of pretrial hearings in this manner is the language of Section 65.101(a), which states: "A child may be found to have engaged in truant conduct only after an adjudication hearing conducted in accordance with the provisions of this chapter." And a remedial order may be entered under Section 65.103(a) only after "a child has been found to have engaged in truant conduct." Therefore, a remedial order may not be entered unless the court has conducted an adjudication hearing. This means that in order to more closely follow the procedures contained in the statute it would be better to schedule an adjudication hearing rather than a pretrial hearing. If the child answers true to the allegations of truant conduct at the adjudication hearing (or before the hearing commences as permitted by Section 65.060), then the court may enter a finding that the child has engaged in truant conduct and proceed to the remedial stage.

But must the court still have the summons served personally or by registered or certified mail at least five days before the adjudication hearing or is there a way to facilitate this process? There are two possible approaches.

Some courts have proceeded as follow. After setting the date and time of an adjudication hearing, the court issues a summons but also sends a letter by first class mail to the child and parent or guardian notifying them of the adjudication hearing and enclosing a copy of the summons. If the child appears but has not been served with the summons personally or by registered or certified mail, the child is served personally at the time he or she appears in court. The adjudication hearing is then postponed for at least five days in order to comply with Section 65.058(a). This requires the child and parent or guardian to come back to court a second time for the actual adjudication hearing.

This is highly inconvenient to the parties and the court and delays the disposition of the case. But these courts have felt constrained by the express language of the statute. One of the concerns is that Section 65.057(d) states that a "party, **other than the child**, may waive service of summons by written stipulation or by voluntary appearance at the hearing." So a parent or guardian could waive service of the summons by a written stipulation or voluntary appearance at the hearing but a child may

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FROM THE TRAINING CENTER... (CONTINUED FROM PAGE 2)

We want to thank the members and Board of the JPCA for all of the great support they provide in making our judicial education programs possible. Special thanks go to the President of the JPCA, Judge Phil Montgomery, and to the Chairs of our Justice of the Peace, Court Personnel and Civil Process Education Committees, Judge Becky Kerbow, Judge Suzan Thompson and Constable Doc Pierce. We also are greatly appreciative of the many judges, court personnel and constables who serve as faculty at our many programs and provide countless hours of time and effort to offer outstanding judicial education.

We are very grateful for the support of the Texas Court of Criminal Appeals, which administers the grant that makes our judicial education programs possible. We also greatly appreciate the support of TxDot which administers a grant that enables us to address many important impaired driving and traffic safety issues.

The Justice Court Training Center is here to serve you and help you to excel as a judge, court clerk or constable. We are always looking for ways to improve and welcome any suggestions you may have. We look forward to seeing you and working with you in the coming year!

DRIVING TESTS...(CONTINUED FROM PAGE 3)

Should the justice court modify its order to include a driving test order?

Despite the lack of jurisdiction, some courts have decided to issue these orders upon request. Their logic is that no one is really being harmed or is likely to complain. And unfortunately, the alternative appears to be a DPS refusal to issue the ODL, resulting in the person either driving with an invalid license (and getting additional criminal charges, surcharges, etc.), or the person not driving and therefore not being able to get their education or maintain employment in order to feed their family. Of course, the Training Center is unable to advocate that a judge ever take action which a judge lacks jurisdiction to take.

The Training Center is engaging in a conversation with DPS which we hope will lead them to reconsider their policy in issuing these letters and instead simply order the person to be examined again, just as they would if you or I let our license expire for more than two years and then applied again. In the meantime, a possible compromise is to include in your original ODL order a notice to the petitioner that to get their license they "must comply with all applicable statutes, administrative regulations, and orders from DPS related to licensing." This would be giving them notice of other requirements, rather than an injunctive order for them to be tested or ordering DPS to test them. It would also include the $10 fee, which DPS does collect even though it is not included in the ODL order.

EDITOR'S NOTE: After completion of this article, DPS amended their policy and will be sending future petitioners directly to the driver's license office for testing. They recommended including the above language regarding compliance in ODL orders, and TJCTC will modify its ODL order to reflect that language.

IMPROVING BOND CONDITIONS IN DWI CASES THROUGH THE TEXAS DWI BOND SCHEMATIC PROGRAM

By Randall L. Sarosdy
General Counsel

The DWI Bond Schematic (or Uniform Bond Condition) Program is part of a statewide plan to reduce the incidence of DWI offenses in Texas by assisting Texas counties in adopting a comprehensive plan for setting bond conditions in DWI cases. The Texas Justice Court Training Center (TJCTC) views this program as an important step in reducing the number of DWI drivers on Texas roads and highways, thereby improving public safety throughout the state.

TJCTC will work with all criminal magistrates (including county judges and justices of the peace), local prosecutors, and potential monitoring agencies in each county that elects to participate in the program in order to create forms specific to that county to be used in administering the program. These forms may be based on TJCTC's Universal DWI Bond Schematic (available at www.tjctc.org) or forms that a county currently uses in setting bond conditions. Forms will be modified to meet the bond conditions that county officials agree are appropriate in DWI cases.

The program: provides county officials with an opportunity to develop a system for setting, monitoring, and enforcing DWI bond conditions to ensure community safety and protect victims; increases consistency in setting bond conditions by a magistrate and a trial court; promotes the use of bond conditions (such as ignition interlock devices) that reduce the incidence of DWI recidivism; and ensures that bond conditions required by law are set, monitored and enforced.

The program is administered by the Texas Justice Court Training Center Traffic Safety Initiative through funding provided by the Texas Department of Transportation. If you would like further information concerning the program, please feel free to contact Randall L. Sarosdy at rs52@txstate.edu.

Save a Life™
TEXAS DEPARTMENT OF TRANSPORTATION

2016-2017 TRAINING SCHEDULE

JUSTICE OF THE PEACE PROGRAM

Galveston
December 4 - 7, 2016

Corpus Christi
January 29 - February 1, 2017

Austin
February 28 - March 3, 2017

Rockwall
April 23 - 26, 2017

Lubbock
May 30 - June 2, 2017

COURT PERSONNEL PROGRAM

Houston
November 16 - 18, 2016

Horseshoe Bay
February 15 - 17, 2017

Galveston
March 8 - 10, 2017

Corpus Christi
April 10 - 12, 2017

San Marcos
May 9 - 11, 2017

Rockwall
July 10 - 12, 2017

CIVIL PROCESS PROGRAM

San Antonio
January 22-25, 2017

Austin
February 26-March 1, 2017

McKinney
April 18-21, 2017

Galveston
May 21-24, 2017

10 HOUR WORKSHOPS

New Braunfels
January 18 - 20, 2017

Galveston
February 6 - 8, 2017

College Station
March 19 - 21, 2017

San Marcos
August 23 - 25, 2017

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LATEST WORD FROM THE SUPREME COURT ON DWI WARRANTS

By Randall L. Sarosdy
General Counsel

We recently explained the impact of two cases, one from the United States Supreme Court and one from the Texas Court of Criminal Appeals, on the need to obtain a blood search warrant before drawing a blood sample following a DWI arrest. *See* "*Courts to Law Enforcement: Get a Blood Search Warrant Before Drawing Blood*," Traffic Safety Initiative Newsletter (April 2016).

In *Missouri v. McNeely,* 133 S. Ct. 1552, 1557-63, 1567-68 (2013), the United States Supreme Court held that in drunk-driving investigations the natural dissipation of alcohol in the bloodstream does **not** constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. And in *State v. Villareal*, 475 S.W.3d 784, 815 (Tex. Crim. App. 2014), the Texas Court of Criminal Appeals held that "a nonconsensual search of a DWI suspect's blood conducted pursuant to the mandatory-blood-draw and implied-consent provisions in the Transportation Code, when undertaken in the absence of a warrant or any applicable exception to the warrant requirement, violates the Fourth Amendment." These cases, taken together, require law enforcement officers to obtain a blood search warrant in most cases before taking a blood sample from a DWI suspect without his or her consent .

The United States Supreme Court has now shed further light on warrant requirements following DWI arrests in its decision on June 23, 2016 in *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016). At issue in this case were state laws from North Dakota and Minnesota that make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. Relying on an 18th century manual for justices of the peace, the Supreme Court noted that a search incident to a lawful arrest has long been recognized as valid. But the specific question before the Court was the extent to which a search following a DWI arrest intrudes upon an individual's privacy on the one hand and is needed for the promotion of legitimate governmental interests on the other hand. 136 S. Ct. at 2174, 2176.

The Court then distinguished breath tests from blood tests. It found that breath tests do not implicate significant privacy concerns because "the physical intrusion is almost negligible." 136 S. Ct. at 2176. But "[b]lood tests are a different matter" because they require piercing the skin and extracting a part of the subject's body. *Id.* at 2178. "In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Id.* After considering the need for such tests in promoting legitimate governmental interests, the Court concluded:

The Supreme Court found that breath tests do not implicate significant privacy concerns because "the physical intrusion is almost negligible." 136 S. Ct. at 2176.

> Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.
>
> We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

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136 S. Ct. at 2184.

In summary, the Court held that because breath tests are significantly less intrusive than blood tests and in most cases amply serve the interests of law enforcement, "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id*. at 2185. Therefore, a search warrant is not needed for an officer to obtain a breath test following an arrest for DWI since a breath test is a reasonable search incident to an arrest.

However, an officer may not obtain a blood test following a DWI arrest without first obtaining a search warrant. In effect, the United States Supreme Court has followed the reasoning of the Texas Court of Criminal Appeals in *State v. Villareal*, 475 S.W.3d 784, 815 (Tex. Crim. App. 2014).

How will this decision affect DWI arrests in Texas?

Under current Texas law, a person arrested for DWI may not withdraw their implied consent to provide a breath or blood test in certain circumstances. These include where: (1) the person was the operator of a motor vehicle involved in an accident that the officer reasonably believes occurred as a result of a DWI offense and the officer reasonably believes that as a direct result of the accident an individual has died or will die, or an individual other than the person arrested has suffered serious bodily injury, or an individual other than the person arrested has suffered bodily injury and has been taken to a hospital; (2) the offense for which the person was arrested is DWI with child passenger under Penal Code § 49.045; or (3) the officer receives information at the time of the arrest that the person was previously convicted of or placed on community supervision for an offense of DWI with child passenger, intoxication assault or intoxication manslaughter, or has two or more prior convictions (including being placed on community service) for an offense under Penal Code §§ 49.04, 49.05, 49.06 or 49.065. *See* Transp. Code §§ 724.012(b), 724.013.

If such a person refuses to provide a blood sample, an officer must obtain a blood search warrant before obtaining a nonconsensual blood draw. This is mandated both by *Villareal* and now *Birchfield*. But it is now clear that an officer is not required to obtain a search warrant before obtaining a **breath** test. Potentially, a person arrested for DWI could try to frustrate the taking of a breath test by not exhaling into the Breathalyzer properly but the person may not refuse to take the test on the ground that the officer must first obtain a search warrant. The Supreme Court has made clear that a search warrant is not required for an officer to obtain a breath test following a lawful DWI arrest.

Texas does not currently have a law, like those in North Dakota and Minnesota, that makes it a crime to refuse to submit a breath or blood sample following a DWI arrest. The Supreme Court's decision in *Birchfield* gives the legislature a green light to enact such a law with respect to a breath test should the legislature wish to do so.

We will be closely monitoring legislative initiatives with respect to DWI issues in the next legislative session and will keep you apprised of any developments in this area.

not do so. These courts believe that in light of this language the best practice is to postpone the adjudication hearing if the child has not been served with the summons until he or she appears for the hearing and have the child and parent or guardian come back to court at least five days later.

But there is another way of reading the statute that might avoid this delay. Section 65.057 (d) says that a person other than a child may waive a summons by written stipulation or by voluntary appearance at the hearing. So that section states how a person **other than a child** may waive a summons. It does not expressly **prohibit** a child from waiving a summons, i.e. it does not say "a child may **not** waive a summons." It simply excludes a child from the waiver provisions permitted for other persons under Section 65.057(d).

It may be that the reason a child is excluded under Section 65.057(d) is because there is a separate provision that applies to a waiver of rights by a child – Section 65.008. That section does permit a child to waive rights if: (1) the right is one that may be waived; (2) the child and the child's parent or guardian are informed of the right, understand the right, understand the possible consequences of waiving the right, and understand that waiver of the right is not required; (3) the child signs the waiver; (4) the child's parent or guardian signs the waiver; and (5) the child's attorney, if any, signs the waiver. In other words, there are a host of procedural safeguards that must be followed for a child to waive a right in a truancy case. But this does not mean that a child may not waive service of the summons; it just means it has to be done under Section 65.008 rather than Section 65.057(d).

Under this interpretation of the statute, if a child appears for an adjudication hearing in response to a copy of the summons mailed by first class mail, it would be possible at that point – after compliance with the requirements of Section 65.008 – for the child to waive service of the summons and answer true or not true to the allegations of the petition. At that point the court could proceed with the adjudication hearing and if the child answers true (or does so before commencement of the hearing) the court could enter a finding that the child has engaged in truant conduct and proceed to the remedial order rather than having the child and parent come back another day.

In sum, problems inherent in getting the parent and child before a truancy court promptly have led to divergent approaches. Some courts have used pretrial hearings to obtain an early resolution of the case. Other courts have been concerned that the letter of the new truancy law requires a summons to be formally served on the child and have been re-setting the adjudication hearing even when the parent and child are present if the child has not been previously served with a summons. There may be a third approach that would allow the child to waive service of a summons so that the parent and child do not have to return to court for an adjudication hearing at a later date. This is an area that we would like to see clarified either through legislative action in the next legislative session or through rules issued by the Texas Supreme Court under Section 65.012, Family Code. We will certainly keep you apprised if either of those actions occur.

SEPTEMBER CHANGES TO MAKE NOTE OF

By Bronson Tucker
Director of Curriculum

Many of you are aware to watch for changes in September of years in which the Texas Legislature meets. The huge majority of bills take effect on September 1, so, for example, September 1, 2017, will be a date likely to feature many changes in the way that justice courts operate in the state of Texas. However, a couple of changes that courts will find impactful are taking effect on September 1, 2016, so here is a quick review of them.

Reporting of Appointment of Guardians and Attorneys

In the 2015 Legislative Session, the Texas Legislature passed SB 1369 which, among other things, mandated courts to report certain appointments, including appointments of guardian ad litems, attorney ad litems and mediators. For full details, along with text of the bill, go to http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=84R&Bill=SB1369, or if you only want to read the statutory changes, they are found in Chapter 36 of the Government Code, found at http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.36.v2.htm

What do justice courts need to do? There are two requirements of the new law. The first is that a report be made to OCA of all appointments, and all payments made to the appointees. The second requirement for justice courts is that the clerk must post the report at the courthouse of the county in which the court is located and on any Internet website of the court. Both of these tasks must occur by the 15th of every month, so September 15, 2016 is the due date for the first report. The report on court appointments must include:

1) the name of each person appointed by the court as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for a case in that month;

2) the name of the judge and the date of the order approving compensation to be paid to a person appointed as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for a case in that month;

3) the number and style of each case in which a person was appointed as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for that month;

4) the number of cases each person was appointed by the court to serve as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator in that month;

5) the total amount of compensation paid to each attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator appointed by the court in that month and the source of the compensation; and

6) if the total amount of compensation paid to a person appointed to serve as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for one appointed case in that month exceeds $1,000, any information related to the case that is available to the court on the number of hours billed to the court for the work performed by the person or the person's employees, including paralegals, and the billed expenses.

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WHAT IS MASKING AND WHY CAN'T YOU ALLOW IT?

By Randall L. Sarosdy
General Counsel

The State Commission on Judicial Conduct recently issued a Public Warning and Order of Additional Education to a County Judge due to a practice of offering persons charged with speeding (and other offenses) the opportunity to change their speeding offense to an illegal parking violation. *See* CJC No. 14-0929-CO (Feb. 29, 2016) (http://www.scjc.texas.gov/media/42369/jones-public-sanction.pdf) The practice went into effect in 2009 and resulted in at least 90 citations being changed to parking violations. The County Judge was alleged to have "explained that the deal was intended to help professional drivers (those who hold Commercial Driver's Licenses) who depend on a clean driving record for their livelihood and that the 'one-time' deal was 'a wake-up call for them to know they can't be doing that anymore.'" Although the judge had acted on motions to dismiss submitted by a prosecutor, the Commission on Judicial Conduct found that he had violated Canons 2A and 3B(2) of the Texas Code of Judicial Conduct, which require a judge to comply with the law and maintain professional competence.

The State Commission on Judicial Conduct has previously found similar violations of those Canons when judges have granted a deferred disposition (or in one case a deferred adjudication) to a holder of a commercial driver's license. *See* Private Reprimand of a Former Municipal Court Judge (Aug. 31, 2011) (http://www.scjc.texas.gov/disciplinary-actions/private-sanctions/fy-2011/priv-repr-of-former-muni-judge-(083111).aspx); Private Admonition and Order of Additional Education of a Municipal Court Judge (April 1, 2010) (http://www.scjc.texas.gov/disciplinary-actions/private-sanctions/fy-2010/priv-adm-and-oae-of-mu-(040110).aspx); Private Warning and Order of Additional Education of a Municipal Judge (March 23, 2006) (http://www.scjc.texas.gov/disciplinary-actions/private-sanctions/fy-2006/priv-warn-and-oae-of-muni-judge-(032306).aspx).

Clearly, the Commission on Judicial Conduct takes this matter seriously! We therefore thought it might be worthwhile to explain what masking is and why it is not permitted.

What is Masking?

Masking generally refers to placing a holder of a Commercial Driver's License (CDL) on deferred disposition (or a pretrial diversion) so that the offense is dismissed and does not appear on the CDL holder's record. It is prohibited under both state and federal law so that licensing authorities such as DPS can identify and weed out those commercial drivers who might endanger the driving public through consistently bad driving practices.

The state laws prohibiting this are found in Arts. 45.051 and 45.0511, Code of Criminal Procedure. Art. 45.0511 is the Driving Safety Course (DSC) statute which gives eligible persons the right to take DSC and have certain offenses dismissed upon completion of the course. This statute expressly excludes CDL holders from eligibility: "This article does not apply to an offense committed by a person who: (1) holds a commercial driver's license; or (2) held a commercial driver's license when the offense was committed." *See* Art. 45.0511(s). This is an unequivocal prohibition on permitting a person who now holds a CDL or who held a CDL at the time of the offense from having an offense dismissed by taking a DSC under Art. 45.0511.

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Art. 45.051 is the deferred disposition statute. It authorizes a judge to defer further proceedings after a plea of guilty or nolo contendere, or a finding of guilt, in a misdemeanor case punishable by fine only and the payment of all court costs, and to impose conditions which, if complied with by the defendant, will result in the dismissal of the complaint. This statute excludes CDL holders from eligibility for a deferred disposition: "This article does not apply to: . . . (2) a violation of a state law or ordinance relating to motor vehicle control, other than a parking violation, committed by a person who: (A) holds a commercial driver's license; or (B) held a commercial driver's license when the offense was committed." *See* Art. 45.0511 (f). Although the phrase "motor vehicle control" is not defined, we think it prohibits a deferred disposition for a CDL holder for any offense that has to do with the safety of the vehicle on the road.

The federal law is broader still. It states: "The state must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State." *See* 49 C.F.R. § 384.226.

When the applicable state and federal laws are read together we can see that a deferred disposition for a CDL holder is permitted only if the charged offense relates to parking. A deferred disposition may not be granted for equipment violations, such as a defective tail light, defective brakes, low or inadequate air warning device, or for no seat belt. In addition, a deferred disposition may not be granted to a CDL holder even if he committed the offense while driving his private car rather than a commercial vehicle. Nor can it be granted to a person who did not have a CDL at the time of the offense but now holds a CDL.

Is it Masking if a Prosecutor Moves to Dismiss an Offense by a CDL Holder?

Sometimes a prosecutor moves to dismiss an offense against a CDL holder. Is this a form of masking? No. A prosecutor generally has broad prosecutorial discretion and the Federal Motor Carrier Safety Administration has indicated that a prosecutor may reduce or dismiss a charge prior to conviction without violating the federal statutory prohibition on masking traffic offenses committed by CDL holders. *See* http://dor.mo.gov/faq/drivers/mcsia.php#q1.

Sometimes a prosecutor moves to dismiss an offense against a CDL holder. Is this a form of masking?

However, there are limits to a prosecutor's discretion. For example, if a prosecutor offers a plea agreement with a CDL holder offering the CDL holder dismissal of the offense upon completion of DSC or conditions of deferral, the court should not approve such an agreement because it clearly constitutes masking. The State Commission on Judicial Conduct found in the case of the County Judge discussed above that the judge's reliance on the advice of the prosecutor and his acceptance of the prosecutor's assurances that the pleas and fines were legal was an abdication of judicial independence and judicial discretion and was "inconsistent with the proper performance of his judicial duties and constituted willful and/or persistent violations of Canons 2A and 3B(2)." *See* CJC No. 14-0929-CO (Feb. 29, 2016) (http://www.scjc.texas.gov/media/42369/jones-public-sanction.pdf).

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WHAT IS MASKING? (CONTINUED FROM PAGE 12)

Is Masking by a County Court Prohibited?

There seems to be some confusion as to whether or not masking by a county court is prohibited. Some county attorneys have told justices of the peace that a county court may place the defendant on a deferred disposition if the case is appealed. This is a myth. If a case is appealed from justice court to county court, there is a trial de novo and the same prohibitions on masking discussed above apply to the county court.

Conclusion

Masking occurs when a CDL holder is permitted to use a deferred disposition (or DSC) to obtain dismissal of a traffic offense. It is prohibited under state and federal law. A judge who permits masking, even at the request of a prosecutor, may be subject to sanctions by the State Commission on Judicial Conduct.

SEPTEMBER CHANGES... (CONTINUED FROM PAGE 10)

OCA has posted instructions for how the report to them should be made, found at http://www.txcourts.gov/reporting-to-oca/news/sb-1369-appointments-fees-reporting.aspx. What if your court doesn't make any appointments? Unfortunately, the law mandates that justice courts which make no appointments in a given month must still submit a report showing that no appointments were made. Although most justice courts will not make such appointments frequently, remember that they are explicitly authorized for truant conduct cases, and allowed in juvenile criminal cases when necessary in the interest of justice.

New Rule and Form for Statement of Inability to Afford Costs in Civil Cases

On May 16, 2016, as posted on tjctc.org, and sent via e-letter, the Texas Supreme Court announced changes to Rule 502.3, which relates to the inability of civil litigants to pay filing fees associated with their cases. The rule advisory announcement can also be found on the Supreme Court website at http://www.txcourts.gov/media/1373678/169056.pdf. The general process is going to remain similar; however, there are some changes. For one, the form will now be referred to as a Statement of Inability to Afford Court Costs. The rule also makes clear that the statement may either be notarized, or it may be sworn to under penalty of perjury. (The Training Center was already instructing this to be the case.) Additionally, the rule makes clear that the court must provide this form without necessity of request from the filing party. Best practice is to have them prominently displayed and ask litigants filing cases if they need the form. Instead of IOLTA certification, now attorneys can attest that they are providing legal services for a legal aid provider and that the provider screened the party for income eligibility. If that attestation is made, the statement cannot be contested.

The Supreme Court is also promulgating a specific form, and either that specific form must be used, or one that contains all of the information in the promulgated form. The Supreme Court took public comments on the rule and form through August 1, and has until September 1 to modify the rule and form based on those comments. Therefore, the Training Center will release information on September 1 regarding the final version of the rule and form, and will have the appropriate form posted at that time.

WEBINAR SCHEDULE

DATE	TOPIC	DATE	TOPIC
September 8, 2016	Inquest Procedure	February 22, 2017	Judicial Ethics Update
September 21, 2016	Basic Eviction Procedure	March 15, 2017	Enforcement of Criminal Judgments
September 30, 2016	Driver License, Handgun, & Environmental Hearings	March 31, 2017	DWI Bond Conditions *(Morning webinar)*
October 5, 2016	Basic Truancy	April 4, 2017	Post-Judgment Civil Procedure
October 18, 2016	Hunting & Hunter Safety *(One hour webinar)*	May 3, 2017	Default Judgment Procedure *(One hour webinar)*
October 27, 2016	Updates & Issues with the OCA Monthly Report	May 16, 2017	Discovery in Justice Court *(Morning webinar)*
November 9, 2016	Impaired Driving & Technology	June 6, 2017	Blood Search Warrants *(One hour webinar)*
December 1, 2016	Boating & Boater Safety *(One hour webinar)*	June 15, 2017	Turnover & Appointment for Receivership *(One hour webinar)*
January 19, 2017	Records Retention	August 23, 2017	Basic Juvenile Law
February 10, 2017	Magistration at the Jail	August 29, 2017	Basic Pre-Trial Civil Procedure

TEXAS JUSTICE COURT TRAINING CENTER

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