

HIGHWAY TO JUSTICE

FALL 2019

From The ABA with support from the National Highway Traffic Safety Administration

EMPOWERING JUDGES AND KEEPING THE ROADS SAFE

*By Judge Gayle Williams-Byers
South Euclid Municipal Court
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In June 2018, a truck plowed into a Jeep Wrangler stopped in traffic on Interstate 84 in Idaho, killing the truck driver and three Idaho airmen who were in the Jeep. A newspaper account later revealed that the truck driver had been convicted of more than 20 driving-related violations in four states before the crash and additional offenses in other states.

The obvious question was, why was a driver with so many convictions still on the road and in possession of a commercial driver's license? One likely reason, though it was not part of the record, relates to an all-too-common traffic court practice called "masking." Masking relates to plea bargains struck by commercial driver's license or CDL holders who are in danger of accruing driving violations including driving under the influence that could result in the automatic suspension of their licenses and commercial driving privileges.¹ When drivers are cited, whether in their personal or professional vehicles, they often seek to plead guilty to different, non-moving or reduced infractions, agree to attend driver's education courses or seek to participate in diversion or deferred prosecution programs.

Prosecutors and judges are often sympathetic to the drivers' argument that the loss of the CDL will take away their means of earning a living and supporting their family. But preserving a driver's license in this way effectively—and illegally—masks the true record of dangerous driving.

The Federal Commercial Motor Vehicle Safety Act was enacted to prevent the concealment of unsafe driving records and to establish uniform sanctions for certain unsafe driving practices by holders of a commercial driver's license. Under the Federal regulations that were promulgated under the Act, all out-of-State traffic convictions involving a CDL holder, regardless of whether the violation occurred in a commercial or private vehicle, must be reported to the licensee's licensing state. Under 49 CFR § 384.226, a State is prohibited from masking, deferring imposition of a judgment of conviction, or allowing an individual to enter a diversion program that would prevent a conviction from appearing on the commercial driver's license record. Under this regulation,

a "conviction" would include an unvacated adjudication of guilt or forfeiture of bail, a court-accepted guilty plea, or payment of a fine or court cost.

In order to promote compliance with the Federal Commercial Motor Vehicle Safety Act and its regulations, the Motor Carrier Safety Improvement Act of 1999 requires the withholding of certain Federal funds from States found to be non-compliant with the Federal regulations regarding masking. Additionally, the Federal government has the authority to also prohibit non-compliant States from issuing CDLs.

More attention, however, has been focused on commercial drivers and how the Courts handle their traffic violations. For nearly 20 years, for example, The National Judicial College, has been educating judges about masking and other highway safety regulations. In the past two years, more than 300 judges have tuned in to the College's live national webcasts on the subject or to webcasts customized for each of the 50 states. In 2016 and 2017, 447 judges attended in-person courses presented in seven states.

And the efforts appear to be finally paying off. In Florida, for example, judges report that it was commonplace to withhold convictions in almost all commercial operators' cases, such as speeding, careless driving and improper lane changes. Romana Lavalas, a senior attorney for the National Traffic Law Center of the National District Attorneys Association, says though that awareness of masking is clearly on the rise in courthouses, and "if judges are doing what they're supposed to do, the right drivers will get disqualified."

When asked, many State Court judges have said they were unaware of the concept of "masking" as well as its impact on road safety and noncompliance with federal law. I've had the opportunity to teach NJC courses on commercial driver's license issues around the country, and have found that many, "if not all" of the judges I've taught were unaware that masking was a violation of federal law. For example, a justice of the peace from Delaware, who attended one of the NJC programs commented:

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We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.

To submit an article, please send it to the editor, Hon. Neil E. Axel at neilaxel49@gmail.com with a copy to the staff liaison, Cheronne.Mayes@americanbar.org. Please contact Ms. Mayes for editorial guidelines.

The deadline for submission of articles for the Winter issue is November 27.

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"I had no idea that these plea agreements effectively violated the law until I took the course. I now take a much closer look at the record of violations."

The National Judicial College is continuing its year-round program of State-specific webcasts and in-State seated courses designed to provide judges with opportunities to understand CDL issues, including masking, with presentations scheduled through September 2020. For more information regarding a program in your State, go to www.judges.org, or call The National Judicial College.

1. For example, commercial drivers may be disqualified from operating a commercial vehicle for 60 - 120 days for speeding excessively, reckless driving, following a vehicle too closely, and 1- 3 years for operating a vehicle under the influence of alcohol or drugs. In some instances, a commercial driver may be disqualified for life from operating a commercial vehicle for a subsequent conviction for operating under the influence.

VIRGINIA'S DRIVEN TO PROTECT INITIATIVE—A PUBLIC-PRIVATE PARTNERSHIP TO ENHANCE PUBLIC SAFETY ON OUR HIGHWAYS

*By Judge Gordon A. Wilkins
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Each year, drunk driving kills approximately 10,000 people and costs the country more than \$190 billion. Although the number of traffic fatalities caused by drivers under the influence had decreased in past years, it appears that number is now leveling off and still remains a significant public safety problem. If any other set of circumstances cost the same amount in lives and assets, there would be a clamor that "something must be done". Consider, for example, the public response if we were to experience one commercial airline crash each week for a year. The resulting number of fatalities would equal the number killed on our highways due to drunk driving.

In recent years, the automotive industry has made great strides in developing non-operator controlled technological innovations, most of them having to do with the safety of the vehicle. Auto manufacturers have developed cars that are safer because of their construction—introducing popular automatic safety features like blind spot detection and automatic braking. Most of the new capabilities of these vehicles become engaged after the vehicle is started and is in operation. Now the Automotive Coalition for Traffic Safety (ACTS) representing the world's leading automakers, in partnership with the federal government, is developing a new safety technology to help prevent alcohol-impaired driving. This technology is currently in its testing phase and is known as the Driver Alcohol Detection System for Safety (DADSS). ACTS has partnered with the Virginia Department of Motor Vehicles to form the Driven to Protect Initiative. This public-private partnership is the first to deploy in-vehicle alcohol detection sensors that will determine when a driver is impaired and therefore unsafe to operate the vehicle.

DADSS is a system designed to detect whether a person who attempts to start and drive a vehicle is under the influence of alcohol, or, in other words, has a blood alcohol concentration of 0.08% or greater. If it is determined that he/she does, the vehicle will start, but will not move. DADSS is approaching the measurement problem in two ways. The first is based upon

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breath alcohol content as measured by a breath-based system which will measure alcohol as the driver sits in the driver's seat. It is not a system whereby the driver is required to blow into a tube or other device, such as is used in ignition interlock systems, but is designed to use measurements from the ambient air while the driver breathes normally. A small sensor analyzes only the breath molecules of the driver using infrared light. The second system being tested is a touch-based technology, whereby the alcohol content of the prospective driver will be measured by shining an infrared light through the skin (such as the fingertip) of the person. The sensor is housed in the normal vehicle controls, such as the steering wheel or the starter button.

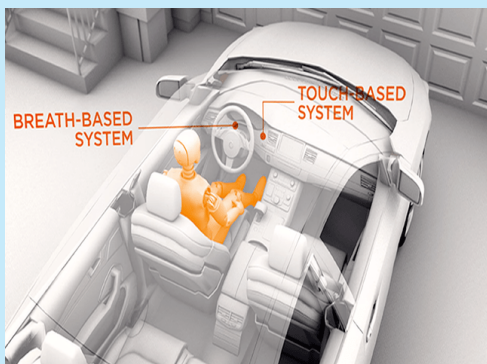
The breath-based technology itself is ready. Prior to adoption of this technology, refinements may be necessary as testing will disclose its reliability, and its durability to withstand violent road and weather conditions as well as the test of time. (The average age of a car on the road today is approximately twelve years). The touch-based technology is not as mature as the breath system and is still in laboratory development and refinement.

DADSS is not a law enforcement tool. Rather, it is designed to be offered to car buyers as a safety option; it can be installed into new vehicles and will not affect normal driving behavior. It is easy to imagine its appeal to parents of young drivers, employers with fleet vehicles, and drivers who want the extra level of certainty that they're being responsible and safe behind the wheel.

As part of this initiative, the James River Transportation Company of Virginia undertook the first in-vehicle, on-road test trials with prototype sensors in a number of their commercial vehicles. The results of these test trials are currently being evaluated. The data and feedback collected from the vehicles and their drivers, will assist in finalizing the technology. If found to be reliable, the system can be offered to vehicle owners as a safety option, similar to other driver assist systems like automatic braking or lane departure warnings.

As you can imagine, questions may arise as to the use of the system. Can it be activated only while the children of the owner use the car? Can the threshold for triggering the system be set for a blood alcohol concentration lower than 0.08? What happens if a person starts a car with a blood alcohol concentration of 0.07 but because of recent drinking goes over 0.08 while driving? Would the data from the system be discoverable by law enforcement and others? These and many other questions will be answered as the research and development moves ahead. The overriding goal is to make our vehicles and our highways safer. For additional information relating to this program, please refer to: <https://www.dadss.org/wp-content/uploads/2019/04/Driven-to-Protect-Overview-2019.pdf>

[Authors Note: This article is not intended to comment on the marketability of the system, nor on the efficacy of it, but rather to inform the public about this important potential tool against impaired driving.]



Dates to Remember

October 21 – 25
National School Bus Safety Week

October 20 – 26
National Teen Driver Safety Week
TEEN DRIVING ISSUES

October 31
Halloween
IMPAIRED DRIVING
Buzzed Driving is Drunk Driving



November 28
Thanksgiving Holiday Travel
OCCUPANT PROTECTION
Buckle Up. Every Trip. Every Time



November 29 – December 10
Pre-Holiday Season
IMPAIRED DRIVING
Buzzed Driving is Drunk Driving



December 1 – 7
Older Driver Safety Awareness Week

December 11 – Jan 1
Holiday Season
IMPAIRED DRIVING
DRUG-IMPAIRED DRIVING
Drive Sober or Get Pulled Over
Buzzed Driving is Drunk Driving



Contact Info

To learn more about programs offered by NHTSA, please contact one of the following:

Judicial Fellow:

Hon. Neil E. Axel: neilaxel49@gmail.com

Tribal Courts Fellow:

Hon. J. Matthew Martin:
abajudicialfellow@gmail.com

Judicial Outreach Liaisons:

Hon. Brian L. Burgess, Judicial Outreach Liaison, Region 1 (Maine, Massachusetts, New Hampshire, Vermont, and Rhode Island): Brian.Burgess@vermont.gov

Hon. John S. Kennedy, Judicial Outreach Liaison, Region 2 (Connecticut, New Jersey, New York, Pennsylvania, Puerto Rico and Virgin Islands): JSKennedy17402@gmail.com

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Hon. Phyllis McMillen, Judicial Outreach Liaison, Region 5 (Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio):
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Hon. Robert S. Anchondo, Judicial Outreach Liaison, Region 6 (LA, MS, NM, OK, TX, Indian Nations); rsanchondo@aol.com

Hon. Chaney W. Taylor, Jr., Judicial Outreach Liaison, Region 7 (Iowa, Missouri, Arkansas, Kansas, Nebraska): ctaylorjol@gmail.com

Hon. Richard A. Vlavianos, Judicial Outreach Liaison, Region 9 (Arizona, California, Hawaii, Pacific Territories): rvlavianos@comcast.net

Hon. Mary Jane Knisely, Judicial Outreach Liaison, Region 10 (Montana, Idaho, Oregon, Washington, Alaska):
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JUDICIAL DIVISION MEMBERS HONORED AT 2019 NADCP NATIONAL CONFERENCE

Each year the National Association of Drug Court Professionals (NADCP) conducts the world's largest conference on addiction, mental health and justice reform. The Conference focuses on pursuing and promoting evidence-based sentencing practices in criminal and traffic cases through problem-solving treatment courts that have been proven to reduce recidivism. At this year's Conference, Judicial Division members Judge Michael J. Barrasse and Judge Mary Jane Knisely were recognized for their outstanding work with DWI Treatment Courts and their leadership in the problem-solving court field.

Judge Barrasse was inducted into the Stanley Goldstein Drug Court Hall of Fame, the highest honor bestowed by NADCP and which recognizes extraordinary leadership and distinguished service in the field. He has been actively involved in the treatment court community and served as the Chairman of the Board of the National Association of Drug Court Professionals. His tireless dedication to, and support of, treatment courts has helped promote the expansion of treatment courts around the country. Judge Barrasse serves as the President Judge of the Court of Common Pleas in Lackawanna County, Pennsylvania. His current responsibilities include the administration of the criminal docket, and the handling of DUI, Veterans and Co-Occurring Treatment courts.

Judge Knisely received the DWI Court Leadership Award recognizing her steadfast dedication to improving the lives of those in her community who come before her Court as a result of alcohol, drugs, or mental illness. She serves on the District Court of Montana and is the Chief Presiding Judge for the Thirteenth Judicial District. Judge Knisely has assisted in the establishment of treatment courts in Montana and currently presides over a Felony Impaired Driving Court, known as STEER Court (Sobriety, Treatment, Education, Excellence, and Rehabilitation), and a Veterans Treatment Court, known as CAMO (Courts Assisting Military Offenders). She is a member of the faculty of the National Judicial College in Reno, Nevada and serves on the Executive Committee for the American Bar Association's National Conference of Specialized Court Judges.

In addition to time spent on the bench, both Judge Barrasse and Judge Knisely are actively involved in judicial outreach and education. Both are actively involved in the Judicial Outreach Liaison Program that is a network of judges around the country who are available as resources and subject matter experts in the areas of traffic safety, impaired driving, and evidence-based pretrial and sentencing practices designed to reduce recidivism. Judge Barrasse serves as a State Judicial Outreach Liaison for Pennsylvania, while Judge Knisely serves as a Regional Judicial Outreach Liaison serving her home State of Montana as well as Alaska, Washington, Oregon and Idaho. Their work to promote treatment courts locally and nationally have improved sentencing outcomes and have improved the lives of treatment court participants, their families, and their communities.

UPCOMING NATIONAL JUDICIAL COLLEGE COURSES



Sentencing to Reduce Recidivism in Impaired Driving Cases

Wednesday, October 16, 2019

Noon PST | Online Webcast | Tuition: Free

While punishment, reducing recidivism, and incapacitation are all important aspects of sentencing, this 60-minute webcast will focus on what research tells us can reduce recidivism in drunk driving cases to keep our roads safer.

Drugged Driving Essentials

Monday, October 28–30, 2019

In-Person Course, Reno, NV | Tuition: Free

This course is funded by the National Highway Traffic Safety Administration (NHTSA) and offered at no cost to eligible participants. Please contact the registrar's office for eligibility.

Unlike alcohol-impaired driving, drugged driving has no bright line test for impairment. Drugged driving cases require a judge to utilize a variety of judicial tools to effectively adjudicate these cases. In addition to the ability to determine which kinds of drugs an individual may be using, it is important to know how these drugs affect the individual and may impair their ability to function. It is also imperative that a judge knows how to effectively craft sentences, which include treatment options, in order to provide a participant with the most beneficial mode of recovery.

Self-Represented Litigant Issues in CMV Cases

Wednesday, December 4, 2019

Noon PST | Online Webcast | Tuition: Free

In the last decade, self-representation has increased exponentially. Self-represented litigants now appear on court dockets in almost every case possible including commercial motor vehicle matters. Self-represented litigants pose a special problem for the judge presiding over the matter because self-represented litigants are not keenly aware of hearing procedures and commercial drivers licensing rules.

Whom should I contact for more information?

For more information, please contact the Registrar's Office at (800) 255-8343 or registrar@judges.org.

Scholarships available: To learn more about financial assistance to attend NJC programs, please email njc-scholarships@judges.org or call us at (800) 25-JUDGE.

These courses qualify for The National Judicial College Certificate in Judicial Development Program Administrative Law Adjudication Skills, Dispute Resolution Skills, General Jurisdiction Trial Skills, Special Court Trial Skills and Tribal Judicial Skills disciplines.

DON'T FORGET

Valuable resources can be found at:

- **National Highway Traffic Safety Administration**
<http://www.nhtsa.gov/Impaired>
- **American Bar Association/Judicial Division/NCSCJ**
http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/NHTSA.html
- **Highway to Justice - Archives**
http://www.americanbar.org/publications/judicial_division_record_home/judicial_division_record_archive.html
- **National Judicial College**
www.judges.org
- **Governors Highway Safety Association: Alcohol Impaired Driving**
<https://www.ghsa.org/issues/alcohol-impaired-driving>
- **AAA Foundation for Traffic Safety**
<https://www.aaafoundation.org/>
- **National Center for State Courts**
<http://www.trafficresourcecenter.org/>
- **National Center for DWI Courts**
<http://www.dwicourts.org>



ABA
AMERICAN BAR ASSOCIATION
Judicial Division
National Conference of
Specialized Court Judges

Save the Date

2020 TRAFFIC COURT SEMINAR MARCH 9–11, 2020 NEW ORLEANS, LOUISIANA

Save the date for the ABA Judicial Division's premier traffic court program designed for judges, judicial officers, prosecutors, and defense attorneys appearing in these courts. The seminar will feature the latest developments in traffic court law, technology, and scientific evidence.

Contact cheronne.mayes@americanbar.org to join the program's mailing list.

Contact Info continued

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