

## UPCOMING TRAININGS & CONFERENCES

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- IACP Drugs, Alcohol and Impaired Driving**  
 Anaheim, CA / August 10–12, 2019
- NDAA Prosecuting and Investigating Sexual Assault and Related Violent Crimes**  
 Minneapolis, MN / August 12–16, 2019
- NDAA Prosecutor 101 Fall**  
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## MASTERING MASKING: Why & How to Avoid Masking CDL-Holder Convictions

By Elizabeth Earleywine<sup>1</sup>

Congress has charged the U.S. Department of Transportation (DOT) with regulating commercial motor vehicles (CMV) to promote the public interest in their safe operation, and to encourage economical, efficient, and fair transportation.<sup>2</sup> The Federal Motor Carrier Safety Administration (FMCSA) is the operating administration within the DOT charged with ensuring “the highest degree of safety in motor carrier transportation.”<sup>3</sup> Congress has instructed FMCSA “to improve motor carrier, commercial motor vehicle, and driver safety” in part by “de-

veloping and enforcing effective, compatible, and cost-beneficial motor carrier, commercial motor vehicle, and driver safety regulations and practices.”<sup>4</sup> To further this goal and its mission to reduce crashes, injuries and fatalities involving large trucks and buses, FMCSA has promulgated (and updates) the Federal Motor Carrier Safety Regulations (FMCSRs).<sup>5</sup>

Driving is a privilege, not a right. It is a privilege granted upon meeting certain qualifications, such as passing a test, and can be taken away for many reasons. A commercial driver’s license (CDL) is not a standard driver’s license. Driving a CMV<sup>6</sup> requires advanced skills and knowledge above those required to drive a car or other lightweight vehicle. To be granted a CDL and authorized to drive a CMV in interstate commerce, an applicant must meet additional specific requirements that do not apply to holders of non-commercial licenses.<sup>7</sup> As such, a CDL holder may be considered a professional driver. A CDL indicates that the individual has a unique privilege to operate a motor vehicle that is larger, longer, and capable of carrying heavier loads.<sup>8</sup> If the driver possesses further qualifications, he/she may have privileges to transport hazardous materials or drive a vehicle that holds large numbers of passengers.<sup>9</sup>

Not only is a person required to meet certain conditions in order to earn the privilege to drive a CMV, he/she must comply with special laws and regulations in order to retain the privilege. These conditions are more stringent than those placed on a person with a standard driver’s license. For example, a CDL holder may not consume any alcoholic beverages within 4 hours of driving or having physical control of a CMV.<sup>10</sup> A CDL holder who operates in interstate commerce is also required to maintain physical qualification standards,<sup>11</sup> which, generally, the CDL holder must renew every two years.<sup>12</sup>

These higher standards reflect the nature of the inherent risk in operating a CMV. The fact is that CMVs are disproportionately involved in motor vehicle crashes and fatalities. Large trucks and buses represent 9.6% of all vehicle miles traveled in 2016, but accounted for 12% of all traffic fatalities.<sup>13</sup> In those crashes, the occupants of a car, pedestrians, bicyclists or motorcyclists accounted for more than 80% of the fatalities.<sup>14</sup>

This article focuses on the role of the courts in advancing FMCSA’s safety mission. Promoting safe driving behavior starts on the roadside through a state’s enforcement of its traffic laws. The process continues in the courts, by holding the driver accountable for unsafe driving behavior. First, this article will provide a brief overview of how modern-day CDL safety measures came about, then it will discuss the prohibition against masking and define key terms. Lastly, the article will describe the ways in which masking can occur and some ways the court might act in conflict with the masking prohibition.

## History of CDL Requirements

Prior to 1986, when Congress enacted the Commercial Motor Vehicle Safety Act (CMVSA),<sup>15</sup> regulation of CMV drivers was largely left to the states, resulting in piecemeal com-

mercial driver qualifications and requirements. Some states did not require special licenses to operate 26,000 pound plus, articulated vehicles. Drivers could obtain licenses in multiple states and states did not communicate driver records with other states. The goal of the CMVSA was to improve highway safety by ensuring that drivers of large trucks and buses are qualified to operate those vehicles and to remove unsafe and unqualified drivers from the highways. In 1985, the year before Congress enacted the CMVSA, large trucks and buses were involved in just under .30 fatal crashes for every 100 million vehicle miles traveled.<sup>16</sup> By 2017, however, they were involved in .14 fatal crashes for every 100 million vehicle miles traveled.<sup>17</sup>

The CMVSA established the CDL Program with minimum standards for commercial drivers,<sup>18</sup> introduced the one driver/one license/one record concept, and mandated creation of the Commercial Driver's License Information System (CDLIS) to "serve as a clearinghouse and depository of information about the licensing, identification, and disqualification of operators of commercial motor vehicles."<sup>19</sup> The CMVSA also required states to ensure that drivers convicted of certain traffic violations be prohibited from operating a CMV.<sup>20</sup> Congress determined that increased highway safety could be achieved by holding CMV drivers accountable for their driving behavior. A significant step toward that accountability was the CMVSA's prohibition on CMV operators from possessing more than one driver's license.<sup>21</sup>

In 1987, the Federal Highway Safety Administration (FHWA)<sup>22</sup> amended the FMCSRs to implement the requirements of the CMVSA and establish national CDL standards that states were responsible for enforcing.<sup>23</sup> As part of this rulemaking, FHWA defined the term "conviction" as "the final judgment on a verdict [or] finding of guilty, a plea of guilty, or a forfeiture of bond or collateral upon a charge of a disqualifying offense, as a result of proceedings upon any violation of the requirements in this part, or an implied admission of guilt in States with implied consent laws."<sup>24</sup> In this final rule, FHWA requested further comment regarding the term "found to have committed," from the CMVSA.<sup>25</sup> In 1988, FHWA published a notice of proposed rulemaking, which, in part, proposed revising the definition of the term conviction in response to the comments received.<sup>26</sup> The proposal discussed adopting the Uniform Vehicle Code and Model Traffic Ordinance (UVC) definition.<sup>27</sup> Several states further suggested that the definition include administrative findings that a violation had been committed.<sup>28</sup> This early collaboration between the Federal government and commenters resulted in the definition that is used today.<sup>29</sup>

Building on the improvements in CMV safety resulting from the CMVSA, Congress implemented additional safeguards in 1999 by enacting the Motor Carrier Safety Improvement Act (MCSIA).<sup>30</sup> The MCSIA created the FMCSA as a separate operating administration of the DOT, and authorized the agency to regulate motor carriers and motor carrier safety. In part, the purpose of the Act was to "reduce the number and severity of large-truck involved crashes through . . . stronger enforcement measures against violators, . . . and effective commercial driver's license testing, recordkeeping and sanctions."<sup>31</sup>

Congress first prohibited states from masking violations committed by CDL holders in MCSIA.<sup>32</sup> The prohibition, codified at 49 U.S.C. § 31311(a), states in relevant part:

(19) The State shall—

(A) record in the driving record of an individual who has a commercial driver's license issued by the State; and

(B) make available . . . all information. . . with respect to the individual and every violation by the individual involving a motor vehicle (including a commercial motor vehicle) of a State or local law on traffic control. . . . **The State may not allow information regarding such violations to be withheld or masked in any way from the record of an individual possessing a commercial driver's license.**<sup>33</sup>

A Joint Explanatory Statement issued by Congress in conjunction with the MCSIA makes clear that this provision is intended to prohibit states from both masking convictions, which includes using diversion programs or any other disposition that would defer the recording of a conviction on the CDL holder's record. The Statement clarifies that the MCSIA prohibits:

both conviction masking and deferral programs by requiring every State to keep a complete driving record of all violations of traffic control laws (including CMV and non-CMV violations) by any individual to whom it has issued a CDL, and to make each such complete driving record available to all authorized persons and governmental entities having access to such record. This provision provides that a State may not allow information regarding such violations to be masked or withheld in any way from the record of a CDL holder.<sup>34</sup>

To implement MCSIA's prohibition against masking, FMCSA promulgated 49 C.F.R. § 384.226, which 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<sup>35</sup> 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.<sup>36</sup>

## The Prohibition Against Masking

To understand the intent of both Congress and FMCSA in codifying the prohibition against masking, we must look to the legislative history and to the definitions of key words within the legislation and regulation. Certain terms, such as “conviction” are specifically defined in the FMCSRs. Other terms, such as “masking,” “defer,” or “diversion” are not defined in the FMCSRs, but otherwise have commonly accepted legal definitions.

### **“Masking,” “Deferred Judgment,” and “Diversion” Defined**

Masking “the act or practice of a defendant’s agreeing by plea bargain to plead guilty to a less serious offense than the one originally charged, as by pleading guilty to parking on the curb when one has been charged with speeding in a school zone” or “the act or an instance of concealing something’s true nature.”<sup>37</sup> Taking the example from the definition, masking occurred because changing the charge and citation to parking on the curb had the effect of concealing the true nature of the violation. In this type of case involving a CDL holder, no record of the actual violation, often having more significant consequences, ever makes it to the driver’s CDLIS record.

The purpose of deferring imposition of judgment or of a diversion program is nearly identical. They differ in procedure, however. “Deferred judgment” places a person convicted of an offense on some form of probation, “the successful completion of which will prevent entry of the underlying judgment of conviction.”<sup>38</sup> A diversion program, however, takes place prior to any preliminary judgments being entered. It is a pre-trial program that typically refers the offender to a rehabilitative program and, upon successful completion of that program, results in the charges being dismissed.<sup>39</sup> In the first instance, a conviction, as it is understood in the criminal justice arena, enters against a person, but is not recorded. In the second, there is never a conviction. The end result is the same, in terms of the prohibition against masking: no record of any violation ever makes its way to the driver’s CDLIS record.

### **“Conviction” Defined**

Also relevant to the discussion of masking is the definition of the term “conviction.” Typically, the term “conviction” describes an instance in which a judgment of guilt is rendered against a person. However, as discussed above, “conviction” is defined more broadly in the FMCSRs, and includes actions beyond a judge entering a judgment of conviction for a substantive offense. To promote the Congressional goal of “improved, more uniform commercial motor vehicle safety measures and strengthened enforcement [to] reduce the number of fatalities and injuries



and the level of property damage related to commercial motor vehicle operations,”<sup>40</sup> the FMC-SRs define “conviction” as:

- An unvacated adjudication of guilt;
- A determination that a person has violated or failed to comply with the law in a court of original jurisdiction;
- A determination that a person has violated or failed to comply with the law 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;
- A payment of a fine or court cost; or
- A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or prorated.<sup>41</sup>

Where any of these actions occur, the violation must be reported from the court to the licensing agency to be recorded on the driver’s record (and trigger any appropriate disqualifying action).

Note that, “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” is considered a conviction.<sup>42</sup> As mentioned above, this language was added to the definition to include administrative findings, such as those originating from implied consent suspensions.<sup>43</sup> This occurs, for example, when a CDL holder refuses chemical testing upon arrest followed immediately by an administrative license suspension, but subsequently the substantive DUI prosecution does not result in a judgment of conviction (the defendant is found not guilty at trial, e.g.). In this case, the finding that the driver refused, for administrative license revocation purposes, must be reported to the licensing agency as a conviction.

Additionally, under the regulation, when a CDL holder fails to appear and his/her bond is forfeited (including any type of recognizance or promise to comply bond), the court is required to report the violation as a conviction to the state licensing agency. Finally, any type of cost or fine associated with the violation requires that the offense be reported as a conviction to the state licensing agency. This includes cases where a violation is dismissed “for court costs.”

## **Plea Negotiations and Masking**

The prohibition against masking is not meant to bar plea negotiations in cases involving a violation by a CLP or CDL holder. Caseloads are large, particularly in courtrooms handling traffic offenses. Offenders often are charged with multiple offenses arising from the same inci-

dent. Not every charge is provable to the standard of beyond a reasonable doubt. The statute and regulation prohibiting masking do not bar negotiations entered in good faith and supported by facts and law. The anti-masking regulation cannot supersede a defendant's due process or other Constitutionally protected rights.

Plea negotiations may take many forms, some of which may contravene the prohibition against masking. In routine traffic matters, such as those involving offenses listed in Table 2 to 49 C.F.R. § 383.51, a common disposition may be that the driver agrees to plead guilty and pay court costs. So long as the driver pays the court costs and does not get another traffic violation in the subsequent 6 months, the charges are dismissed. This is a clear case of deferring judgment, which constitutes masking. If the driver is a CDL-holder,<sup>44</sup> and the violation is not reported as a conviction, as defined in 49 C.F.R. § 383.5, it has been masked.<sup>45</sup> Likewise, where a driver is charged with DUI, a common plea negotiation for a first offense could be a diversion program. Here, the driver agrees to certain terms, which typically includes substance abuse education or counseling, and the charges are dismissed upon successful completion of the terms. This occurs pre-trial or pre-disposition, so the driver never pleads guilty or is never found guilty. As with the previous scenario, if the driver is a CDL-holder and a conviction is not reported to the licensing agency, masking has occurred.<sup>46</sup>

Furthermore, just because a CMV operator has given up his or her CDL does not mean that deferral or diversion are legally permissible dispositions. If the individual had a CDL at the time of the offense, allowing the charge to be deferred or granting diversion would be prohibited by the anti-masking regulation.<sup>47</sup> In *Indiana Bureau of Motor Vehicles v. Hargrave*, the defendant, a CDL holder at the time of the offense, was charged with driving under the influence. He surrendered his CDL prior to pleading guilty to the offense and was granted diversion with the understanding that the charge would be dismissed upon successful completion of the program.<sup>48</sup> The defendant later filed a petition to reduce the time of his administrative suspension, which the court granted.<sup>49</sup> Upon receiving the order regarding the suspension, the Bureau of Motor Vehicles (BMV) petitioned the court to reconsider, arguing that the defendant was not eligible for a diversion program due to his holding a CDL at the time of the offense.<sup>50</sup> The appellate court agreed with the BMV, stating, “[a]llowing Hargrave to surrender his license, avoid his conviction, and possibly return to driving professionally with no record of the offense is precisely what the anti-masking law is designed to prevent. Hargrave’s suggested interpretation of the law is unreasonable, as it would permit the very mischief that the law is designed to prevent.”<sup>51</sup>

A more challenging scenario for prosecutors, defense attorneys, and judges occurs when the defense requests that a charge be reduced. Sometimes the request is for a reduction to an offense that would be considered a lesser included offense of the charge, while on other occasions, the reduced charge has no bearing on the original offense. In either scenario, the prosecutor and judge must determine the reason for the amendment. Is there a bona fide legal and/or

factual issue with the original charges brought against the driver? Where the answer is yes, those legal or factual issues provide justification for amending or reducing the charge. If not, the intent behind the action is no different than that found in *Hargrave*. The driver will have avoided the conviction, and will continue to drive with no record of the actual offense. Where there are no legitimate legal or factual bases for a reduction, then masking has occurred, as the purpose of the plea is to conceal the nature of the offense.

## Conclusion

While the rate of fatal crashes involving large trucks or buses and the number of fatalities as a result of these crashes per miles traveled has improved since Congress passed the CMVSA in 1986, the actual number of fatal crashes and fatalities has been rising since 2009.<sup>52</sup> In 2017 more than 5,000 people lost their lives in crashes involving large trucks and buses.<sup>53</sup> Part of this can be attributed to an increase in the number of large trucks and buses on the road and miles being driven in all types of vehicles in that same time frame.<sup>54</sup> Additionally, not all fatal crashes involving large trucks or buses are the fault of the driver of these vehicles. However, one only has to consider the size difference between a CMV (over 26,000 pounds)<sup>55</sup> and an average car (approximately 4,000 pounds)<sup>56</sup> to conclude that the truck will inflict the majority of the destruction.

The prohibition against masking is not an arbitrary rule. A driver record that accurately reflects the CDL-holder's driving behavior is critical to promoting highway safety. Operators of CMVs are professional drivers, held to a higher standard based upon the type of vehicle they drive. As stated in *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, "without a clear picture of a driver's history, a prosecutor, judge, or even a perspective employer will be unable to determine the threat posed by that driver and what remedial actions should be taken to correct his poor driving. Driver's histories also are relevant to those handling impaired driving cases, as well as serious or fatal crashes caused by impaired or reckless driving."<sup>57</sup> Masking prevents the court system, state licensing agency, and motor carrier employers from taking the appropriate action against a potentially dangerous driver. Too often, we hear the lament after a particularly egregious crash involving a CDL-holder driving a CMV, "(s)he never should have been on the road." An effective way to avoid this is to follow the prohibition against masking and ensure a violation appears on the CDL-holder's driving record.

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<sup>1</sup> By Elizabeth Earleywine, Attorney Advisor, Federal Motor Carrier Safety Administration.

<sup>2</sup> 49 U.S.C. § 31131(b)(1) (finding that "it is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage").

<sup>3</sup> 49 U.S.C. § 113(b).

<sup>4</sup> 49 U.S.C. § 31100.

<sup>5</sup> See, e.g., 49 U.S.C. §§ 31136, and 31142; 49 C.F.R. pts. 350-399.



- <sup>6</sup> 49 C.F.R. § 383.5. A CMV is defined, in part, as a combination vehicle having a gross combination weight of 26,001 pounds or more or as a heavy straight vehicle having a gross vehicle weight of 26,001 pounds or more.
- <sup>7</sup> 49 C.F.R. § 383.25(a).
- <sup>8</sup> *Supra*, note 1.
- <sup>9</sup> 49 C.F.R. §§ 383.93; 383.117; 383.121.
- <sup>10</sup> 49 C.F.R. §§ 382.207; 392.5(a)(1) (2018).
- <sup>11</sup> 49 C.F.R. § 383.71(h)(3) (2018).
- <sup>12</sup> 49 C.F.R. §§ 391.41; 391.45 (2018).
- <sup>13</sup> FMCSA Commercial Motor Vehicle Traffic Safety Facts, <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/84856/cmv-traffic-safety-facts-sheet-2016-2017.pdf> (last visited May 20, 2019) citing Fatality Analysis Reporting System (FARS) and Federal Highway Administration, Highway Statistics 2016 data.
- <sup>14</sup> Insurance Institute for Highway Safety-Highway Loss Data Institute, <https://www.iihs.org/iihs/topics/t/large-trucks/fatality-facts/large-trucks> (last visited April 4, 2019).
- <sup>15</sup> Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, tit. XII, §§ 12001-12019, 100 Stat. 3207-170 (1986) (Codified as amended at 49 U.S.C. §§ 31301-31317) (“CMVSA”).
- <sup>16</sup> Large Truck and Bus Crash Facts 2017, Table 1, <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/461861/ltrcbf-2017-final-5-6-2019.pdf> (last visited May 20, 2019).
- <sup>17</sup> *Id.*
- <sup>18</sup> CMVSA §§ 12005-6, codified at 49 U.S.C. §§ 31307-08.
- <sup>19</sup> CMVSA § 12007, codified at 49 U.S.C. § 31309.
- <sup>20</sup> CMVSA § 12008, codified at 49 U.S.C. § 31310.
- <sup>21</sup> CMVSA, § 12002, codified at 49 U.S.C. § 31302.
- <sup>22</sup> Prior to the creation of FMCSA, the FHWA was authorized to regulate motor carriers and motor carrier safety.
- <sup>23</sup> *Commercial Driver Licensing Standards; Requirements and Penalties*, 52 Fed.Reg. 20574 (June 1, 1987).
- <sup>24</sup> *Id.* at 20581, 20587.
- <sup>25</sup> *Id.*
- <sup>26</sup> *Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers; Notice of Proposed Rulemaking and Public Information Forum*, 53 Fed.Reg. 16656 (May 10, 1988).
- <sup>27</sup> Conviction — means that a court of original jurisdiction has made an adjudication of guilt. The term includes an unvacated forfeiture of bail or collateral deposited to secure a defendant's appearance in court, a plea of nolo contendere accepted by the court, the payment of a fine, and a plea of guilty or a finding of guilt, regardless of whether the penalty is rebated, suspended or probated. UVC § 1-117 (2000)
- <sup>28</sup> *Blood Alcohol Concentration Level for Commercial Motor Vehicle Drivers*, 53 Fed.Reg. 39044, 39047 (October 4, 1988).
- <sup>29</sup> See 49 C.F.R. § 383.5 for this definition, discussed further, below.
- <sup>30</sup> Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999) (codified as amended in scattered sections of 49 U.S.C.) (“MCSIA”).
- <sup>31</sup> MCSIA, § 4, 113 Stat. at 1749, 49 U.S.C. § 113 note.
- <sup>32</sup> MCSIA § 202,
- <sup>33</sup> 49 U.S.C. § 31311(a)(19), emphasis added.
- <sup>34</sup> 145 Cong. Rec. H12870-12874 (daily ed. Nov.18, 1999); 145 Cong. Rec. S15207-15311 (daily ed. Nov.19, 1999).
- <sup>35</sup> Commercial learners permit.
- <sup>36</sup> 49 C.F.R. § 384.226 (2018) (as amended).
- <sup>37</sup> *Masking*, *Black's Law Dictionary* (10th ed. 2014)
- <sup>38</sup> *Id.* Judgment.
- <sup>39</sup> *Id.* Diversion Program.
- <sup>40</sup> 49 U.S.C. § 31131(b)(2) (2017).
- <sup>41</sup> 49 C.F.R. § 383.5 (2018).
- <sup>42</sup> See, e.g., *Burdine v. Arkansas Dept. of Finance & Admin.*, 379 S.W.3d 476 (Ark. 2010) (The suspension of driver's license in Missouri constituted a conviction for driving while intoxicated, warranting disqualification of licensee's CDL); *Strup v. Director of Revenue*, 311 S.W.3d 793 (Mo. 2010 (en banc)) (Suspension of motorist's base driving privilege constituted a “conviction” for driving under the influence of alcohol for the purposes of the Commercial Driver's License Act, such as to merit disqualification of his CDL for a period of one year); *State v. Arterburn*, 751 N.W.2d 157 (Neb. 2008) (In state law, the phrase “authorized administrative tribunal” implicitly references Administrative LR proceedings.; and *State v. Burnell*, 966 A.2d 168 (Conn. 2009).
- <sup>43</sup> Also commonly referred to as administrative license suspensions.
- <sup>44</sup> Or “someone required to hold a CDL.” 49 C.F.R. § 383.51.
- <sup>45</sup> 49 C.F.R. § 384.226
- <sup>46</sup> *Id.*
- <sup>47</sup> See, e.g., *Indiana Bureau of Motor Vehicles v. Hargrave*, 51 N.E.2d 255 (In. Ct. App. 2016) (Driver was not eligible to participate in a diversion program, or to have judgment deferred on that conviction, regardless of when he surrendered his CDL); *People v. Meyer*, 186 Cal.App.4th 1279 (2010) (Surrendering commercial driver's license did not permit defendant to attend traffic school in lieu of adjudication).
- <sup>48</sup> *Id.* at 258.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 260.

<sup>52</sup> Large Truck and Bus Crash Facts 2017, *supra* note 11, Table 1. (2014 was the only year in this time-frame to show a reduction in fatalities.)

<sup>53</sup> *Id.*

<sup>54</sup> *See, Id.*

<sup>55</sup> 49 C.F.R. § 383.5.

<sup>56</sup> <https://www.autolist.com/guides/average-weight-of-car> (last visited May 20, 2019).

<sup>57</sup> *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, 2nd edition, 2017, p 41. [https://ndaa.org/wp-content/uploads/CDLMono\\_REV2017\\_FinalWeb.pdf](https://ndaa.org/wp-content/uploads/CDLMono_REV2017_FinalWeb.pdf) (last visited May 20, 2019).

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## MASTERING MASKING: *The Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver's Licenses*

By Jeanine Howard, NDAA Staff Attorney

**O**n June 5, 2019, the National Traffic Law Center (NTLC), with funding provided by the Federal Motor Carrier Safety Administration (FMCSA), hosted 26 prosecutors and other traffic safety professionals for its inaugural presentation of “Mastering Masking: The Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver’s Licenses,” in Cleveland, Ohio.

This course was designed to provide prosecutors and other traffic safety professionals with the materials and techniques necessary to train others in their respective jurisdictions about the fundamentals of the prohibition on masking<sup>1</sup> offenses. The NTLC wanted attendees to be able to appreciate how the enforcement of these regulations results in reducing injuries and deaths by keeping unsafe commercial driver’s license (CDL) holders off the roads and assuring that each driver has one driver’s license and one complete driver’s record.

In Cleveland, attendees participated in four modules which employed adult learning techniques to help facilitate the understanding of the federal definition of the terms “masking,” “conviction,” and “disqualification,” pursuant to the Federal Motor Carrier Safety Regulations (FMCSRs).

The first course module was the **Convictions** module. During this module, attendees were introduced to the federal definition of the term “conviction,”<sup>2</sup> which is much broader than its traditional meaning. Understanding what constitutes a conviction is key to understanding the importance of CDL record keeping and the sharing of CDL information from state to state. Par-

ticipants also learned how convictions affect CDLs through disqualifications and what role convictions play in masking.

**Masking and Ethics** introduced the second module. During this module, attendees gained more in depth information pertaining to masking and why it is prohibited by the FMCSRs through a thorough examination of the statute.<sup>3</sup> Attendees participated in exercises designed to help them identify masking and determine the ethical considerations involved when prosecutors negotiate CDL cases. Attendees also learned that states are required, under 49 U.S.C.A. §31311(19), to comply with the FMCSR definition of masking and to create state specific versions of the FMCSRs, including the prohibition on masking offenses.<sup>4</sup>

The third module was **Disqualifications**. During this module, attendees learned to navigate the CDL disqualification tables found in 49 C.F.R. §383.51 and learned the difference between federal versus state disqualification of a CDL. The states' traffic control laws that are subject to disqualification were highlighted. Attendees learned that the regulations governing the disqualification of CDLs were established as a mechanism to ensure that each driver has one driver's license and one driver's record.

The fourth and final module was a **Panel** discussion. This optional module was designed to allow attendees to hear real world examples from instructors of their own experiences involving convictions, masking, and disqualification involving CDL holders, and the impact on traffic safety in their communities. The panel module was particularly powerful for our course attendees. One panelist, Stacy Emert, opened the discussion with the moving account of her parents who were tragically killed in a tractor-trailer crash. Elizabeth Matune, the Ohio prosecutor who handled Stacy's parents' case, was also a panelist. Other panelists included: Christopher Daniels, the Traffic Safety Resource Prosecutor (TSRP) from Indiana; Jennifer Cifaldi, the TRSP from Illinois, and Elizabeth Earleywine, FMCSA's Attorney Advisor.

The Mastering Masking course is designed to be used as a whole or as individual modules to be added on to other trainings. By providing course participants with all the course materials on a thumb drive, the NTLC has provided an option which allows for traffic safety professionals to seamlessly add portions of the course to existing presentations or trainings. Course materials are available upon request. Alternatively, NTLC staff is available to come to your jurisdiction to provide this course at no cost, subject to available funding. For more information on Mastering Masking, contact NTLC Staff Attorney, Jeanine Howard: [jhoward@ndaajustice.org](mailto:jhoward@ndaajustice.org).

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<sup>1</sup> 49 C.F.R. § 384.226: 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.

<sup>2</sup> 49 C.F.R. § 383.5.

<sup>3</sup> 49 C.F.R. § 384.226.

<sup>4</sup> 49 U.S.C.A. § 31102(c).