

Driving Under the Influence: An Overview of Michigan's Marijuana-Related Driving Offenses

Mary Chartier, Chartier & Nyamfukudza | P.L.C.

- 8.1 Introduction
- 8.2 Michigan's OWI and Impaired Driving Statute
- 8.3 Operating a Motor Vehicle When Death or Serious Impairment Results
- 8.4 Operating a Motor Vehicle With a Child in the Vehicle
- 8.5 Michigan's Zero Tolerance Per Se Statute
- 8.6 Punishment Provisions
- 8.7 Enhanced Sentencing
- 8.8 Plea Restrictions
- 8.9 Proving Prior Convictions
- 8.10 Jury Verdict Forms
- 8.11 Court Reporting Requirements
- 8.12 Ignition Interlock Statutory Provision
- 8.13 Statutory Definitions
- 8.14 Defining "Operating"
- 8.15 Assessing Whether a Place is Open to the General Public or Generally Accessible to Motor Vehicles
- 8.16 Metabolites Are Not a Controlled Substance
- 8.17 Driving and the Michigan Medical Marijuana Act
- 8.18. Testing Challenges
- 8.19 License Sanctions for Marijuana Offenses
- 8.20 The Drug Recognition Evaluation
- 8.21 Forensic Chemical Testing
- 8.22 Other Resources
- 8.23 Conclusion

8.1 Introduction

This chapter covers the basics of marijuana-related driving offenses in Michigan. Defending an operating under the influence of a controlled substance offense that involves marijuana requires experience, skill, and training in criminal defense, constitutional law, and much more. Marijuana-related driving offenses may involve issues with scientific testing, as well as issues involving the effects of a conviction on a person's driver's license, professional license, and more. Defending these cases becomes even more complicated when the client is a cardholder under the Michigan Medical Marijuana Act. No matter what the specifics of the case are, defense attorneys are encouraged to use this chapter as merely a primer of some of the issues that may arise. Of course, issues that relate to the search and seizure of the client are not covered in this chapter, but they should always be considered because an unconstitutional seizure or search may vitiate the need to go further in defending the client.

8.2 Michigan's OWI and Impaired Driving Statute

Michigan prohibits a driver from operating a motor vehicle while intoxicated. MCL 257.625. This includes the driver being under the influence of marijuana. A conviction results in no more than 93 days in jail and a fine of not more than \$500 for a first offense. There are also 6 points placed on a person's driver's license and a driver's license suspension of not more than 180 days. Like many offenses, there are a number of other consequences, including the possibility of probation.

Michigan has a "lesser offense" to the OWI statute, and this is "impaired" driving. A conviction results in no more than 93 days in jail and a fine of not more than \$300 for a first offense. There are also 4 points placed on a person's driver's license and restrictions on where a person can drive for 180 days if impaired by a controlled substance. However, this allows the driver to be able to drive for certain activities, such as going back and forth to work and school. The ability to continue driving is often an incentive for a person accused of an OWI offense to accept an offer of impaired driving.

The statute provides, in relevant portion, the following:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

* * *

(2) The owner of a vehicle or a person in charge or in control of a vehicle shall not authorize or knowingly permit the vehicle to be operated upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state by a person if any of the following apply:

(a) The person is under the influence of alcoholic liquor, a controlled substance, other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

* * *

(c) The person's ability to operate the motor vehicle is visibly impaired due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

(3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.

8.3 Operating a Motor Vehicle When Death or Serious Impairment Results

When an accident results in the death or serious impairment of another person and the driver is intoxicated or impaired, the penalties are significant.

The statute provides, in relevant part, the following:

(4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

* * *

(c) If, at the time of the violation, the person is operating a motor vehicle in a manner proscribed under section 653a and causes the death of a police officer, firefighter, or other emergency response personnel, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both. This subdivision applies regardless of whether the person is charged with the violation of section 653a. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

(5) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a crime as follows:

(a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than \$1,000.00 or more than \$5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

8.4 Operating a Motor Vehicle With a Child in the Vehicle

The penalties are enhanced when a driver is intoxicated or impaired and there is a child in the vehicle.

The statute provides, in relevant part, the following:

(7) A person, whether licensed or not, is subject to the following requirements:

(a) He or she shall not operate a vehicle in violation of subsection (1), (3), (4), (5), or (8) while another person who is less than 16 years of age is occupying the vehicle. A person who violates this subdivision is guilty of a crime punishable as follows:

(i) Except as provided in subparagraph (ii), a person who violates this

subdivision is guilty of a misdemeanor and shall be sentenced to pay a fine of not less than \$200.00 or more than \$1,000.00 and to 1 or more of the following:

(A) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of this imprisonment shall be served consecutively. This term of imprisonment shall not be suspended.

(B) Community service for not less than 30 days or more than 90 days.

(ii) If the violation occurs within 7 years of a prior conviction or after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, a person who violates this subdivision is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and to either of the following:

(A) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(B) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of this imprisonment shall be served consecutively. This term of imprisonment shall not be suspended.

(c) In the judgment of sentence under subdivision (a)(i) or (b)(i), the court may, unless the vehicle is ordered forfeited under section 625n, order vehicle immobilization as provided in section 904d. In the judgment of sentence under subdivision (a)(ii) or (b)(ii), the court shall, unless the vehicle is ordered forfeited under section 625n, order vehicle immobilization as provided in section 904d.

(d) This subsection does not prohibit a person from being charged with, convicted of, or punished for a violation of subsection (4) or (5) that is committed by the person while violating this subsection. However, points shall not be assessed under section 320a for both a violation of subsection (4) or (5) and a violation of this subsection for conduct arising out of the same transaction.

8.5 Michigan's Zero Tolerance Per Se Statute

Michigan has a zero tolerance per se drugged driving law for controlled substances. MCL 257.625. This includes marijuana.

The statute states, in relevant part, the following:

(8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her

body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

8.6 Punishment Provisions

Collateral consequences come along with any conviction and are frequently vast.

Penalties provided in the statute are as follows:

(9) If a person is convicted of violating subsection (1) or (8), all of the following apply:

(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

(i) Community service for not more than 360 hours.

(ii) Imprisonment for not more than 93 days, or, if the person is convicted of violating subsection (1)(c), imprisonment for not more than 180 days.

(iii) A fine of not less than \$100.00 or more than \$500.00, or, if the person is guilty of violating subsection (1)(c), a fine of not less than \$200.00 or more than \$700.00.

(b) If the violation occurs within 7 years of a prior conviction, the person shall be sentenced to pay a fine of not less than \$200.00 or more than \$1,000.00 and 1 or more of the following:

(i) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of the term of imprisonment imposed under this subparagraph shall be served consecutively.

(ii) Community service for not less than 30 days or more than 90 days.

(c) If the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and to either of the following:

(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

(d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended.

(e) In the judgment of sentence under subdivision (a), the court may order vehicle immobilization as provided in section 904d. In the judgment of sentence under subdivision (b) or (c), the court shall, unless the vehicle is ordered forfeited under section 625n, order vehicle immobilization as provided in section 904d.

(f) In the judgment of sentence under subdivision (b) or (c), the court may impose the sanction permitted under section 625n.

(10) A person who is convicted of violating subsection (2) is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) and (c), a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not less than \$100.00 or more than \$500.00, or both.

(b) If the person operating the motor vehicle violated subsection (4), a felony punishable by imprisonment for not more than 5 years or a fine of not less than \$1,500.00 or more than \$10,000.00, or both.

(c) If the person operating the motor vehicle violated subsection (5), a felony punishable by imprisonment for not more than 2 years or a fine of not less than \$1,000.00 or more than \$5,000.00, or both.

(11) If a person is convicted of violating subsection (3), all of the following apply:

(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

(i) Community service for not more than 360 hours.

(ii) Imprisonment for not more than 93 days.

(iii) A fine of not more than \$300.00.

(b) If the violation occurs within 7 years of 1 prior conviction, the person shall be sentenced to pay a fine of not less than \$200.00 or more than \$1,000.00, and 1 or more of the following:

(i) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of the term of imprisonment imposed under this subparagraph shall be served consecutively.

(ii) Community service for not less than 30 days or more than 90 days.

(c) If the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and either of the following:

(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

(d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended.

(e) In the judgment of sentence under subdivision (a), the court may order vehicle immobilization as provided in section 904d. In the judgment of sentence under subdivision (b) or (c), the court shall, unless the vehicle is ordered forfeited under section 625n, order vehicle immobilization as provided in section 904d.

(f) In the judgment of sentence under subdivision (b) or (c), the court may impose the sanction permitted under section 625n.

* * *

(13) In addition to imposing the sanctions prescribed under this section, the court may order the person to pay the costs of the prosecution under the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69.

(14) A person sentenced to perform community service under this section shall not receive compensation and shall reimburse the state or appropriate local unit of government for the cost of supervision incurred by the state or local unit of government as a result of the person's activities in that service.

8.7 Enhanced Sentencing

(15) If the prosecuting attorney intends to seek an enhanced sentence under this section or a sanction under section 625n based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information, or an amended complaint and information, filed in district court, circuit court, municipal court, or family division of circuit court, a statement listing the defendant's prior convictions.

8.8 Plea Restrictions

(16) If a person is charged with a violation of subsection (1), (3), (4), (5), (7), or (8) or section 625m, the court shall not permit the defendant to enter a plea of guilty or nolo contendere to a charge of violating subsection (6) in exchange for dismissal of the original charge. This subsection does not prohibit the court from dismissing the charge upon the prosecuting attorney's motion.

8.9 Proving Prior Convictions

(17) A prior conviction shall be established at sentencing by 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) An abstract of conviction.
- (c) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (d) A copy of a court register of actions.
- (e) A copy of the defendant's driving record.
- (f) Information contained in a presentence report.
- (g) An admission by the defendant.

8.10 Jury Verdict Forms

(18) Except as otherwise provided in subsection (20), if a person is charged with operating a vehicle while under the influence of a controlled substance or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance in violation of subsection (1) or a local ordinance substantially corresponding to subsection (1), the court shall require the jury to return a special verdict in the form of a written finding or, if the court convicts the person without a jury or accepts a plea of guilty or nolo contendere, the court shall make a finding as to whether the person was under the influence of a controlled substance or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance at the time of the violation.

(19) Except as otherwise provided in subsection (20), if a person is charged with operating a vehicle while his or her ability to operate the vehicle was visibly impaired due to his or her consumption of a controlled substance or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance in violation of subsection (3) or a local ordinance substantially corresponding to subsection (3), the court shall require the jury to return a special verdict in the form of a written finding or, if the court convicts the person without a jury or accepts a plea of guilty or nolo contendere, the court shall make a finding as to whether, due to the consumption of a controlled substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate a motor vehicle was visibly impaired at the time of the violation.

(20) A special verdict described in subsections (18) and (19) is not required if a jury is instructed to make a finding solely as to either of the following:

- (a) Whether the defendant was under the influence of a controlled substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance at the time of the violation.
- (b) Whether the defendant was visibly impaired due to his or her consumption of a controlled substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance at the time of the violation.

8.11 Court Reporting Requirements

(21) If a jury or court finds under subsection (18), (19), or (20) that the defendant operated a motor vehicle under the influence of or while impaired due to the consumption of a controlled substance or a combination of a controlled substance, an alcoholic liquor, or other intoxicating substance, the court shall do both of the following:

(a) Report the finding to the secretary of state.

(b) On a form or forms prescribed by the state court administrator, forward to the department of state police a record that specifies the penalties imposed by the court, including any term of imprisonment, and any sanction imposed under section 625n or 904d.

(22) Except as otherwise provided by law, a record described in subsection (21)(b) is a public record and the department of state police shall retain the information contained on that record for not less than 7 years.

8.12 Ignition Interlock Statutory Provision

(24) The court may order as a condition of probation that a person convicted of violating subsection (1) or (8), or a local ordinance substantially corresponding to subsection (1) or (8), shall not operate a motor vehicle unless that vehicle is equipped with an ignition interlock device approved, certified, and installed as required under sections 625k and 625l.

8.13 Statutory Definitions

(25) As used in this section:

(a) "Intoxicating substance" means any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following:

(i) Recognized as a drug in any of the following publications or their supplements:

(A) The official United States pharmacopoeia.

(B) The official homeopathic pharmacopoeia of the United States.

(C) The official national formulary.

(ii) A substance, other than food, taken into a person's body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.

(b) "Prior conviction" means a conviction for any of the following, whether under a law of this state, a local ordinance substantially corresponding to a law of this state, a law of the United States substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state, subject to subsection (27):

(i) Except as provided in subsection (26), a violation or attempted violation

of any of the following:

(A) This section, except a violation of subsection (2), or a violation of any prior enactment of this section in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

(B) Section 625m.

(C) Former section 625b.

(ii) Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

(iii) Section 601d or 626(3) or (4).

(27) If 2 or more convictions described in subsection (25) are convictions for violations arising out of the same transaction, only 1 conviction shall be used to determine whether the person has a prior conviction.

8.14 Defining "Operating"

A key area in dispute in many cases is whether a person was “operating” a vehicle in violation of the statute. Michigan courts have addressed this issue many times in terms of offenses involving alcohol, and it is important to examine cases that discuss this issue. The following cases are just a small number of those cases that have addressed this topic.

The Michigan Supreme Court has held that the definition of “operating” in the operating while intoxicated (OWI) statute is defined as follows: “Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.” *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995).

The Court explained in *Wood* that the legality of the defendant’s arrest depended on whether the defendant was operating a vehicle when the police found him. *Id.* at 403. The Court concluded that the defendant was operating the vehicle because he was found in a drive-through restaurant lane with his vehicle running and his foot on the brake. *Id.* at 405. The defendant was using his vehicle as a vehicle, he had put his vehicle in motion, and the vehicle had not been returned to a position of safety. *Id.* His foot could have easily slipped off the brake while he was sleeping, and he could have caused a collision. *Id.*

Another twist on the operating issue is when the driver is asleep in the car. The Court of Appeals has held that a man who was discovered asleep in a truck with the engine running in a parking lot was not operating a vehicle under the OWI statute and, thus, his conviction was vacated. *People v Burton*, 252 Mich App 130, 132; 651 NW2d 143 (2002). When the police discovered him, he was asleep behind the wheel of the truck with his seatbelt fastened. *Id.* at 142. The truck was in a stationary position either in park or neutral. *Id.* When

the officers awakened the defendant and questioned him, he said he had been drinking alcohol that evening and the police found empty alcohol bottles in his truck. *Id.* at 132. He also told the police he had driven the truck from one side of the parking lot to the other. *Id.* at 133. The Court of Appeals explained that the risk that a defendant may inadvertently shift his vehicle into gear while sleeping is not a significant risk and, thus, the defendant's conduct cannot be classified as operating. *Id.* at 144.

The court said that there was insufficient evidence that the defendant was intending to use his truck as a motor vehicle as opposed to shelter. *Id.* at 142. "The mere fact that the engine was running does not sufficiently establish that defendant had or was intending to put the vehicle in motion. As one of the arresting officers conceded, it was possible that defendant was simply keeping the truck warm while he slept." *Id.*

The Court of Appeals has also held that a police officer did not have probable cause to arrest a defendant for OWI in *People v Spencley*, 197 Mich App 505, 507; 495 NW2d 824 (1992), because the defendant was not operating the vehicle in the officer's presence. In *Spencley*, the defendant's vehicle was found parked partially on the shoulder of a roadway and partially in the driveway of a motel with the lights on and the engine running. *Id.* at 506. There were tire tracks from the vehicle, but no footprints, and the defendant was found asleep behind the wheel. *Id.* The court held that the officer did not have probable cause to arrest the defendant for operating a motor vehicle because the officer did not observe the defendant actually operating the vehicle in his presence. *Id.* at 507.

8.15 Assessing Whether a Place is Open to the General Public or Generally Accessible to Motor Vehicles

The Court of Appeals recently held that, based on where the vehicle was located, a person's private driveway was not open to the public or generally accessible to motor vehicles. *People v Rea*, ___ Mich App ___; ___NW2d ___ (2016). The court said that it does not matter whether other vehicles had the ability to enter the defendant's driveway. *Id.* "Physical ability is not the touchstone of general accessibility." *Id.* The statute prohibits driving while intoxicated in places where vehicles are regularly, widely, and usually expected to travel. *Id.* The area of a private driveway between one's detached garage and the house is not such a place. *Id.*

8.16 Metabolites Are Not a Controlled Substance

A cannabis metabolite is not the same as THC when determining whether a person has violated the law for operating a motor vehicle with any amount of a controlled substance in his system. In *People v Feezel*, 486 Mich 184, 217; 783 NW2d 67 (2010), the Michigan Supreme Court reversed a prior ruling regarding the presence of a cannabis metabolite in a person's blood while driving a motor vehicle. The Court held that the presence of a *metabolite* of marijuana in a driver's blood is not evidence of being under the influence when driving. *Id.* at 205. The Court held that 11-carboxy-THC is not a schedule 1 controlled substance. *Id.* Thus, a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his system. *Id.* The holding in *Feezel* is a critical ruling for drivers who are not protected by the Michigan Medical Marihuana Act.

8.17 Driving and the Michigan Medical Marihuana Act

Qualifying patients and caregivers are protected when they engage in the medical use of marijuana. MCL 333.26424(a). Regarding qualifying patients, the MMA states the following:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or

occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient. [Id.]

The MMA defines “medical use” as “the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient’s debilitating medical condition or symptoms associated with the debilitating medical condition.” MCL 333.26423(f).

Accordingly, when registered qualifying patients acquire marijuana, they are engaging in the “medical use” of marijuana and receive the protections embodied in the MMA. This protection means that the qualifying patients cannot be arrested, prosecuted, or otherwise penalized. MCL 333.26424(a).

There are restrictions on the medical use of marijuana. MCL 333.26427 excludes protection of an individual who engages in any of the following five actions:

- (b) This act shall not permit any person to do any of the following:
 - (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
 - (2) Possess marihuana, or otherwise engage in the medical use of marihuana:
 - (A) in a school bus;
 - (B) on the grounds of any preschool or primary or secondary school; or
 - (C) in any correctional facility.
 - (3) Smoke marihuana:
 - (A) on any form of public transportation; or
 - (B) in any public place.
 - (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.
 - (5) Use marihuana if that person does not have a serious or debilitating medical condition.

There are numerous cases that deal with the Michigan Medical Marihuana Act. The case that deals with a patient driving with THC in his system is *People v Koon*, 494 Mich 1; 832 NW2d 724 (2013). In *Koon*, the

Michigan Supreme Court held that the Michigan Vehicle Code's provision against operating a motor vehicle with any amount of a controlled substance in a person's system does not apply to a qualifying registered patient under the MMA. *Id.* at 3. The standard in the MMA for a registered patient is "under the influence," which means a substantial and material effect on a person's driving. *Id.* at 6, n 14. Thus, it is not enough for a prosecutor to show that a patient has THC in his system to prove that he violated the law. The prosecutor must prove that the THC had a substantial and material effect on the patient's driving to obtain a conviction.

Finally, on August 29, 2013, the United States Department of Justice issued a memorandum to United States Attorneys to provide guidance on marijuana enforcement in light of the number of states that had enacted medical and recreational marijuana laws. This memorandum is frequently referred to as the "Cole memo" because it was authored by Deputy Attorney General James M. Cole. The memorandum lists the enforcement priorities of the Department. One of those priorities is to prevent drugged driving. This memorandum can be found at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

8.18. Testing Challenges

Laboratory testing should be closely examined, especially when the laboratory tests indicate a low level of THC. Counsel may choose to seek an independent laboratory test to determine if the results are similar or even result in no level of active THC. Counsel may first choose to ask the prosecutor to agree that the defense may conduct an independent test. If the prosecutor will not agree, then counsel may then choose to file a motion with the court asking for this independent test.

Note that if the case goes to trial, the only relevant level of THC is active THC. The Michigan Supreme Court in *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010), held that the presence of a *metabolite* of marijuana in a driver's blood is not evidence of being under the influence when driving because 11-carboxy-THC is not a schedule 1 controlled substance. *Id.* Thus, the metabolite level, which is often listed on the laboratory report, is not relevant, so attorneys should file a motion to preclude this level from being shared with the jury because it is irrelevant and may confuse the jury.

8.19 License Sanctions for Marijuana Offenses

Note that drug offenses in Michigan, including marijuana offenses that do not involve driving, come with license sanctions. MCL 333.7408a. A first offense suspends a person's license for 60 days, but a person can request a restricted license to begin after 30 days. MCL 333.7408a(1)(a). A second offense within 7 years suspends a person's license for one year, but a person can request a restricted license to begin after 60 days. MCL 333.7408a(1)(b). To request a restricted license, a person must meet the requirements in MCL 333.7408a(8). The license suspension is imposed and abstracted at the time of sentencing. MCL 333.7408a(2). Thus, a person must bring his license to sentencing, and the court must destroy the license at the time of sentencing. MCL 333.7408a(2). Note that licensing sanctions also apply to attempted offenses. MCL 333.7408a(1).

The Michigan Secretary of State provides an index of offenses and the licensing sanctions for these offenses. The guide lists the licensing sanctions for drug crimes found in MCL 333.7401 through MCL 333.7455. The index notes that there are no points on a person's license for these convictions, and there is no hardship appeal allowed.

This handy guide can be found at https://www.michigan.gov/documents/OffenseCode_73877_7.pdf.

8.20 The Drug Recognition Evaluation

Drug recognition evaluations (DRE) are becoming more common as law enforcement officers claim to be able to determine if a person is using drugs and is impaired based on observations and conversations with a

driver. Notably, many medical conditions present with the same symptoms as those associated with certain drugs. Notably, a law enforcement officer, including one who has taken a DRE course, is not a trained medical professional.

The protocol for the DRE may be found at www.theiacp.org. When faced with a DRE, attorneys must become familiar with the protocol and training that officers go through. The portion of the DRE related to cannabis is actually quite small, but there is much for attorneys to learn in this area.

The 12 steps of the Drug Evaluation Process include the following major components:

1. Breath Alcohol Test

The officer learns the result of the driver's breath alcohol test, if one was taken. This is important because the officer must determine whether alcohol accounts for the observed impairment. Often, when a driver's blood alcohol level is above the state's limit, a DRE drug evaluation is not conducted.

2. Interview of the Arresting Officer

The DRE begins the investigation by discussing the circumstances of the arrest with the arresting officer. The DRE asks about the driver's behavior, appearance, and driving. The DRE also asks if the subject made any statements regarding drug use and if the arresting officer found any other relevant evidence consistent with drug use.

3. Preliminary Examination and First Pulse

The DRE conducts a preliminary examination, in large part, to ascertain whether the subject may be suffering from an injury or other condition unrelated to drugs. Accordingly, the DRE asks the driver a structured series of questions and observes the driver's appearance and behavior. This is the first time that a driver's pulse is taken. The DRE also takes an initial estimate of pupil size and checks for the initial angle of onset of horizontal gaze nystagmus (HGN).

4. Eye Examination

The DRE examines the subject for HGN, vertical gaze Nystagmus (VGN), and for a lack of ocular convergence. Note that there are many causes of nystagmus that have nothing to do with the ingestion of drugs.

5. Divided Attention Psychophysical Tests

The DRE administers four psychophysical tests: the Romberg Balance, the Walk and Turn, the One Leg Stand, and the Finger to Nose tests.

6. Vital Signs and Second Pulse

The DRE takes the driver's blood pressure, temperature, and pulse. Some drug categories may elevate vital signs. Others may lower them. Vital signs provide evidence of the presence and influence of a variety of drugs. This is the second time that a pulse is taken.

7. Dark Room Examinations

The DRE estimates the driver's pupil sizes and the reaction of the pupils to light.

8. Examination for Muscle Tone

The DRE examines the driver's arm muscles looking for muscle tone. Some drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid. Muscle tone is checked by the officer by grasping the upper arm and slowly moving down

to determine the muscle tone.

9. *Check for Injection Sites and Third Pulse*

The DRE examines the driver for injection sites, which may indicate recent use of certain types of drugs. This is the third time that a pulse is taken.

10. *Subject's Statements and Other Observations*

The DRE typically reads *Miranda* warnings to the driver, if not done so previously, and asks the driver a series of questions regarding drug use.

11. *Analysis and Opinions of the Evaluator*

Based on the totality of the evaluation, the DRE may form an opinion as to whether the driver is impaired. If the DRE determines that the driver is impaired, the DRE will indicate what category or categories of drugs may have contributed to the impairment. The conclusions must be documented, along with a narrative summary of the observed facts that led to the conclusion.

12. *Toxicological Examination*

After completing the evaluation, the DRE normally requests a urine or blood specimen, which is then sent to the laboratory for chemical analysis.

8.21 Forensic Chemical Testing

Issues that relate to chemical testing are extensive, so be certain to consider all aspects of your client's case as you conduct your investigation. One item that you must be certain to obtain from the Michigan State Police laboratory is the uncertainty level for THC in a person's blood. The uncertainty levels can be quite high and may make a significant difference in litigating the case. Another area to consider is the laboratory's ability to actually detect THC at low levels. This is an area ripe to explore with a qualified and experienced expert witness.

Another emerging area relates to roadside testing for cannabis use. Michigan recently passed legislation that authorizes a pilot program that will allow officers in five counties to engage in roadside testing to determine if a driver has been using drugs, including marijuana. The science behind this testing is extremely dubious, so this is an area that will be ripe for challenges.

8.22 Other Resources

There are numerous studies that have examined the use of marijuana and driving. It is critical when defending a marijuana-related offense, especially when the client is a Michigan Medical Marijuana Act cardholder, to understand the science in this area.

- D. Mark Anderson & Daniel I. Rees, *Per Se Drugged Driving Laws and Traffic Fatalities*, *International Review of Law and Economics*, 42, 122-134 (2015) ("Our results provide no evidence that per se drugged driving laws reduce traffic fatalities.")
- D. Mark Anderson & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, *Journal of Law and Economics*, 56 (2), 333-369 (2013) ("Legalization of medical marijuana is associated with increased use of marijuana among adults, but not among minors. In addition, legalization is associated with a nearly 9 percent decrease in traffic fatalities, most likely due to its impact on alcohol consumption.")
- Amy Berning & Dereece D. Smither, *Understanding the Limitations of Drug Test Information*,

Reporting, and Testing Practices in Fatal Crashes, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS 812 072 (Nov. 2014) (“Every State has enacted a law defining drivers who are at or above .08 grams per deciliter BAC as ‘legally impaired,’ but there are no similar, commonly accepted impairment levels for other drugs. Some State laws have established levels for some drugs at which it is illegal to operate a motor vehicle. . . . The alcohol laws are based on evidence concerning the decreased ability of drivers across the population to function safely at these BACs. Such evidence is not currently available for concentrations of other drugs.”)

- F. Grotenhermen et al., *Developing Limits for Driving Under Cannabis*, *Addiction* (Dec. 2007) 102 (12): 1910-7 (“In analogy to alcohol, finite (non-zero) per se limits for delta-9-tetrahydrocannabinol (THC) in blood appear to be the most effective approach to separating drivers who are impaired by cannabis use from those who are no longer under the influence. Limited epidemiological studies indicate that serum concentrations of THC below 10 ng/ml are not associated with an elevated accident risk. A comparison of meta-analyses of experimental studies on the impairment of driving-relevant skills by alcohol or cannabis suggests that a THC concentration in the serum of 7-10 ng/ml is correlated with an impairment comparable to that caused by a blood alcohol concentration (BAC) of 0.05%. Thus, a suitable numerical limit for THC in serum may fall in that range.”)
- Rebecca L. Hartman et al., *Cannabis effects on driving lateral control with and without alcohol*, *Drug and Alcohol Dependence* 154, 25-27 (2015) (“Cannabis only affected SDLP [standard deviations of lateral position]; whereas alcohol affected SDLP, lane departures/min, and maximum acceleration. During-drive 8.2 u.g./L blood THC was associated with SDLP increases similar to 0.05 g/210 L BrAC (~0.05% BAC), and SDLP at 13.1 u.g./L THC approximated 0.08 g/210 L BrAC.”)
- R. Andrew Sewell, James Poling, & Mehmet Sofuoglu, *The Effect of Cannabis Compared With Alcohol on Driving*, *Am. J. Addict* 18 (3), 185-193 (2009) (“Detrimental effects of cannabis use vary in a dose-related fashion, and are more pronounced with highly automatic driving functions than with more complex tasks that require conscious control, whereas with alcohol produces an opposite pattern of impairment. Because of both this and an increased awareness that they are impaired, marijuana smokers tend to compensate effectively while driving by utilizing a variety of behavioral strategies. Combining marijuana with alcohol eliminates the ability to use such strategies effectively, however, and results in impairment even at doses which would be insignificant were they of either drug alone. Epidemiological studies have been inconclusive regarding whether cannabis use causes an increased risk of accidents; in contrast, unanimity exists that alcohol use increases crash risk. Furthermore, the risk from driving under the influence of both alcohol and cannabis is greater than the risk of driving under the influence of either alone.”)
- U.S. Department of Transportation, National Highway Traffic Safety Administration, *Marijuana and Actual Driving Performance: Effects of THC on Driving Performance*, DOT HS 808 078 (No. 1993) (Conclusions include the following: “A low THC dose (100 ug/kg) does not impair driving ability in urban traffic to the same extent as a blood alcohol concentration (BAC) of 0.04g%. . . . Drivers under the influence of marijuana tend to over-estimate the adverse effects of the drug on their driving quality and compensate when they can; e.g. by increasing effort to accomplish the task, increasing headway or slowing down, or a combination of these. . . . Drivers under the influence of alcohol tend to under-estimate the adverse effects of the drug on their driving quality and do not invest compensatory effort. . . . The maximum road tracking impairment after the highest THC dose (300 ug/kg) was within a range of effects produced by many commonly used medicinal drugs and

less than that associated with a blood alcohol concentration (BAC) of 0.08g% in previous studies employing the same test. . . . It is not possible to conclude anything about a driver's impairment on the basis of his/her plasma concentrations of THC and THC-COOH determined in a single sample.")

Michigan is at the forefront of defending cases involving allegations that a person is operating under the influence of a controlled substance. Michigan has a statewide organization - Michigan Association of OWI Attorneys - that is dedicated to mentoring attorneys and offering them support with all aspects of defending these challenging cases. Michigan is also fortunate to have an OWI Handbook written specifically for Michigan by Michael J. Nichols. On the national front, the National College of DUI Defense is an indispensable resource, and the National Association of Criminal Defense Lawyers provide high-quality training and materials in this area and many more.

8.23 Conclusion

Litigating an operating under the influence of a controlled substance offense that involves marijuana requires experience, skill, and training. Those accused of this crime need an attorney with a thorough understanding of this area of the law and a willingness to engage in additional research depending on the facts and circumstances of the case. This chapter was only intended to provide a brief overview of some of the issues that arise in these case. Attorneys are encouraged to use the many resources available to provide the advocacy needed in this ever-changing area of the law.