

Montana State Legislature

2011 Session

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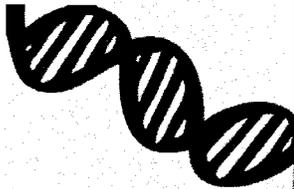
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Combating DUIs,



Preserving DNA, and



Examining Emerging Law & Justice Issues

A REPORT TO THE 62ND LEGISLATURE

**Activities of the
Law and Justice Interim Committee
2009-2010**

Published By
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January 2010

**LAW AND JUSTICE INTERIM COMMITTEE
2009-2010**

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Greg Hinkle (R - Thompson
Falls)

Larry Jent (D - Bozeman)

Carol Juneau (D - Browning)

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Part II: SJR 29 - Study Retention of DNA Evidence

Part III: Agency Oversight and Emerging Issues

Law and Justice Interim Committee

Overview: 2009-2010

Assigned studies

Two interim study resolutions passed by the 2009 Legislature were assigned to the Law and Justice Interim Committee (Committee) for the 2009-2010 interim:

- ▶ SJR 29 - study retention of DNA evidence; and
- ▶ SJR 39 - study Montana's DUI laws.

Agency oversight responsibilities

In addition to conducting studies as assigned, the Committee has the statutory duty to monitor, authorize bill drafting, and review rules for the following agencies:

- ▶ Department of Corrections;
- ▶ Department of Justice;
- ▶ Judicial Branch; and
- ▶ Office of State Public Defender.¹

Emerging issues

The Committee may also examine emerging issues of interest to Committee members that concern matters of law and justice within the Committee's purview.

Priorities

The Committee set the SJR 39 study of Montana's DUI laws as its top priority.

Meeting schedule

The Committee met eight times, most were 2-day meetings. The Committee also joined the Children, Families, Health, and Human Services Interim Committee

¹ The Office of State Public Defender is actually administratively attached to the Department of Administration, so is overseen by the State Administration and Veteran's Affairs Interim Committee. However, the Law and Justice Interim Committee has historically performed this function and therefore formally requested that the Legislative Council draft legislation to amend current statutes to formalize the Committee's oversight functions for the Office of State Public Defender. This request was approved.

(CFHHS) for a half-day meeting to examine medical marijuana laws.² Four Committee members (Sen. Esp, Sen. Moss, Rep. Augare, and Rep. Peterson) also participated in two subcommittee meetings of the Legislative Finance Committee to review options for budget cutting in agencies that the Committee monitors.

The Committee's meeting dates were as follows:

- ▶ August 3, 2009;
- ▶ September 28-29, 2009;
- ▶ December 17-18, 2010;
- ▶ February 8-9, 2010;
- ▶ April 5-6, 2010;
- ▶ June 29-30, 2010;
- ▶ August 3, 2010 (subcommittee on SJR 29 DNA study); and
- ▶ September 9-10, 2010.

Organization of this report

This report is segregated into the following three parts:

- PART I SJR 39 - Study Montana's DUI Laws;
- PART II SJR 29 - Study Retention of DNA Evidence; and
- PART III Agency Oversight and Emerging Issues.

A table of contents is provided at the beginning of each part.

More information

Meeting agendas, minutes, audio and video links, and all major reports presented to the Committee are available online from the Legislative Branch website at www.leg.mt.gov. Follow the links for Interim Committees, Law and Justice Interim Committee, 2009-2010. Hard copy files with minutes and all the exhibits from each meeting are available by contacting the Legislative Services Division.

² Children, Families, Health, and Human Services Interim Committee meeting of June 28, 2010.

PART I
SJR 39 - Study Montana's DUI
Laws

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Current Law and Research Findings

DUI versus a BAC offense

Current law

Under current law, there are two types of impaired driving offenses: driving under the influence (i.e., a DUI offense); and driving with excessive blood alcohol concentration (i.e., a BAC offense).

Under section 61-8-401, Montana Code Annotated (MCA), it is unlawful for a person to be in actual physical control of a vehicle while under the influence of alcohol or a drug. The statutory definition of "under the influence" is "that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a vehicle has been diminished".

Under section 61-8-406, MCA, it is unlawful for a person to drive a noncommercial vehicle if the person's BAC is 0.08 or more. For a commercial vehicle, the limit is a 0.04 BAC. A separate statute provides that the BAC limit for a person under 21 years of age is 0.02.³ Section 61-8-406, MCA, setting the 0.08 BAC limit is often called the *per se* statute because "under the influence" may be presumed.

Data

In 2008, Montana had the highest alcohol-impaired fatality rate in the nation at 0.84 fatalities per 100 million vehicle miles traveled.⁴ See APPENDIX A for a state-by-state comparison.

Nearly 40% of all traffic fatalities in Montana involve an alcohol-impaired driver, which is the third highest percentage in the country.

Nearly 40% of all traffic fatalities in Montana involve an alcohol-impaired driver, which is the third highest percentage in the country.⁵ Montana court and Motor

³ Section 61-8-410, MCA.

⁴ National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Facts Research Note: Fatalities and Fatality Rates in Alcohol-Impaired-Driving Crashes by State, 2007-2008*, Washington D.C.: U.S. Department of Transportation, December 2009. (DOT HS 811 250)

⁵ Mothers Against Drunk Driving (MADD), *State Progress Report*, Campaign to Eliminate Drunk Driving Report Card, November 15, 2007. Includes the District of Columbia.

Vehicle Division data on DUI and BAC offenses in Montana is provided at APPENDIX B.

Breath and blood testing

Current law

Montana's "implied consent" law states that a person driving in Montana is presumed to have given consent to breath or blood testing for alcohol or drugs. An officer who makes a traffic stop may request a preliminary alcohol screening test (a breath test for alcohol) if the officer has a "particularized suspicion" that the person is driving under the influence.⁶ An officer may request a more formal test (often called an evidentiary test) if the officer has "reasonable grounds" (such as a preliminary breath test or other field sobriety tests) to suspect the person is driving under the influence.⁷ However, even though consent is implied, a person may refuse to submit to a breath or blood test. The penalty for a first refusal is suspension of the person's driver's license for 6 months. For a second or subsequent refusal within 5 years, the person's driver's license may be suspended for 1 year.⁸ Refusal is not a criminal offense under current law, so a person convicted of a refusal is not subject to jail time.

Committee work

On February 8, 2010, the Committee participated in a sobriety lab and seminar conducted specifically for Committee members. Members learned how law enforcement officers conduct field sobriety

tests, including the horizontal gaze nystagmus, the walk and turn, the one-leg stand, and the preliminary breath test. The Committee also toured the Highway Patrol's Mobile Impaired Driver Assessment Center, learned about drug recognition training, and watched video demonstrating the effects of drugs and alcohol on drivers. To learn about how alcohol affects coordination, Committee members observed volunteers before and after drinking for 2 hours in a controlled situation. These volunteers demonstrated various field sobriety tests and breath tests.

Montana's "implied consent" law states that a person driving in Montana is presumed to have given consent to breath or blood testing for alcohol or drugs.

⁶ Section 61-8-409, MCA.

⁷ If a car crash is involved, the application of the implied consent law changes.

⁸ Section 61-8-402, MCA.

Two Committee bill recommendations deal with search warrants to obtain breath and blood tests. These recommendations (numbers 11 and 12) are summarized in the recommendations section.

Jail or prison sentences

Misdemeanor offenses

A first, second, or third DUI or BAC conviction within 5 years is a misdemeanor. The possible jail sentence is different depending on whether the conviction is for a DUI or BAC violation. If a passenger under 16 years old was in the vehicle, the possible jail sentences are longer.

Table 1: Possible Jail Sentences

	DUI violation section 61-8-714, MCA	BAC violation section 61-8-722, MCA
1st offense <i>(w/passenger under 16 yrs)</i>	24 hrs to 6 months <i>(48 hrs to 12 months)</i>	not more than 10 days <i>(not more than 20 days)</i>
2nd offense <i>(w/passenger under 16 yrs)</i>	7 days to 6 months <i>(14 days to 12 months)</i>	5 to 30 days <i>(10 to 60 days)</i>
3rd offense <i>(w/passenger under 16 yrs)</i>	30 days to 1 year <i>(60 days to 12 months)</i>	10 days to 6 months <i>(20 days to 12 months)</i>

The following table shows how many adult misdemeanor DUI and BAC convictions Montana had in 2009.

Table 2: Misdemeanor Convictions in 2009

	1st offense <i>(within 5 yrs)</i>	2nd or 3rd offense <i>(within 5 yrs)</i>	TOTAL
DUI offense	2,891	1,161	4,052
BAC offense	2,165	264	2,429
TOTAL	5,056	1,425	6,481

Source: Montana Motor Vehicle Division, Department of Justice

Felony offenses

Current law provides that a fourth DUI or BAC conviction within any amount of time is a felony. The incarceration penalty for a felony DUI or BAC violation is a minimum of 13 months in a state correctional facility. However, if the person completes a 6-month secure residential treatment program (i.e., WATCH),⁹ the remainder of the 13-month sentence is served on probation. A suspended sentence of up to 5 years may also be imposed, but must run consecutively with the 13 months.¹⁰ In 2009, there were 217 felony impaired driving convictions in Montana.¹¹

As used in this report, the term "impaired driving" is used to refer to both a DUI or a BAC offense.

Data on charges

A total of 18,553 impaired driving charges were filed from January 1, 2008, through December 31, 2009. This is about 8,500 charges each year.

Current law provides that a fourth DUI or BAC conviction within any amount of time is a felony.

About 92% of the charges are initially filed in courts of limited jurisdiction.

About 34% of the charges were amended after they were filed; 12% were amended to nonimpaired driving charges (6% were amended to nontraffic charges; and 6% were amended to a traffic charges, such as reckless driving).¹²

⁹ WATCH stands for Warm Springs Addictions Treatment and Change program. WATCH is operated by Community Counseling and Correctional Services, Inc., under contract with the Montana Department of Corrections. There are two campuses: Warm Springs (115 male-only beds) and Glendive (50 male or female beds). The program's recidivism rate (i.e., percentage of WATCH graduates who have committed another impaired driving offense since WATCH was established in 2002) is 10%. The average cost for 6 months at WATCH is about \$16,461. The average cost of 13 months in prison (if the person fails WATCH or elects not to participate) is \$34,729. More information on the WATCH program is provided at APPENDIX C.

¹⁰ Section 61-8-731, MCA.

¹¹ Montana Motor Vehicle Division, Department of Justice.

¹² APPENDIX B provides more data on DUI and BAC charges and convictions in Montana.

Committee work

In addition to panel discussions with judges, prosecutors, and public defenders, the Committee heard from offenders, including a recent graduate of the WATCH program. The Committee also toured the WATCH program in Warm Springs. A few members, on their own initiative, toured the Municipal DUI Court in Billings and the Rimrock Foundation's jail-based diversion program and outpatient treatment center.

The Committee received a special report from Dr. Timothy Conley, Ph.D., L.C.S.W., School of Social Work, University of Montana. The report involved surveys of felony DUI offenders in the WATCH program and, based on the survey results, provided an assessment of strategies to prevent multiple impaired driving offenses.¹³

The Committee considered making a third DUI or BAC offense a felony, but declined to pursue this option primarily because of the cost. Based on court data (available in Appendix B), if a third DUI or BAC offense was a felony and current sentencing laws remained the same, about 150 more offenders each year would have to be imprisoned or handled by the Department of Corrections' WATCH program.

Two Committee bill recommendations propose to revise possible jail time for a misdemeanor DUI or BAC violation. See recommendation numbers 6 and 8 in the recommendations section.

The Committee considered making a third DUI or BAC offense a felony, but declined to pursue this option primarily because of the cost.

One Committee recommendation would eliminate the 5-year lookback period for determining the number of prior misdemeanor offenses. See recommendation number 10 in the recommendations section.

Fines and collections

Possible fines are the same for either a DUI or a BAC misdemeanor conviction. These fines are as follows:¹⁴

¹³ Dr. Conley's report, presented on February 8, 2010, is available on the Committee website or in the Committee's hard-copy files maintained by the Legislative Services Division.

¹⁴ Sections 61-8-714 and 61-8-722, MCA.

Table 3: Fines and Collections

	Regular fine	With passenger under 16 yrs
1st offense w/in 5 yrs	\$300 - \$1,000	\$600 - \$2,000
2nd offense w/in 5 yrs	\$600 - \$1,000	\$1,200 - \$2,000
3rd offense w/in 5 yrs	\$1,000 - \$5,000	\$2,000 - \$10,000
4th or subsequent	\$1,000 - \$10,000	same as regular

Based on 2 years of data (January 1, 2008, through December 31, 2009) reported to the Committee by the Office of Court Administrator, judges are imposing the minimum fine for most second and subsequent DUI and BAC offenses. In that 2-year period, courts ordered offenders to pay \$9.7 million in surcharges, fees, fines, restitution, and other costs (this includes subtracting suspended and reduced amounts). Fines account for about 85% of the total amount.

Offenders typically pay court-ordered fines, fees, and other costs on an installment basis. In a 2-year period, courts had collected 55% of the total amounts charged. By law, restitution, surcharges, and court fees are collected first, while fines are collected last. Also by law, cities retain 100% of the fines collected by city courts, counties retain 50% of the fines collected by justice's courts, and the state retains the fines and surcharges for information technology and the Montana Law Enforcement Academy collected by district courts.¹⁵

Need for treatment and supervision

Reports and testimony presented to the Committee indicated that the DUI and BAC offenders of most concern to the public are the repeat and hardcore drunk drivers. The Century Council, a private nonprofit coalition of distillers who fight drunk driving and underage drinking, defines hardcore drunk drivers are those who drive with a BAC of 0.15 or higher.

Of those convicted of a DUI or BAC offense in Montana in 2009, about 32% were repeat offenders.¹⁶ According to available data, the average BAC of all drunk

¹⁵ Office of Court Administrator, *Summary of Statewide DUI Data*, January 21, 2010, prepared for the Law and Justice Interim Committee's February 9, 2010, meeting. See APPENDIX B.

¹⁶ This percentage is calculated using Motor Vehicle Division Data showing 1,642 second and subsequent offenders (including felony offenders) and 5,056 first offenders. See Motor Vehicle Division chart at APPENDIX B.

drivers in Montana, including first-time offenders, is above 0.15. However, the driver's BAC is recorded in Montana's court records for only 26% of the cases. The average BAC in these cases increases as the number of prior convictions increases.

Research indicates that incarceration (or the threat of incarceration) alone will not deter hard core drunk drivers.

<u>Offense</u>	<u>Avg BAC</u>
1st	0.159
2nd (w/in 5 yrs)	0.175
3rd (w/in 5 yrs)	0.182
4th and subsequent	0.197 ¹⁷

Research indicates that incarceration (or the threat of incarceration) alone will not deter hard core drunk drivers. Because of underlying substance abuse and addiction problems, treatment and intensive community supervision is necessary. The National Highway Traffic Safety Administration (NHTSA) publishes guidelines to assist sentencing judges imposing effective sanctions. According to these guidelines:

- ▶ A professional evaluation of an offender's drug or alcohol problem should be conducted prior to sentencing.
- ▶ Consistency in sentences should be balanced by sentencing tailored to individualized treatment needs.
- ▶ Intensive judicial supervision (i.e., frequent appearances and accountability before a judge, such as provided by a DUI court) reduces recidivism.
- ▶ Conditions of preconviction or postconviction release should combine intensive supervision (such as use of secure remote alcohol monitoring bracelets, ignition interlock devices, and drug and alcohol testing) with regular attendance at peer support groups, therapy sessions, and aftercare programs.¹⁸

¹⁷ Office of Court Administrator, *Summary of Statewide DUI Data*, January 21, 2010. See APPENDIX B.

¹⁸ National Highway Traffic Safety Administration, *A Guide to Sentencing DWI Offenders: 2nd Edition 2005*, February 2006. (DOH HS 810 555)

Driver's license sanctions and interlocks

In addition to possible incarceration and fines, impaired driving offenders face driver's license sanctions and may be required to install ignition interlock devices in their vehicles.¹⁹ These sanctions are the same for either a DUI or BAC conviction and are summarized below.

Table 4: Driving Restrictions

	Driver's License Suspension or Revocation	Interlock Device
1st offense (w/in 5 yrs)	6-month suspension, but the court may recommend a probationary license. ²⁰	The court <i>may</i> require an ignition interlock device. ²¹
2nd or 3rd offense (w/in 5 yrs)	1-year suspension, but the court may recommend a probationary license after 45 days. ²²	If a probationary license is granted, the persons <i>must</i> use an ignition interlock device. ²³
Felony offense	License is revoked. A probation officer may authorize a restricted license (e.g., for work or certain hours).	If a restricted license is authorized, the person <i>must</i> use an ignition interlock device. ²⁴

By law, all costs for installation, monitoring, and servicing of an ignition interlock must be paid by the offender. According to testimony presented to the Committee, the cost of an ignition interlock device is about \$120 for installation

¹⁹ An ignition interlock is a device installed in a motor vehicle's dashboard. To start the car, a person must blow into the device, which then measures the person's BAC. If the person's BAC is 0.02 or more, the vehicle will not start. An interlock device may also require a person to "blow clean" at regular intervals in order to continue driving the vehicle.

²⁰ Section 61-5-208, MCA.

²¹ Section 61-8-442, MCA.

²² Section 61-5-208, MCA.

²³ Section 61-8-442, MCA.

²⁴ *Ibid.*, and section 61-8-731(4)(e) and (4)(h).

and \$80 a month for monitoring services.²⁵ As an alternative to the interlock, the judge may order the person's vehicle or vehicles to be seized and forfeited.²⁶

Following New Mexico's example, several states have now mandated an interlock after the first offense, but most states do not. According to national research, ignition interlocks are effective while in use, but recidivism rates increase after they are removed. Thus, many interlock advocates also support treatment in conjunction with interlock use.²⁷

Committee work

The Committee considered testimony and public comment that interlock devices should be mandated for first offenses. The Committee also heard testimony indicating that interlock devices are not being court-ordered or installed as often as required by law. Some testimony indicated that a major reason interlocks are not being installed is the cost. The Committee did not seek to independently verify this perception and chose to not further pursue options to revise current law on Montana's ignition interlock devices.

The Committee also considered revising driver's license sanctions. One of the Committee's recommendations would revise probationary driver's license provisions to allow persons convicted of a second or subsequent impaired driving offense to receive a probationary driver's license prior to the 45-day hard suspension if the person is participating in a DUI court and the judge recommends that the probationary license be granted. See recommendation number 5 (LC0370) under the recommendation section of this report. A Committee recommendation to revise driver's license sanctions for persons under 21 years of age (recommendation number 1) is discussed later in this report.

Montana's Assessment, Course, and Treatment (A.C.T.) Program

Current law

Under current law, everyone who is convicted of a DUI or BAC offense must complete what is commonly referred to as the A.C.T. program: **A**ssessment of chemical dependency, an educational **C**ourse, and **T**reatment as indicated in the

²⁵ Law and Justice Interim Committee, testimony by Mr. Stan Morris, President of DMB Interlock and Safety Service, Inc., Billings, MT, April 5, 2010.

²⁶ Section 61-8-442, MCA.

²⁷ Melissa Savage and Anne Teigen, "Last Call: Lawmakers hope new technology could mean end to drunken driving", *State Legislatures*, National Conference for State Legislatures, December 2009, pp. 26-30.

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