



KANSAS ATTORNEY GENERAL

KRIS KOBACH

MASKING – ETHICS

2025 KANSAS CDL DOCKET TRAINING

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A HIGH STANDARD

Rule 3.8

Special Responsibilities of a Prosecutor

Comment:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.



A HIGH STANDARD

ABA Standard 3-1.4

(a) In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.



MASKING - DUTIES & RESPONSIBILITIES

What is masking?



MASKING - DUTIES & RESPONSIBILITIES

Uniform Commercial Driver's License Act - Effective January 1, 1991

Attorney General Opinions

2003-032

(Focused on definition of Driver & Diversions - 6 pages)

2011-010

(Addressed legislative changes that included “holder of a CDL” in the definition of driver - 3 pages)

2011-011

(Clarification of prior opinion as to amendments made pursuant to plea negotiations vs. amendments due to the evaluation of the evidence - 3 pages)

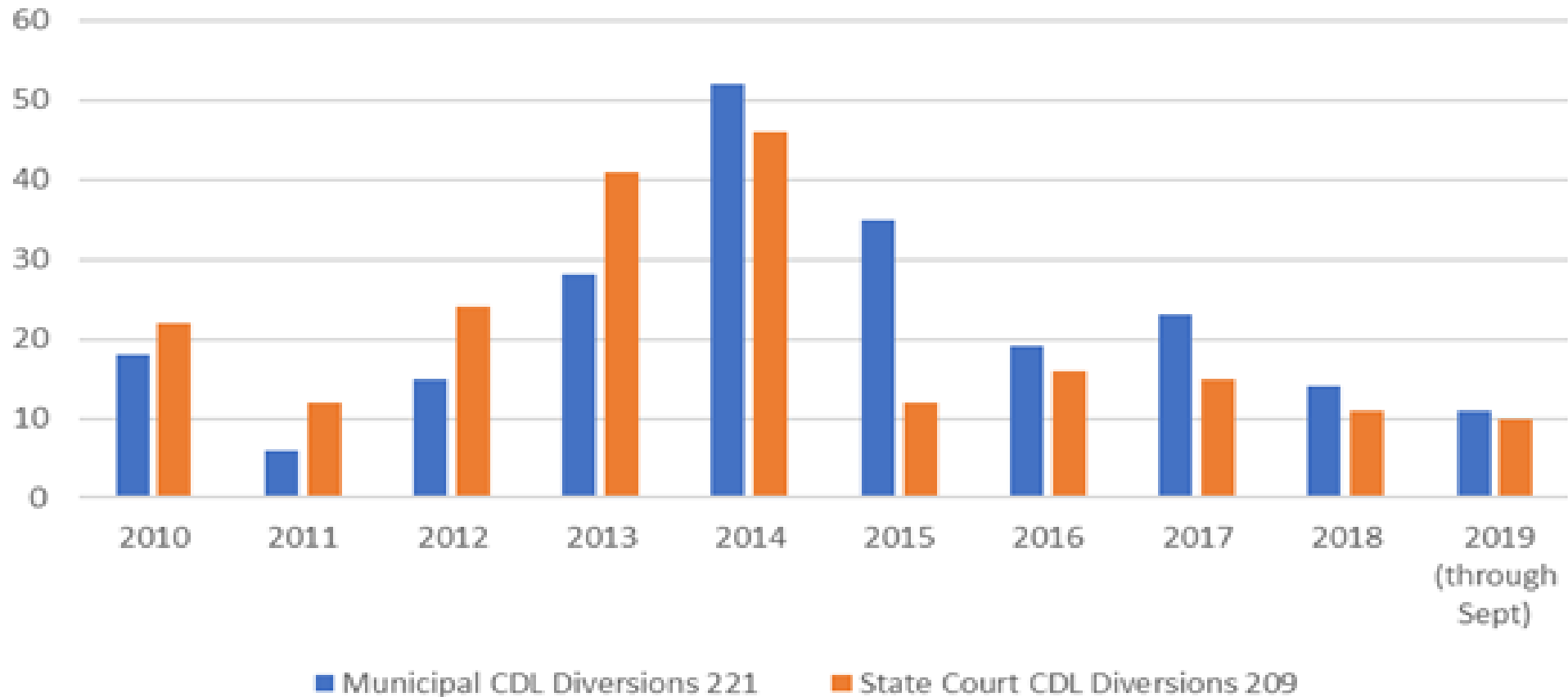
2022-02

(Focused on defining key terms, responsibilities and uniqueness of KS DUI Law - 11 Pages)



MASKING - DUTIES & RESPONSIBILITIES

DUI Diversions Entered In Violation of K.S.A. 8-2,150 - CDL Holders



MASKING - DEFINITIONS

Masking Defined **Black's Law Dictionary**

masking n.

1. Criminal law. The practice or an instance 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.
2. In critical legal studies, the act or an instance of concealing something's true nature



MASKING - DEFINITIONS

What is a conviction?



MASKING - DEFINITIONS

Conviction Defined 49 CFR § 383.5 & K.S.A. § 8-2,128(h)

- 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 or an authorized administrative tribunal (e.g. DMV)
- An unvacated **forfeiture of bail or collateral** deposited to secure a person's appearance in court
- A **plea of guilty** or **nolo contendere** (no contest) accepted by the court



MASKING - DEFINITIONS

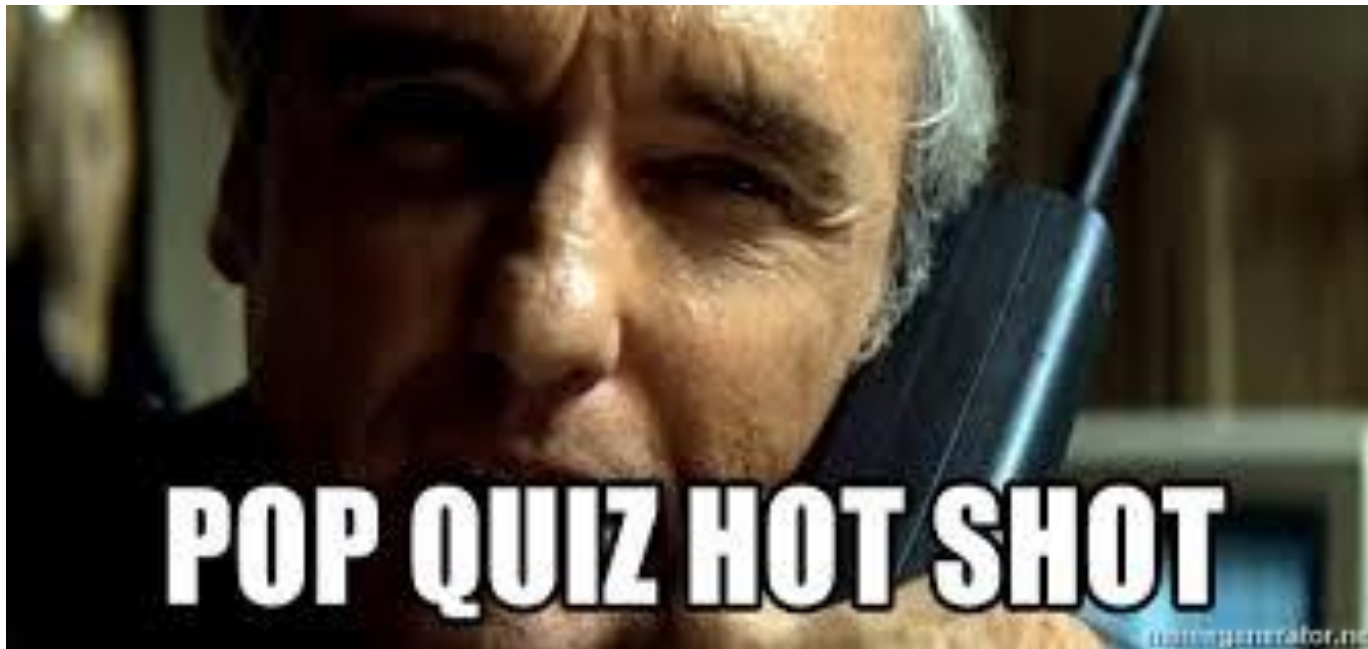
Conviction Defined 49 CFR § 383.5 & K.S.A. § 8-2,128(h)

- The payment of a **fine**, or **court cost**
 - (fees imposed by a court [at the conclusion or as part of the final resolution of the case] intended to cover the court's expense of handling the case)
- A **violation of a condition of release without bail**, regardless of whether or not the penalty is rebated, suspended, or prorated

Example: Failure to appear in court, failure to pay fine, and/or failure to comply with a court mandate



MASKING - DEFINITIONS



MASKING - CONVICTION

Question 1

CDL Defendant enters a *no contest* plea to speeding.

Is this a conviction?



MASKING - CONVICTION

Question 2

At an Administrative License Hearing, the Hearing Officer finds the CDL Defendant in violation and upholds the suspension or suspension and restriction.

Is this a conviction?



MASKING - CONVICTION

Question 3

CDL Defendant pleads guilty, the Court later vacates the plea and dismisses the case.

Is this a conviction?



MASKING - CONVICTION

Question 4

CDL Defendant charged with DUI under K.S.A. § 8-1567 and enters a diversion agreement;

Diversion Agreement complies with relevant statutes

K.S.A. § 22-2909(c)(1) - requires payment of a fine,

K.S.A. § 8-1567(h) - requires the court to report the diversion, &

K.S.A. § 8-2115(e) - requires the division to record all diversions & convictions

Is this a conviction?

Is this allowed?



MASKING - CONVICTION

What even is a Conviction?

CDL holder Vogt arrested for DUI in non-CMV (12/2021)

No Administrative Suspension/Restriction

Diversion granted by the city after release of 2022 AG Opinion

KDOR suspended Vogt's CDL privilege upon report of diversion

Vogt petitioned district court for review of suspension



MASKING - CONVICTION

What even is a Conviction?

District Court - reversed KDOR's suspension

KS Court of Appeals ruled that the district court lacked jurisdiction and remanded for reinstatement of suspension

KS Supreme Court granted review and remanded case to Court of Appeals to determine the merits of the case.

Vogt v. KDOR, 126477



MASKING - RULES - FEDERAL LAW - 49 CFR § 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.



MASKING - RULES - STATE LAW - K.S.A. § 8-2,150

Commercial driver's licenses; diversion agreements not allowed.

(a) A driver or a holder of a commercial driver's license may not enter into a diversion agreement in lieu of further criminal proceedings that would prevent such person'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 person's record, whether the person was convicted for an offense committed in the state where the person is licensed or another state.

(b) For purposes of subsection (a), a person shall be considered a holder of a commercial driver's license if the person was a holder of a commercial driver's license at the time the person was arrested or was issued a citation and shall remain a holder of a commercial driver's license even if the person surrenders the commercial driver's license after the arrest or citation.



MASKING - RULES - STATE LAW - K.S.A. § 8-2,150

Commercial driver's licenses; diversion agreements not allowed.

(c) (1) A prosecuting attorney as defined in K.S.A. § 22-2202, and amendments thereto, shall not mask or defer imposition of judgment or allow an individual to enter into a diversion program that would prevent a commercial learner's permit or commercial driver's license holder's conviction from appearing on the CDLIS driver record of any violation of a state or local traffic control law that occurred in any type of motor vehicle. The provisions of this subsection shall apply regardless of whether the driver was convicted for an offense committed in the state where the driver is licensed or in any another state.

(2) The provisions of this subsection shall not apply to parking, vehicle weight or vehicle defect violations.



MASKING - RULES

Masking is prohibited by State Law
K.S.A. § 8-2,150

Driver or holder of commercial driver's license



MASKING - RULES

No diversion or amendment allowed?
“We will just drive a CMV without a CDL”

K.S.A. § 8-2,128(k)

(k) "**driver**" means any person who drives, operates or is in physical control of a commercial motor vehicle, in any place open to the general public for purposes of vehicular traffic, or who is required to hold a commercial driver's license.



MASKING - RULES

Masking is prohibited by State Law
K.S.A. § 8-2,150

... any violation ...

... in any type of motor vehicle ...

... of a state or local traffic control law ...

... except a parking violation ...



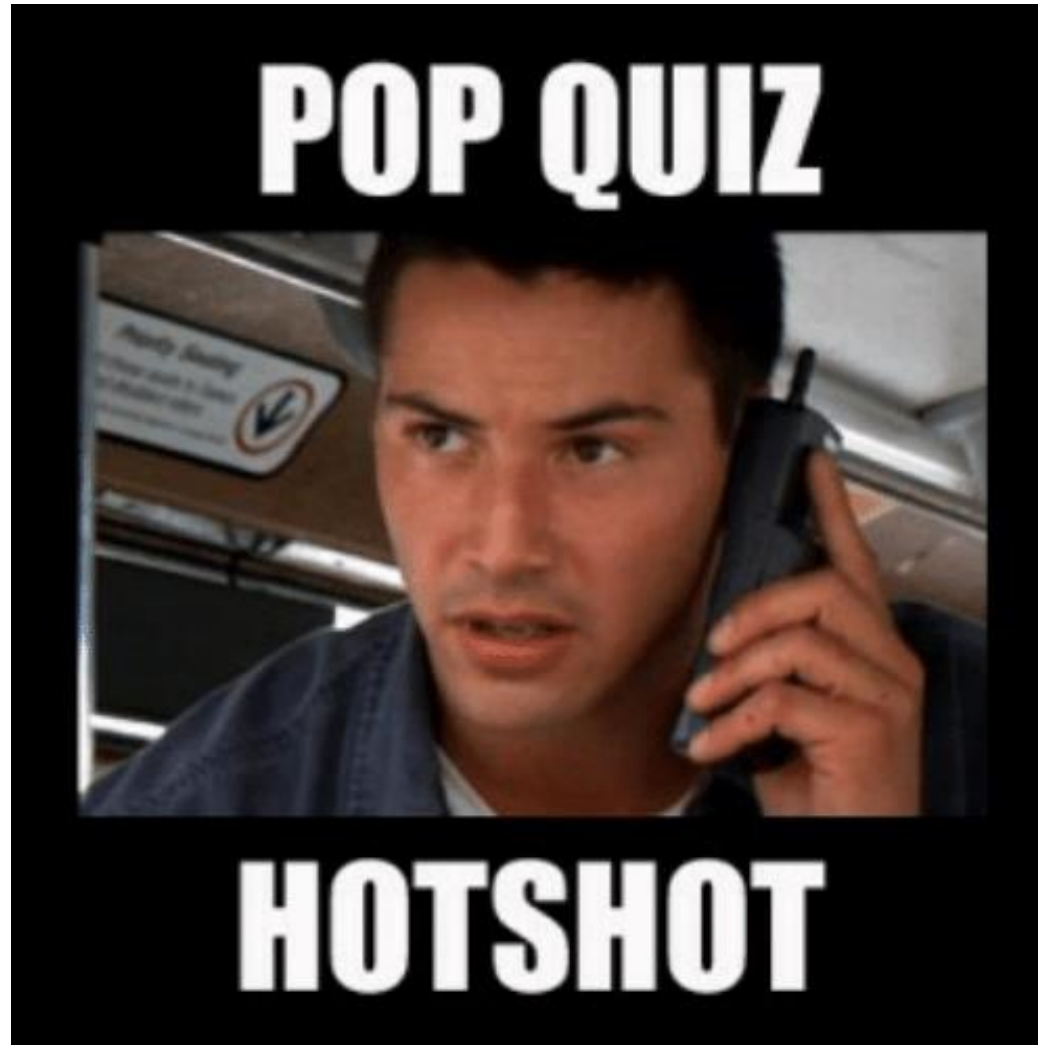
MASKING - RULES

Masking is prohibited by State Law
K.S.A. § 8-2,150

CDL at time of stop = Always a CDL



MASKING - RULES



MASKING - RULES

Question 1

CDL Defendant is charged with going 70 mph in a 55 mph zone, having expired registration and having a broken tail light.

Prosecutor: “With proof of registration and tail light fix, I’ll dismiss the speeding.”

Is this Masking?



MASKING - RULES

Question 2

CDL Defendant is charged with using a cell phone while driving.

Prosecutor: “Since the officer cannot testify that he was actually using the phone, I will dismiss the case upon proof that he contributed \$50 to the Human Fund.”

**Is this Masking?
Ethical?**



MASKING - RULES

Question 3

CDL Defendant is charged with Reckless Driving as a result of driving 70 mph in a 45 mph work zone.

Prosecutor: “I’ll grant diversion. If Def. has no more law violations for the next 6 months and pays \$100 in court costs, I’ll move to dismiss it.”

Is this Masking?



MASKING - RULES

Question 4

CDL Defendant is charged with traveling 75 mph in a 55 mph zone in his personal vehicle.

Prosecutor: “I’ll reduce the speed to 69 mph in a 55 mph zone.”

Is this Masking?



MASKING - RULES

Question 5

CDL Defendant is charged with DUI, Speeding, & Failure to Signal in his personal vehicle but relinquished his CDL before arraignment.

Prosecutor: “Since Defendant no longer has a CDL, I will agree to diversion on all charges.”

Is this Masking?



MASKING - ROLES

Responsibility from the Roadway to the Legislature

Law Enforcement

Prosecutor

Court

KDOR

KS Legislature



MASKING - ROLES

Responsibility from the Roadway to the Legislature

Law Enforcement

LEO's have a responsibility to accurately record and forward information and/or charges for prosecution that clearly identifies whether the driver is a holder of a CDL and whether the vehicle being operated was a commercial vehicle.

If you do not indicate that the driver has a CDL on a simple ticket, how would your prosecutor know?



MASKING - ROLES

Responsibility from the Roadway to the Legislature

Prosecutor

K.S.A. § 8-2,150 & 49 CFR § 384.226

Prosecutor's would be well-advised to adopt policies and practices designed to avoid engaging in practices that may result in masking. If the prosecutor knows that an amendment through plea bargaining or diversion will result in the masking of a traffic violation, the prosecutor has a responsibility to discontinue that practice.



DISPOSITION - DIVERSION

K.S.A. § 22-2908 (b)(2) / K.S.A. § 12-4415 (c)

No diversion permitted if:

- Violation under K.S.A. Chapter 8
- Defendant was a CDL holder at the time of the violation, or at any subsequent time prior to being considered for diversion

ABSOLUTE PROHIBITION ON CDL TRAFFIC DIVERSIONS

EFFECTIVE JULY 1, 2022



MASKING - ROLES

Prosecutor Practice Tips

Take the time to determine if the driver has a CDL or was operating a commercial vehicle.

Adopt written diversion and amendment policies regarding tickets when the driver has a CDL.

Include CDL status on diversion applications and include a provision in diversion agreements that provide for revocation if false information is provided in the application.

You can always decline to grant a diversion or amendment - we are restricted on when we can grant a diversion or amendment

If you are unsure, ask for help



MASKING - ROLES

Responsibility from the Roadway to the Legislature

Court

K.S.A. § 8-1567(h)

The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division including any finding regarding the alcohol concentration in the offender's blood or breath.



MASKING - ROLES

Responsibility from the Roadway to the Legislature

Court

K.S.A. § 8-2115

Every Municipal judge or judge of a court not of record and every clerk of a court of record shall:

Keep a full record

Prepare & forward an electronic abstract of a conviction or a forfeiture of bail/appearance bond w/in 10 days

Prepare & forward an electronic abstract of a conviction of manslaughter or other felony in the commission of which a vehicle was used

Failure, Refusal or Neglect to comply shall constitute misconduct in office...



MASKING - ROLES

Responsibility from the Roadway to the Legislature

KDOR (Division of Vehicles)

K.S.A. § 8-249(b)

The division also shall file all accident reports and abstracts of court records of convictions received by it under the laws of the state...



MASKING - ROLES

Responsibility from the Roadway to the Legislature

KDOR (Division of Vehicles)

K.S.A. § 8-2115(e)

The division shall electronically file all abstracts received hereunder at its main office and the same shall be open to public inspection during reasonable business hours.



MASKING - ROLES

Responsibility from the Roadway to the Legislature

KDOR (Division of Vehicles)

49 CFR § 384.225 - CDLIS Driver Recordkeeping

(a) CLP or CDL holder. Post and maintain as part of the CDLIS driver record:

(1) All convictions, disqualifications and other licensing actions for violations of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight, or vehicle defect violations) committed in any type of vehicle.



MASKING - ROLES

Responsibility from the Roadway to the Legislature

KS Legislature

49 U.S. Code § 31311

The State shall adopt and enforce regulations prescribed by the Secretary under as [2] 31310(j) of this title.



MASKING - CONSEQUENCES

Withholding of Funds based on noncompliance

49 CFR § 384.401

1st year of noncompliance - an amount up to 4% of the Federal-aid highway funds from the following apportionments:

2nd year & subsequent years of noncompliance - an amount up to 8%

National Highway Performance Program

Surface Transportation Block Grant Program

- 4% = \$ 17,692,650 - 8% = \$ 35,385,299 (FY2025)



MASKING - CONSEQUENCES

Decertification of State CDL Program

49 CFR § 384.405

Prohibition on CLP or CDL transactions. The Administrator may prohibit a State found to be in substantial noncompliance from performing any of the following CLP or CDL transactions:

- (1) Initial issuance.
- (2) Renewal.
- (3) Transfer.
- (4) Upgrade.



MASKING - DUTIES & RESPONSIBILITIES

Resources

NTLC CDL Resources

“From Roadside to Record” Video Series

Mastering Masking Training Course

CDL Monograph

CDL Quick Reference Guide

Masking Quick Reference Guide

