Proposed amendments for DUI 1st through 3rd offense.

Enhanced penalties for Refusal / Look Back

Reinstatement Fees / Bail considerations

 BY ART LUSSE \*\*

Present law provides a maximum six months in jail, fines, ACT program and license suspension. In practice, it is “six months and done”. These proposals apply to both 61-8-401 and 406 (DUI and Per se). Deficiencies in the present law are reflected by the catastrophic impact DUI related offenses have had on our communities and our state. These proposals are not my “wish list”, a paradigm shift is necessary to effect our best efforts to attack this societal problem. However, as long as fiscal impacts thwart those efforts my proposed amendments provide a foundation to build on. My proposals do not require any fiscal expenditure.

PROPOSAL FOR AMENDMENTS

Court jurisdiction is increased to 3 years for a 1st offense. The term of jurisdiction is mandatory. The rationale for both a mandatory term and conditions is multifaceted; from consistency within the community and state to recognition that chemical dependency professionals and studies through the NHTSA and others are in the best position to set guidelines, provide assessments and make recommendations. The jurisdictional term is hereinafter referenced as “summary probation”. The conditions of the 3 year summary probation are:

1. The defendant not commit any criminal offenses while on probation. (traffic infractions are not criminal offenses) 60% of criminal offenses involve alcohol.
2. The defendant, if arrested on suspicion of drunk driving, must submit to a chemical test to determine blood alcohol concentration (BAC). These tests include a preliminary alcohol screening (PAS) test.
3. The defendant not drives unless properly licensed and insured. Defendant required to file with the court an SR22.
4. The defendant not drive with any measurable amount of alcohol (“zero tolerance") for a minimum period of one year. The court, in its discretion can increase the minimum 1 year for first offenders to 36 months.
5. Fine of $750 to $2,000. If passenger under 16 in vehicle those fines double.

Increase in reinstatement fee to $500.

1. Current law requires an ACT program of six to eight hours. (Set to increase to 12 to 20 hours) A part of ACT is an assessment for chemical dependency.
	1. I propose the defendant not be sentenced prior to the court, the prosecution, and the defendant indicating they have read and considered the assessment.
	2. I propose the defendant complete the ACT program within 4 months of sentencing. Current law also provides the court must order treatment at a level appropriate to a defendant’s alcohol or drug problem, if a finding of chemical dependency is found by a certified dependency counselor. This is in addition to ACT.
	3. I propose in any case where a chemical dependency finding is made the court order monthly reporting.

In addition to these mandatory conditions a sentencing court may impose any other conditions deemed appropriate and reasonable which are otherwise already provided under current law or available in particular counties such as:

* Monthly reporting to the court,
* Defendant submit to random or routine drug and alcohol testing; and
* If defendant is permitted to operate a motor vehicle, the vehicle is equipped with an ignition interlock system.
* I propose Victim Impact panels in every case. Victim Impact panels are composed of community volunteers and therefore, no fiscal impact.
* Community service.
* Any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of society. (current law)
* 24/7 Monitoring (AG Bullock South Dakota Program)

Summary Probation

Summary probation allows a defendant to avoid all incarceration except that currently mandated by the law so long as the conditions are honored, basically a contract with the court. At sentencing the defendant executes the “terms and conditions of probation” and acknowledges possible sanctions should a condition be violated. Violating any condition of probation can result in the imposition of the maximum six month jail term.

The defendant is not required to report to anyone, no probation officers are involved. Violations of probation will come to the courts attention when the city/county attorney, pursuant to MCA 46-18-203 (Appendix “A”), files a “Petition to Revoke” defendantsprobation in the court where the defendant was sentenced**.** Filing the petition is an administrative task. Based on the filing, the judge issues an order for a hearing requiring the defendant to appear. (A judge may also issue a warrant of arrest.)

The hearing to revoke probation is before the judge, no jury. The burden of proof is a “preponderance of the evidence”. A petition to revoke probation is separate from any new charge which the city/county attorney may file for the same incident.

 A petition for revocation is prosecution friendly. A defendant will want to minimize his/her exposure to both the probation violation and a new criminal filing. Both the prosecutor and court can leverage the petition to encourage a defendant to seek help through treatment vs. jail time. Therefore, I propose a pre-filing/post petition settlement conference which would need to occur only after a new referral for assessment. Summary probation is also defendant friendly, if a defendant is dedicated to not reoffending.

 PROPOSAL FOR AMENDMENTS FOR 2ND OFFENSE

Maximum punishment increased to 1 year. Court jurisdiction to a mandatory 5 years. Mandatory conditions for the 5 year period:

1. The defendant not commit any criminal offenses. (traffic infractions are not "criminal" offenses) Sixty percent of criminal offenses involve alcohol. Mandatory 15 days in jail for a violation of this condition.
2. The defendant, if arrested on suspicion of drunk driving, must submit to a chemical test to determine blood alcohol concentration (BAC). These tests include a preliminary alcohol screening (PAS) test. Mandatory 30 days in jail for a violation of this condition.
3. The defendant not drive unless properly licensed and insured. Defendant is required to file SR22 with court. When defendant properly licensed, Ignition Interlock Device and/or 24/7 program for period of probation. Mandatory 30\* days in jail for a violation of this condition.
4. The defendant not drive with any measurable amount of alcohol ("zero tolerance") for the five year term of probation. Mandatory 30 days in jail for a violation of this condition.
5. $2,400 to $4,000 if a passenger under 16 in vehicle fine doubles.

Increase in reinstatement fee to $750.

1. Minimum 15 days in jail; 7 days served consecutively.

Minimum 30 days in jail if a passenger under 16 in vehicle

1. Defendant referred for assessment**.** Current law provides the court must order treatment at a level appropriate to a defendant’s alcohol or drug problem, if a finding of chemical dependency is found by a certified dependency counselor.
2. I propose a second offense is a finding of “chemical dependency
3. Defendant must appear in court monthly, for a period of 24 months, longer if deemed appropriate by assessment professionals
4. I propose all recommendations of the assessment professional constitute “rebuttable presumptions” which must be followed unless a defendant overcomes said presumption.
* Defendant may receive day for day credit for time served in an inpatient court approved program or ½ day credit for intensive outpatient.
* Defendant pays all costs of incarceration and if unable to pay an amount of community service equal to said costs.
* Defendant pays all costs of treatment and if unable to pay an amount of community service equal to said costs.
* Defendant pays all costs of Ignition Interlock Device or 24/7 program.

In addition to these mandatory conditions a sentencing court may impose any other conditions deemed appropriate and reasonable which are otherwise already provided under current law or available in particular counties such as:

* Defendant submit to random or routine drug and alcohol testing; and
* I propose Victim Impact panels in every case. Victim Impact panels are composed of community volunteers and therefore, no fiscal impact.
* Community service.
* Any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of society. (current law)

PROPOSAL FOR AMENDMENTS FOR 3rd OFFENSE

 Court jurisdiction is increased to a mandatory 5 years for a second offense. Mandatory conditions for the 5 year period:

1. The defendant not commit any criminal offenses while on probation (traffic infractions are not "criminal" offenses) 60% of criminal offenses involve alcohol. Domestic violence, assault, child endangerment would all trigger a defendants DUI probation.
2. The defendant, if arrested on suspicion of drunk driving, must submit to a chemical test to determine blood alcohol concentration (BAC). These tests include a preliminary alcohol screening (PAS) test. 120 day minimum jail time which must be served consecutively.
3. A rebuttable presumption that defendants vehicle be subjected to the provisions of MCA 61-8-733 and 61-8-421 (forfeiture of vehicle). Should such presumption be overcome, a requirement the defendant not drive unless properly licensed and insured. When defendant properly licensed, Ignition Interlock Device or 24/7 program for period of probation. Mandatory 90 days in jail for a violation of this condition, time must be served consecutively.
4. A requirement that defendant not drive with any measurable amount of alcohol ("zero tolerance") for the five year term of probation. Mandatory 90 days in jail for a violation of this condition.
5. $2,400 to $4,000 if a passenger under 16 in vehicle fine doubles.

Increase in reinstatement fee to $1000.

1. Minimum 120 days in jail

Minimum 180 days in jail if a passenger under 16 in vehicle

Jail term: 30 days must be served consecutively.

(No judicial discretion—allow for detention official discretion)

1. Defendant referred for assessment. Current law provides the court must order treatment at a level appropriate to a defendant’s alcohol or drug problem, if a finding of chemical dependency is found by a certified dependency counselor. Defendant can receive day for day credit for time served in a court approved residential treatment program.
2. Defendant must appear in court monthly, for a period of 60 months.
* Defendant pays all costs of incarceration and if unable to pay an amount of community service equal to said costs.
* Defendant pays all costs of treatment and if unable to pay an amount of community service equal to said costs.
* Defendant pays all costs of Ignition Interlock Device or 24/7 program. (no exceptions)

In addition to these mandatory conditions a sentencing court may impose any other conditions deemed appropriate and reasonable which are otherwise already provided under current law or available in particular counties such as:

* Defendant submit to random or routine drug and alcohol testing; and
* I propose Victim Impact panels in every case Victim Impact panels are composed of community volunteers and therefore, no fiscal impact.
* Community service.
* Any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of society. (current law)

REINSTATEMENT FEES

I propose increases in reinstatement fees paid by all offenders convicted of DUI. For a 1st offense the amount increases to $500 and for a second offense to $750. The costs of DUI go well beyond the courthouse to auto insurance, attorneys etc. None of those costs return to the court for treatment purposes, the reinstatement fee does. Especially with the 65% of those who do not reoffend and want to be law abiding these fees will generate more funds for local prevention and treatment.

Per statute (61-2-107, MCA driver’s license reinstatement fees are allocated 50 percent to the general fund and 50 percent to a state special revenue account (in this the Highways State Special Revenue Account) to be used to fund county drinking and driving prevention programs.

Per statute (61-2-108, MCA) each county’s portion of the driver’s license reinstatement fee is to be transmitted to the county treasurer at the end of each quarter if the county has initiated and maintained a drinking and driving prevention program.

 REFUSALS AMENDMENT

Present law: An offender who refuses to submit to a chemical test loses his license for six months. For a second or subsequent offense the offender loses his license for 1 year. Many suspected offenders escape prosecution for a DUI by “refusing” at the time of the offense and later “plea bargaining” the loss of license in lieu of filing a DUI.

Nationally, NHTSA reports that 15% of individuals arrested for DUI refusal to submit to a chemical test. In Montana, at least in Yellowstone County, the County Attorney stated the refusal percentage was “50”.

My proposal is an “enhancement” for a defendant’s refusal to submit to a test at the time of arrest. The prosecutor files the DUI and adds, for the jury’s determination “whether at the time of the offense the defendant refused to take tests.” At the time of trial the “refusal” question is submitted to the jury or court if the defendant is found guilty of the underlying DUI offense. If there is a finding of “refusal” then a mandatory jail term would be imposed; a term of not less than 10 days. If an offender has a prior DUI conviction the minimum mandatory jail term is 30 days.

Note the term refusal addresses “tests”: In a case decided on May 11, 2010 DA 09-0467 our Supreme Court decided that failure to submit to field sobriety can also be considered consciousness of guilt or inference of guilt. I believe that this allows the enhancement to be charged beyond the chemical test requirement.

This change will aid law enforcement in gaining an offenders agreement to submit to a test. Currently an individual who refuses to submit to a chemical test is advised by the officer that his/her refusal can be seen by a judge or jury as “consciousness of guilt” or inference that the person was under the influence. The inference is rebuttable. With the enhancement the officer can also add the provisions of the proposed law.

Enhancement for Prior Offenses (Look back)

 Present law calls for five years, and needs to be increased to 10 years.

BAIL REQUIREMENTS

 Admission to bail for second and subsequent offenders including those charged with a felony is “routine” based on a pre-set bail schedule. I propose for repeat offenders the Court be required to separately set bail in all such cases.

MCA 46-9-109 states that among those considerations in determining whether the defendant should be released or detained take into account; physical and mental condition, past conduct, history relating to alcohol or drug abuse and criminal history.
Whether at the time of the current arrest or offense, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentencing for an offense. The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. The statute provides that any party or the court can request a hearing may be held to determine whether bail is established in the appropriate amount or whether any other condition or restriction upon the defendant's release will reasonably ensure the appearance of the defendant and the safety of any person or the community.

Proof of Financial Responsibility

Current requirements for minimum insurance for bodily injury or death have not been increased since 1975. In 1975, the minimum insurance requirement for bodily injury to or death of a person was increased to $25,000 and to $50,000 for two or more persons. These amounts have not been increased since then. I do not know the correct amount to adjust to 2010 minimums but it must be increased.

ADDITIONAL REPORTING RESPONSIBILITIES ON COURT AND PROSECUTION

 I suggest the additional reporting duties and court time required by my proposals will have a minimum impact. The investment in the beginning to accommodate monthly reporting, hearings for assessments of chemical dependency and Petitions to Revoke probation will be returned in the end through lives saved; both victims and offenders.

For example, for the monthly reporting obligations imposed on 2nd and 3rd offenders (in some cases 1st offenders) a summary sheet could be created outlining the requirements for the defendants report to the court. This summary could be reviewed by a city/county attorney with notes to the court. The court could set aside a time (I suggest at the end of the work day, say 5:30) for all defendants required to report to attend. Within an hour (I have seen it in Drug Courts) 30 cases can be handled. Might even consider the cost of an on-duty officer with a PAS be present.

Petitions to revoke probation where new charges are filed will become merged into one hearing. Given the additional leverage on a defendant facing both the petition and new charges the incentive for resolution, the incentive for treatment become a focus.

BACKGROUND INFORMATION ON ART LUSSE

\*\*To give some credibility to my proposal, a little biographical background: After graduation from law school I entered the Army Judge Advocate General Corps as a Captain for four years, including a year in Vietnam. I was assigned as trial counsel (prosecutor) and, in that one year alone I did twenty plus court martial’s involving alcohol including murder and vehicular manslaughter. I then served as a senior deputy district attorney in Marin County, California, prosecuting the most serious of felony offenses. During my time as deputy district attorney I also directed prosecution efforts in the county Youth Court. (60% of youth offenses involve alcohol /drugs) For ten years following, I did criminal defense work and civil litigation defense. Having eight years prosecuting I found it a distinct advantage on the defense side of criminal cases being able to evaluate cases from both perspectives.

 A unique perspective I bring to “crimes involving alcohol” is my own recovery; my last drink was November 14, 1984. I am not a book thumping crusader: in fact, my wife is something of a wine aficionado. From the inception of my own recovery I have been involved in intervention and rehabilitation efforts for attorneys, for clients, and others. I was recognized by the California State Bar for my work with chemically dependent lawyers in 1987. In 2003 the Montana State Bar awarded me the “Distinguished Service Award” for my work as Chair of the Lawyers Helping Lawyers assistance program.

 I have been involved with public service both publicly and privately, having served on boards and volunteered my entire adult life. In 1991 I began volunteering with Judy Wang, a legend in domestic violence service and ironically killed by a drunk driver just last September. In 1995, with my wife Kitty, we founded the Community Dispute Resolution Center of Missoula County. The Center continues today offering services through more than 40 volunteers to the Justice and District Courts of the Fourth Judicial District and City and County of Missoula. The CDRC mediates approximately 400 cases each year from small claims actions, where mediation is mandatory, to parenting plan mediations and a mandatory parenting orientation for divorcing parents with children. For 13 years I taught at the University of Montana School of Law and created the school’s Mediation Clinic. As a mediator, problem solving is my forte and I see DUI’s as a cultural and legal problem in great need of resolution.

 *The amendments which follow are not my “wish list” for dealing with the alcohol related crimes issue, specifically DUI. I view it as a pragmatic approach to the obstacles we face with a deficit budget, cultural, social and other issues which are problematic in the legislature. My wish list includes much tougher laws, making the third DUI a felony, more resources in better more sophisticated, and cross culturally appropriate treatment and rehabilitation efforts from the first MIP and first DUI. It also includes state wide efforts with the Attorney Generals 24/7 program. It would also include more law enforcement resources from “feet on the street” (nationwide there 3.00 officers for every thousand people, in Montana 1.27) to “perception” efforts to give law enforcement a level table dealing with offenders*

**Appendix “A”**

**MCA 46-18-203. Revocation of suspended or deferred sentence.** (excerpted and emphasized)(1) Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence…the judge may issue an order for a hearing on revocation. The order must require the offender to appear at a specified time.. The judge may also issue an arrest warrant …
     (2) The petition for a revocation must be filed with the sentencing court during the period of suspension. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.
     (3) The provisions pertaining to bail, as set forth in Title 46, chapter 9, are applicable to persons arrested pursuant to this section.
     (4) Without unnecessary delay, the offender must be brought before the judge, and the offender must be advised of:
     (a) the allegations of the petition;
     (b) the opportunity to appear and to present evidence in the offender's own behalf;
     (c) the opportunity to question adverse witnesses; and
     (d) the right to be represented by counsel at the revocation hearing pursuant to Title 46, chapter 8, part 1.
     (5) A hearing is required before a suspended sentence can be revoked or the terms or conditions of the sentence can be modified,…
     (6) (a) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of:
     (i) the terms and conditions of the suspended sentence; or
          (7) (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may:
     (i) continue the suspended or deferred sentence without a change in conditions;
     (ii) continue the suspended sentence with modified or additional terms and conditions;
     (iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence; or
     (iv) if the sentence was deferred, impose any sentence that might have been originally imposed....

**Appendix “B”**

**Sample Petition to Revoke Sentence**

**MONTANA \_\_\_\_\_\_JUDICIAL DISTRICT COURT, \_\_\_\_\_\_\_\_\_\_\_COUNTY**

 **State of Montana**

 **v. Case No:**

**John Doe**

PETITION TO REVOKE SUSPENDED SENTENCE

 COMES NOW, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, County Attorney in and for the County of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, State of Montana, and files this petition with the court to revoke the suspended sentence given to the above defendant upon the following grounds and for the following reasons:

1. That on May 1, 2009, the defendant received a six month suspended sentence and was placed on summary probation for a period of 3years for Driving Under the Influence of Alcohol, a misdemeanor. Defendant signed the rules and conditions of a 3 year summary probation on May 1, 2009 in \_\_\_\_\_\_\_\_Court, in \_\_\_\_\_\_\_\_\_\_\_\_\_Montana.

Since that time, the following violations are alleged to have occurred:

1. Defendant was stopped by the Montana Highway Patrol on April 3, 2010 on suspicion of driving under the influence of alcohol.
2. Defendant refused to submit to a preliminary test of his BAC, and subsequently refused to a test of his BAC by blood, breath, or urine.
3. Defendant was not properly licensed.
4. Defendant did not produce evidence of insurance.
5. WHEREFORE, petitioner prays as follows:
6. That a hearing be held by this court upon said violations of defendants summary probation / suspended sentence and that the court formally revoke the sentence and that he be sentenced to the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_county jail for a period of six months.
7. That a bench warrant be issued for the defendant’s appearance at the hearing.

DATED this\_\_\_\_\_\_\_\_day of April, 2010.

**JUDGES ORDER FIXING TIME AND**

**PLACE FOR INITIAL APPEARANCE**

 Upon reading and considering the Petition to Revoke Suspended / Deferred Sentence, filed by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_County Attorney, charging \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_with violating his three (3) Suspended / Defendant, and praying among other things, for the court to fix and determine a time and place for an initial hearing on the petition.

 WHEREFORE, it is further hereby ordered, and this does so order than an initial appearance on the petition is set for hearing on the \_\_\_\_\_\_\_\_\_ day of April, at \_\_\_\_\_

In the Courtroom of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, County, Montana, and that the defendant be served with a copy of the petition filed herein prior to said hearing.

 DATED this\_\_\_\_\_\_\_\_day of April, 2010

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge

 Or the court can issue a Bench Warrant