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 August 21, 2024, Charlotte, NC

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# HIGHly Effective Methods for Prosecuting the Cannabis-Impaired Driver

*Amy J. Tripp-Steiner, Senior Assistant Minneapolis City Attorney*

"But I *only* smoked weed!" screamed the driver as he was placed under arrest for driving while under the influence of cannabis. The trooper, as she walked the driver away from the crashed car, matter-of-factly replied, "driving high is illegal, sir."

The shock and surprise expressed by that driver when he learned it is, in fact, unlawful to operate a motor vehicle while under the influence of cannabis, is common. Ask any DWI prosecutor around the country, and they are sure to share a similar story, including creative arguments made by defense attorneys or alarming comments made by jurors during jury selection. Most comments boil down to a lack of understanding about how cannabis can, and does, impair the body such that it becomes dangerous to operate a motor vehicle.

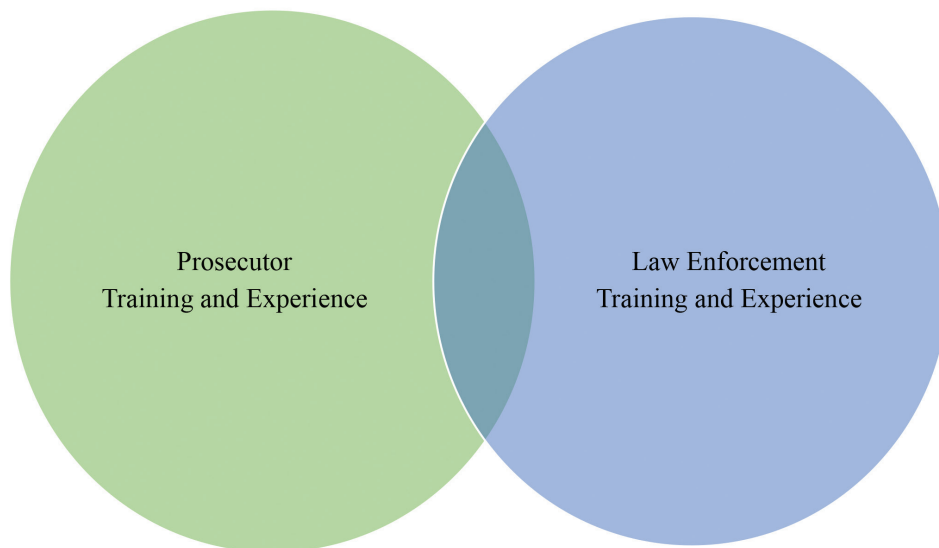
The National Highway Traffic Safety Administration's (NHTSA) August 2018 safety campaign, "If You Feel Different, You Drive Different. Drive High, Get a DUI," addresses these types of misconceptions regarding cannabis use and driving. The campaign message is simple yet brilliant and resonates with most people. Indeed, it certainly has helped this prosecutor in settlement discussions and during jury selection, and I am grateful to the NHTSA team who created the campaign.

Even so, DWI prosecutors agree, one of the most difficult types of DWI case to prosecute is the cannabis-impaired driving case. Many factors contribute to these concerns, including public perception issues, but there are ways to help improve how these cases are prosecuted, much of which is about bridging educational gaps amongst law enforcement and prosecutors.

### Educating Prosecutors

#### *Prosecutors Should Attend Law Enforcement Trainings*

Prosecutors are highly trained individuals who have sat through more hours of classroom courses than any would care to admit. Similarly, law enforcement are highly trained individuals who have endured many hours of classroom experiences. Interestingly, however, the two educational experiences have little overlap with regard to the content and materials. This is especially true in the area of DWI investigations and prosecution.



A widespread sentiment is that law enforcement officers must do their job, prosecutors must do their job, and each should stay in their own lane. That type of thinking misses a tremendous opportunity, however, for effectively investigating and prosecuting cases. If the prosecutor knows *what* was observed, but does not understand *why* the observation is relevant, how can that prosecutor effectively argue to a jury *how* that driver was impaired? The answer is simple: they cannot, and public safety is not advanced when impaired drivers are not held accountable.

The solution: send prosecutors to law enforcement trainings. Officers understand through training and experience the importance of correctly administering Standardized Field Sobriety Tests (SFSTs) and how to interpret the results. Prosecutors, therefore, should also learn how those tests are administered, why they are administered in a particular way, and how the clues correlate to impairment. The same can be said for Advanced Roadside Impaired Driving Enforcement (ARIDE) training and, especially so, Drug Recognition Expert (DRE) certification. These trainings are vitally important for any DWI prosecutor to attend. By doing so, prosecutors will be better prepared for the direct examination of an officer as well as closing arguments. Prosecutors will be able to effectively explain to judges and jurors why the clues observed by the officer are evidence of a driver's impairment.

<sup>1</sup> See [www.nhtsa.gov/press-releases/us-department-transportation-launches-new-ad-campaign-stop-impaired-driving](https://www.nhtsa.gov/press-releases/us-department-transportation-launches-new-ad-campaign-stop-impaired-driving), last accessed July 15, 2024.

I am incredibly fortunate to work at a prosecution office that decades ago, recognized the value in sending prosecutors to law enforcement trainings. For example, when Minnesota started its DRE program in 1991, we had a prosecutor there. Still today, we send prosecutors to DRE school, and those prosecutors exclusively handle all of our drug-impaired DWI cases.<sup>2</sup> The knowledge is what makes the difference. I still think back and cringe at a hearing I had when I was with a different office and prior to attending DRE school. I know I asked so many of the wrong questions and so very few of the right questions, despite having had years of experience with alcohol-impaired cases. The reality is that drug impairment often is vastly different from alcohol impairment in how the drug impairment presents in the body, what clues will and will not be present, and how the investigation will unfold. The phrase, “you don’t know what you don’t know” certainly is applicable for any prosecutor who has not received specific training on drug-impaired DWIs.

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Pop quiz time, prosecutors! Do you know the significance of the following?

- Vehicle stopped for weaving within and over the lane line and going below the speed limit.
- Field sobriety tests administered, and officer observed:
  - No clues observed on horizontal gaze nystagmus (HGN) test;
  - No clues observed on vertical gaze nystagmus (VGN) test;
  - During walk and turn test: officer had to repeat instructions twice, driver took an incorrect number of steps, made an improper turn, stopped walking during test, missed heel-to-toe, and had visible body tremors;
  - During one leg stand test: driver used arms for balance and had body tremors;
  - Preliminary breath test registered 0.000;
  - During Modified Romberg balance test: driver estimated the passage of 30 seconds in 40 actual seconds and had eyelid flutters; and
  - Officer administered the lack of convergence test and observed driver’s eyes could not converge.
- Driver denied alcohol consumption and said only took vitamins.

If you deduced that this driver was under the influence of cannabis, you are correct. While that is a good start, that is really the end conclusion. A prosecutor needs to explain *why* the presence or lack of a clue matters and *how* each clue links to impairment. To do this, we start with the DRE Matrix.<sup>3</sup>

<sup>2</sup> Special acknowledgment to Minnesota’s past and present DEC Coordinators for their extraordinary partnership and dedication to advancing educational opportunities.

<sup>3</sup> The Drug Symptomatology Matrix outlines the expected results to be observed during a drug influence evaluation regarding each drug category. *Drug Recognition Expert—7-Day School (DRE) Participant Manual*, 2023 edition, pg. 18, Session 24.

## Drug Influence Evaluation – Symptomology Matrix

	CNS Depressants	CNS Stimulants	Halluci- nogens	Dissociative Anesthetics	Narcotics Analgesic	Inhalants	Cannabis
<b>HGN</b>	Present	None	None	Present	None	Present	None
<b>VGN</b>	(High Dose) Present	None	None	Present	None	(High Dose) Present	None
<b>Lack of Convergence</b>	Present	None	None	Present	None	Present	Present
<b>Pupil Size</b>	(1) Normal	Dilated	Dilated	Normal	Constricted	(4) Normal	(6) Dilated
<b>Reaction to Light</b>	Slow	Slow	(3) Normal	Normal	Little or None Visible	Slow	Normal
<b>Pulse</b>	(2) Down	UP	UP	UP	Down	UP	UP
<b>Blood Pressure</b>	Down	UP	UP	UP	Down	(5) UP/Down	UP
<b>Body Temperature</b>	Normal	UP	UP	UP	Down	UP/Down/ Normal	Normal
<b>Muscle Tone</b>	Flaccid	Rigid	Rigid	Rigid	Flaccid	Flaccid	Normal

Looking at the above scenario, it is now clear why the officer did not see HGN or VGN. Cannabis is not a drug that causes HGN and VGN.<sup>4</sup> Thus, the lack of HGN and VGN should not induce panic for a prosecutor. While many prosecutors are comfortable with HGN because alcohol is a central nervous system depressant,<sup>5</sup> the prosecutor needs to know that not all impairing substances work the same way. This knowledge comes from attending trainings so the prosecutor knows what the officer knows. The prosecutor then will have more confidence in the investigation, more confidence in making a correct charging decision, and more confidence in being highly effective while presenting the case.

Next, let us review the significance of the driver’s eyes having an inability to converge. A lack of convergence means the inability to cross one’s eyes.<sup>6</sup> That is a symptom of being under the influence of cannabis.<sup>7</sup> The next step for the prosecutor is crucial: to link the clue (lack of convergence) to how it impairs the person’s ability to drive. DRE officers are trained that, “lack of convergence can cause double vision (diplopia) when looking at objects up close or when frequently or repeatedly changing viewing distances between far and near (such as when looking back and forth from the road to the car’s dashboard).”<sup>8</sup> When the clue is linked to the act of driving, it explains why the person was unsafe to operate a motor vehicle. If a prosecutor knows to ask about the significance of lack of convergence and elicits such testimony, it becomes easier to overcome public perceptions regarding cannabis during the closing argument. The average citizen can understand that having double vision while driving is not a good thing and makes a person unsafe to operate a motor vehicle.

The takeaway here is twofold: (1) drug-impaired drivers present clues of impairment in ways that can be different than alcohol but still, nevertheless, are unsafe to operate a motor vehicle; and (2) the prosecutor needs to know what the officer knows about drug impairment clues in order to effectively communicate this to a judge or jury. Prosecutors can reach out to their state Drug Evaluation and Classification (DEC) Coordinator to learn more about the educational opportunities in their area. The International Association of Chiefs of Police has a list of each state’s contact information.<sup>9</sup>

<sup>4</sup> *Id.* at pg. 18, Session 4.

<sup>5</sup> *Id.* at pg. 16, Session 1.

<sup>6</sup> *Id.* at pg. 19, Session 1.

<sup>7</sup> *Id.* at pg. 4, Session 5.

<sup>8</sup> *Id.* at pg. 3, Session 5. See also Leigh, R. and Zee, D. (2015) *The Neurology of Eye Movements*, Fifth Edition. Oxford University Press.

<sup>9</sup> See [www.theiacp.org/projects/the-international-drug-evaluation-classification-program](http://www.theiacp.org/projects/the-international-drug-evaluation-classification-program), last accessed July 15, 2024.

### *Law Enforcement Training Prosecutors*

Another way to build educational bridges is by including law enforcement in traditionally attorney-only trainings to present on various topics. Does that sound like an obvious suggestion? Maybe. Have I found that very few jurisdictions do this? Absolutely.

The phrase, “stay curious, my friends” may have been spoofed by a particular adult-beverage brand, but the message is applicable. Be curious about what your justice partners do. A desire to learn and understand each other only serves to improve the justice system. Being curious is also wanting input and suggestions from those partners. Some of the best lessons learned can be from people outside your lane to help you get a full picture of the highway.

Compare the following trainings:

Training #1: new prosecutor training on how to conduct direct examination regarding SFST put on by the available attorneys. Lecture only presentation.

Training #2: new prosecutor training on how to conduct direct examination regarding SFST put on by experienced trial attorneys and prolific DWI law enforcement officers. Mix of lecture and demonstrations.

The second is, obviously, the superior choice. The combination of the trial prosecutors and experienced officers training *together* on how to be highly effective during direct examination is a homerun. While we could spend extensive time discussing adult-learning styles,<sup>10</sup> for purposes of this article, suffice it to say that we humans like having a lesson taught to us in more than one format and by people who are highly familiar with the topic. Reflect on some of your favorite trainings you have attended in your career. Those that were educational and entertaining are the ones most likely to stick out and keep the lessons stuck in your brain.

How do you make this happen? Well, I am 99% confident if a prosecutor calls up one of the law enforcement officers they see regularly in court and asks them about their thoughts and suggestions on how to improve a part of the process, that officer is going to have something to say, most of which will be helpful! Throughout my career, I frequently ask after a hearing if the officer had any feedback for me. I learned right then and there how to ask better questions, especially regarding drug-impaired DWIs. The next logical step was to start asking those officers to come and help us train our fellow prosecutors. My office and I did that, and we were lucky enough to partner with fabulous officers around our state and create highly effective training sessions.

In acknowledgement that this article is entitled *HIGHly Effective Methods for Prosecuting the Cannabis-Impaired Driver*, prosecutors would be best served to seek out DRE officers who have demonstrated a proficiency in cannabis-impaired detection to help educate their offices on the intricacies of how they conduct their investigations and develop probable cause that a person is under the influence of cannabis and unsafe to operate a motor vehicle. Knowing more, understanding more, and comprehending more makes for a better prosecutor. Seeking knowledge is the goal. NBCUniversal’s 1990’s public service initiative is still relatable: “The More You Know.”

Be curious about what your justice partners do. A desire to learn and understand each other only serves to improve the justice system.

<sup>10</sup> There is a vast body of materials on adult-learning styles. The National Highway Institute published an Instructor Development Course that discusses one of the approaches to adult-learning styles. For additional information, visit the National Highway Institute website at [www.nhi.fhwa.dot.gov](http://www.nhi.fhwa.dot.gov); for additional information about the Instructor Development Course, click [here](#) or review the Principles of Adult Learning and ISD at [www.nhi.fhwa.dot.gov/downloads/freebies/172/pr%20pre-course%20reading%20assignment.pdf](http://www.nhi.fhwa.dot.gov/downloads/freebies/172/pr%20pre-course%20reading%20assignment.pdf), last accessed July 15, 2024.

## Educating Law Enforcement

Just as there is immense value in law enforcement providing education to prosecutors, so too can prosecutors educate law enforcement, including about what happens once a case goes to the prosecutor. This knowledge helps officers to improve their investigative procedures as well as to testify more effectively in court.

About a decade ago, my colleague, David Bernstein, now the Criminal Deputy of the Minneapolis City Attorney's Office, saw an educational opportunity to train law enforcement about how prosecutors must prove impairment in a jury trial, specifically on the language contained in the jury instructions. Law enforcement often is not aware of this language, which may contain language not included in a state's statute, code, or regulation. By training law enforcement about the jury instruction language, the officer can gain a better understanding of how to persuasively present their testimony to the jury in order to prove that the person was impaired.

For example, in 2023, Minnesota legalized the adult recreational use of cannabis. The DWI statute was amended and added a new provision specific to cannabis. The statute provides that "it is a crime for any person to drive, operate, or be in physical control of a motor vehicle within this state or on any boundary water of this state when . . . the person is under the influence of cannabis flower, a cannabis product, a lower-potency hemp edible, a hemp-derived consumer product, an artificially derived cannabinoid, or tetrahydrocannabinols."<sup>11</sup> For ease of reference, this will be called "under the influence of cannabis." No place in statute does it define what constitutes "under the influence." Of course, the charge of under the influence of cannabis requires proof beyond a reasonable doubt that the driver was impaired by cannabis. The jury instruction defines under the influence of cannabis as follows:

There is no set standard as to the quantity of a controlled substance a person must ingest before a person is regarded as being "under the influence." When a person is so affected by a controlled substance that the person does not possess that clearness of intellect and control of (himself) (herself) as (he) (she) otherwise would have, that person is under the influence.<sup>12</sup>

This language is derived from 1920's case law discussing various ways a person can be in an intoxicated condition.<sup>13</sup> What we prosecutors focus on is what clues were observed to demonstrate that the driver "lost control" or was "not normal." For example, the average sober driver maintains the clearness of intellect and control to be able to drive their vehicle within the marked lane lines. The impaired driver, however, loses that clearness of intellect and control when the impairing substance prohibits their brain from concentrating on the lane and starts to drift across the roadway. By simply explaining the jury instruction language to law enforcement, they were better able to see why, for example, it is relevant to include in their report details regarding how the rest of traffic was able to maintain their respective lanes and how the arrested driver had lost control of his vehicle and was driving abnormally. Further, it helped them better testify about known sober behaviors and compare that to the behaviors exhibited by the impaired driver to demonstrate to the jury how the person was under the influence.

To be clear, this training is not forcing or requiring officers to put specific language in police reports or to testify in only specific ways. Rather, the purpose of training officers on the jury instruction language is to bridge the gap between the statutory language and the jury instruction the prosecutor is required to prove beyond a reasonable doubt to a unanimous jury.

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<sup>11</sup> Minnesota Statute section 169A.20, subdivision 1(8).

<sup>12</sup> 10A Minn. Prac., Jury Instr. Guide—Criminal CRIMJIG 25.08 (7th ed).

<sup>13</sup> See, for example, *State v. Graham*, 176 Minn. 164, 168-9, 222 N.W. 909, 911 (1929).

Law enforcement across our state appreciated these trainings. They reported it helped them view their investigative techniques through the lens of a juror. These officers also spent more time in their reports to explain not just *what* they observed, but *why* it led them to the conclusion there was probable cause to believe the person was under the influence. As an aside, I have yet to meet a prosecutor who was upset by a well-written, detailed report. Finally, these officers reported their very least-favorite task—testifying in court—was less horrible because they understood why they were being asked particular questions and could better explain each clue of impairment. I would call that a success and a win for public safety.

This training has continued to develop over the last decade and morphed into an effective combination of what has been discussed in this article. I have been lucky to partner with our State DEC Coordinator and travel around Minnesota and across the country training prosecutors, law enforcement, toxicologists, and other public safety partners about how to improve cannabis-impaired driving investigations and prosecutions. If it has worked here, there, and a bit of everywhere, it can work for your jurisdiction too. Stay curious, my friends.

### Prosecutors: Slow and Steady Wins the Race

For my fellow prosecutors, I encourage you to channel your inner tortoise. As we learned in Aesop's Fable "The Tortoise and the Hare," there is value in taking the task slowly but steadily. When directing your investigating officer, break down each clue observed and ask questions such as:

- What did you observe?
- Was that of any significance to you? Why or why not?
- How does that observation/clue indicate impairment?
- How does that observation/clue relate to the act of driving?

THINK: WHAT? → WHY? → HOW?

While all states have varying language in its jury instructions, the basic principles of impairment are the same: when a person can no longer control themselves due to the substance ingested, they are under the influence and unsafe to operate a motor vehicle. When conducting your witness examinations, ask yourself after each clue or observation if you have elicited testimony that satisfies the jury instruction. If the answer is no, ask more questions.

Go slowly through these directs, even if it feels painfully slow. We only have one chance once jeopardy attaches. We must overcome public perceptions that are unique to cannabis. We need to make it clear the prosecution of that driver is not to punish the use of cannabis, but to show the person was under the influence at the time of driving and unable to operate a motor vehicle safely. The highly effective piece is then wrapping it all up in closing statement by taking the jury on a slow yet steady recap of each clue, each observation, and linking each one to the language of your jury instruction to all add up to proof beyond a reasonable doubt the person is guilty of driving under the influence of cannabis. The journey may not feel swift but is winnable when done with knowledge, persistence, and dedicated advocacy.

### Conclusion

The well-prepared prosecutor starts long before a case hits their desk. Dedication to being a lifelong learner is the path to success. I encourage each of you reading this to reach out to one or more of your justice partners to learn from them about their area of expertise. Be curious, ask questions, ask for feedback, or ask to collaborate. It just might be the key to being highly effective at proving when a person is under the influence of cannabis.

Regarding that driver who was so mystified by being arrested for "*only* smoking weed," he certainly seemed to understand NHTSA's message after his incident. During his plea hearing, he admitted that he traded "one type of high for another" and realized cannabis can be just as dangerous for him as alcohol. Here's hoping he has now joined members of the public safety community to spread the message it is not safe to drive high.

When a person can no longer control themselves due to the substance ingested, they are under the influence and unsafe to operate a motor vehicle.

### About the Author

Amy J. Tripp-Steiner is a senior prosecutor for the Minneapolis City Attorney's Office. Ms. Tripp-Steiner specializes in the prosecution of alcohol and drug-impaired driving cases, illegal street racing activities, and other complex matters. She attended the full two-week DRE School and has effectively applied that training in the courtroom as well as being a frequent presenter at educational seminars to attorneys and law enforcement around the State of Minnesota and across the country.

In August 2023, Ms. Tripp-Steiner, along with Minnesota's DEC Coordinator, Minnesota State Patrol Sgt. Tyler Milless, presented *HIGHly Effective: Removing Smoke Screens* at the IACP Impaired Driving & Traffic Safety Conference, and again gave their presentation in May 2024 at Missouri's DWI/Traffic Safety Conference.

Ms. Tripp-Steiner is a member of Minnesota's DRE Steering Committee, where she provides legal guidance to the committee members. Ms. Tripp-Steiner also specializes in criminal appellate matters including authoring briefs and arguing cases before Minnesota's appellate courts. Ms. Tripp-Steiner previously worked as an Assistant Attorney General for the State of Minnesota litigating implied consent cases.



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