

6 July 2018

Dear Members of the Montana Legislature's Interim Law and Justice Committee,

I am enclosing for your review a summary of the analysis of a DUI Survey our DUI Law Committee, consisting of 7 members of the Cascade, Yellowstone, and Missoula County DUI Task Forces, conducted in January of this year. Our committee includes two citizens, a licensed addiction counselor, two law enforcement officers, a DUI task force coordinator, and a county prosecuting attorney. We work under the auspices of the Cascade County DUI Task Force.

Surveyed were 149 members of 15 county DUI Task Forces and 45 lower court judges. These individuals were asked a series of questions to obtain their professional opinions on how to reduce DUI's in Montana. Those task force members surveyed included prosecuting attorneys, probation officers, licensed addiction counselors, law enforcement officers, addiction prevention specialists, elected officials, and citizen members of the task forces. The judges surveyed handle DUI's at the misdemeanor level. The opinions of those surveyed reflect a wealth of knowledge and experience in dealing with the problem of impaired driving. Based upon these survey findings and research cited by the National Highway Traffic Safety Administration in its reference, *Countermeasures That Work, 2015*, our committee has developed five primary recommendations for your consideration, as well as a number of other recommendations that can reduce DUI's in Montana. The complete DUI survey analysis can be found on the website [zeroduideaths.org](http://zeroduideaths.org).

We will present these findings on 16 July at your committee meeting in Helena and look forward to answering your questions and obtaining your support in reducing DUI's in Montana.

Sincerely,

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Enclosure

# Montana DUI Task Forces and Judges DUI Survey Analysis and Recommendations July 2018

**DUI Law Committee  
Cascade County DUI Task Force  
Great Falls, Montana**

**Please note:** The following information contains highlights of a 150+ page report that can be found at [zeroduideaths.org](http://zeroduideaths.org). The complete report will be made public in August or September of this year, 2018.

## **Summary**

In January 2018 147 members of 15 Montana county DUI Task Forces and 46 lower court judges were surveyed to learn their concerns about the state's DUI problem, and what could be done about it. Findings of that survey were analyzed and recommendations developed based upon those findings and the recommendations of various federal agencies and national groups combating the DUI problem. A copy of this analysis can be found at [zeroduideaths.org](http://zeroduideaths.org)

Montana has an extremely serious DUI problem:

- Montana had the nation's highest percentage of fatal vehicle accidents caused by impaired drivers in three of the last five years (2012-2016).
- Fatalities involving legally drunk drivers increased from 38% in 2007 to 45% in 2016.
- Montana deaths caused by alcohol-impaired drivers average about twice the national average per 100 million miles driven over the last five years.
- In 2016 46% of drivers charged with a DUI refused to take the breathalyzer test, increasing the likelihood of more plea bargains to lesser charges and expanding the need for more trial time to try these offenders, significantly increasing costs to local governments to prosecute these cases
- Each year in the state there are approximately 2000 vehicle crashes involving an impaired driver, including about 1000 crashes that involve injuries.
- Chances of a Montanan being involved in their lifetime in an accident involving an impaired driver are about one in seven. Chances of being in an injury accident involving an impaired driver are about one in fourteen.
- Montana was rated last nationally by MADD (Mothers Against Drunk Driving) in the effectiveness of its DUI laws in its *2017 Drunk Driving Rating of States*.

Survey results showed that strong majorities of the prosecuting attorneys, judges, law enforcement, probation counselors, probation officers, elected officials, citizens, and prevention specialists felt, except where noted, that:

- Montana DUI laws are not adequate.
- A third DUI offense should be made a felony (currently a fourth offense is a felony).
- Ignition Interlock devices should be required for first time DUI offenders. Here only judges disagreed.
- Law enforcement should adopt the use of well-publicized sobriety checkpoints.
- 24/7 close monitoring of first time DUI offenders was strongly supported by law enforcement, citizens, probation officers, and prevention specialists but opposed by elected officials and judges. Prosecuting attorney were mixed in response, with 50% supporting the idea.
- More DUI Courts should be used where needed.
- The State should annually gather court statistics on DUI cases heard and their disposition. Only half of attorneys and 40% of judges thought this was a good idea.
- Of all the professionals dealing with DUIs, all but counselors strongly felt they had inadequate resources to deal with the problem.
- Attorneys and judges both strongly felt there were inadequate treatment facilities and treatment staff to handle DUI offenders with addiction problems.
- Prosecuting attorneys felt the need to create progressively stiffer penalties for repeat DUI offenders.
- Only 14% of prevention specialists felt that schools had adequate prevention programs.
- 65% of judges and 50% of attorneys felt that properly operated and calibrated breathalyzer tests were accurate in determining breath alcohol content. More would likely have agreed but recognized the frequent request by defense attorneys to have state experts vouch that the machines were properly calibrated and the training qualifications of the operator were up to date.

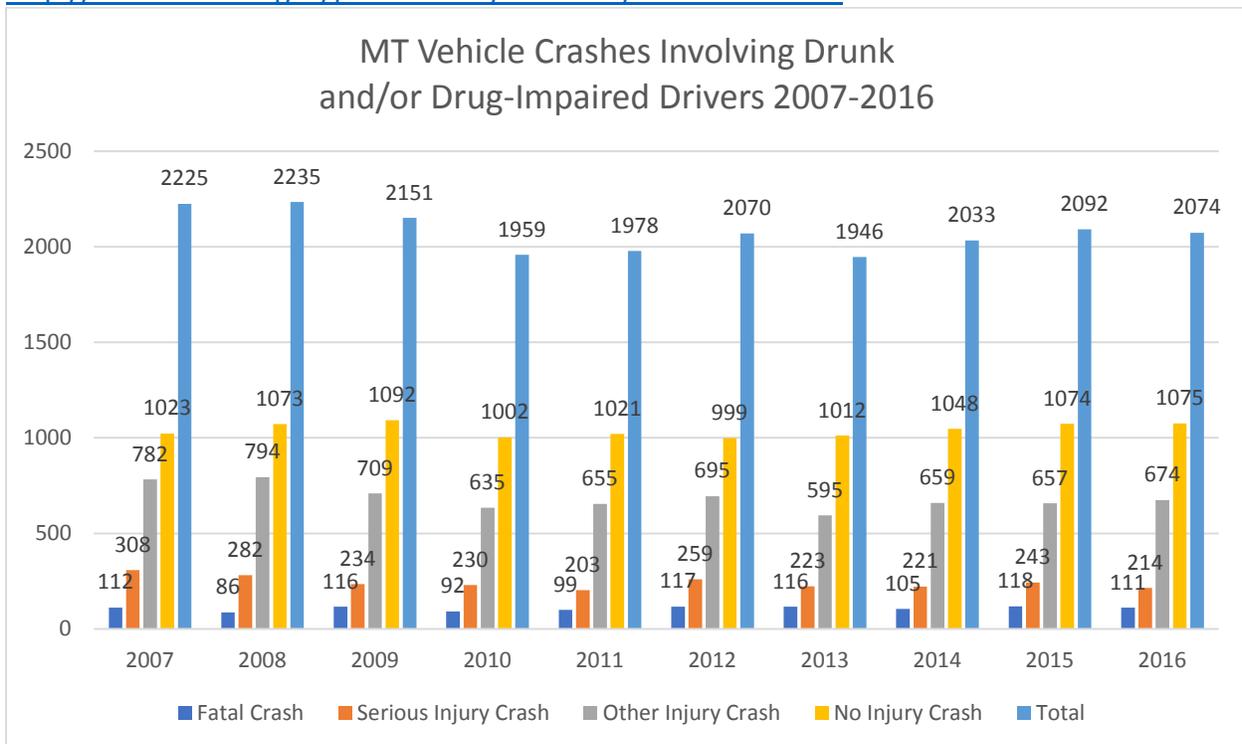
This analysis developed five primary recommendations from these survey findings, as well as 34 other recommendations. Many are also supported in *Countermeasures That Work, 2015*, National Highway Transportation Safety Administration.

- **Make a third DUI offense a felony.** This will result in both stiffer penalties and the opportunity for offenders to take earlier the highly effective residential addiction treatment WATCH program offered by Department of Corrections.
- **Require either close monitoring or ignition interlocks for first-time DUI offenders, giving judges the discretion of which to require based on availability, costs, and needs of the offender and society. Costs shall be paid for by the offender, except where the indigent may need local or state government assistance to accomplish the required monitoring or use of interlock devices.**
- **Require the use of well-publicized Sobriety Checkpoints by law enforcement and provide additional funding to encourage their regular use for maximum effectiveness.**
- **Require the state to electronically collect annual DUI case statistics by court and judge, including the number of DUI cases heard, the number of DUI cases dismissed,**

the number of DUI cases pled to lesser offenses, the number of DUI cases resulting in DUI convictions, and any other statistics that help the state assess the effectiveness of these courts in dealing with DUI cases.

- Allow law enforcement to request an electronic warrant to determine the breath alcohol content of a first-time DUI suspect refusing to take the breathalyzer test.

The following graph is from Montana Dept. of Transportation Crash Data at <http://www.mdt.mt.gov/publications/datastats/crashdata.shtml>

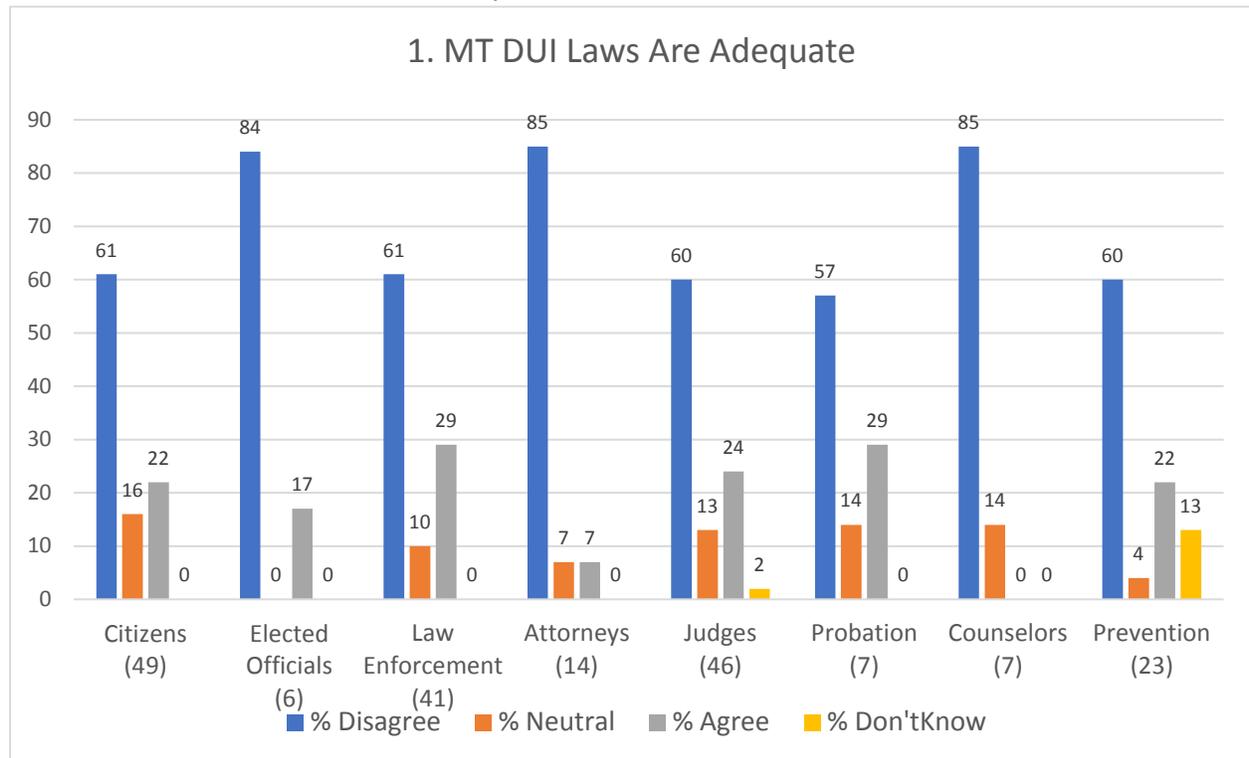


Note in the above graph that the total number of fatalities annually are consistently around 100 and the number of serious injuries vary between 200 to 300 annually, while less severe injuries average around 600 to 700 annually. An average of over 1000 Montanans are killed or injured each year in accidents involving impaired drivers. This data has not significantly changed in the last 10 years.

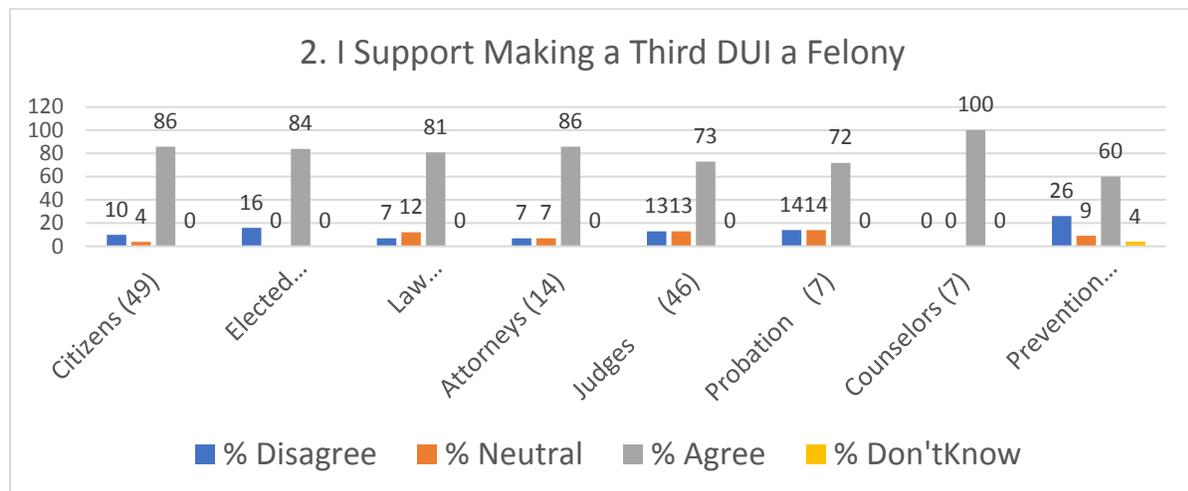
**Please Note: The following questions generated the most important information in this analysis.**

**Question 1. “Current Montana DUI laws are adequate.”** Strong majorities in all survey groups felt that current DUI laws are not adequate. Eighty-five percent of prosecuting attorneys and 85% of addiction counselors had a consensus (67% or higher) that these laws were not adequate. A strong majority of citizens (61%), law enforcement (61%), judges (60%), prevention specialists (60%), and 57% of probation officers felt that current laws are inadequate. This is despite the many efforts of the state legislature to improve these laws. The

concern about the inadequacy of Montana DUI laws is ripe for action, and specific recommendations are made in later questions.



**Question 2. "I support a law making a third DUI a felony."** Currently in Montana the first three DUI convictions are misdemeanors, and the fourth conviction a felony. Making a third DUI a felony generated more strong support than any other issue. There was consensus of all professions, except for prevention specialists (60% of them agreed) that this was a good idea. This idea is ripe for action.



Recommendation: **“Make a third DUI offense a felony.”** Third-time DUI offenders are a serious danger to Montana drivers. They have typically driven hundreds of times before getting their third DUI, and need both incarceration to protect society, and effective treatment to help solve their addiction problems. Felony DUI cases are handled in District Court and provide both increased treatment opportunities and more severe financial and incarceration penalties.

The highly effective 180 day long WATCH (Warm Springs Addictions Treatment & Change) addiction recovery program run by Department of Corrections is only available to incarcerated felony offenders. Since 2002 it has provided residential treatment for over 4000 individuals guilty of felony drunk driving. Of the more than 500 WATCH graduates still on probation, 87% have been probation and parole and aftercare compliant, meaning they did not commit a crime, including driving impaired, since graduation from the WATCH program. That is a phenomenal success rate compared with other less intensive forms of treatment. WATCH provides a therapeutic community where participants are responsible to not only themselves, but to their peer community. Treatment closely follows evidence-based practices. The results are life-changing and provide graduates with tools to solve their addiction problems. Very important to their success is follow up monitoring and support by the WATCH staff. This monitoring and support lasts only for the duration of their probation and parole. The program received very favorable reviews in 2013 when the Warm Springs program was reviewed. (*EFFECT OF PRISON-BASED ALCOHOL TREATMENT: A MULTI-SITE PROCESS AND OUTCOME EVALUATION FINAL REPORT, 2013*, Miller, Miller and Tillyer for National Institute of Justice). It closely follows evidence-based treatment recommended by the National Institute on Drug Abuse for prison populations. Cost of incarcerating and treatment for the offender is half that of sending them to the State Prison (*WATCH Program Primer, 2009*, MT. Dept. of Corrections). Costs of the WATCH program in 2018 are just \$62 per inmate per day, roughly half the cost of incarcerating other prisoners in the state prison.

Though the WATCH program has demonstrated its effectiveness, the average age of its participants is 45, and the average offender has already had an average of 5.75 DUI's, 21 misdemeanors, and over 3 felonies, including DUI charges. (WATCH Program Statistics, 2017-2018, MT. Dept. of Corrections). Fourth time DUI offenders are typically criminals with lengthy criminal records. They need to have WATCH's intensive addiction treatment much earlier in their lives to treat their addictions, create life changes, and prevent some of the misdemeanors and felonies associated with repeat DUI offenders. Younger participants have had less time in incarceration and are more amenable to earlier treatment. WATCH program after treatment monitoring of graduates can be strengthened by increasing a DUI offender's length of parole from an average of two or three years to five years. Currently, WATCH program can not monitor and provide moral support for individuals beyond the time of their probation. WATCH program participants are down significantly since HB 133, which allowed felony DUI offenders, as an alternative, to be treated in DUI/Drug Courts. There is no longer a waiting list to get into the program. It remains to be seen if DUI courts can deal with repeat DUI offenders as

effectively as WATCH. The WATCH program can be taken more than once, with a modified curriculum, by felons who graduate but have another DUI. Addiction to alcohol and/or drugs is a disease that, like cancer or other diseases, may need followup treatment to help the offender. WATCH graduates who get additional DUI's need both additional treatment and significantly more time in prison to protect society.

Most third time offenders have already driven impaired hundreds of times before being caught a third time. The FBI reported that every day 2,800 people are arrested for DUI in the United States while 300,000 reported driving while drunk (Arrest Data: Federal Bureau of Investigation, "Crime in the United States: 2015"). That indicates that drunk drivers nationally drive drunk more than 100 times before being picked up for a first DUI; 200 or more times before getting a second DUI, and 300 or more times before getting a third DUI! In a report by Dr. Timothy B. Conley of the University of Montana Department of Social work titled *ASSESSING MONTANA'S MULTIPLE OFFENDER DRUNK DRIVERS FOR PREVENTION STRATEGY IDEAS Preliminary Report for the Law and Justice Interim Committee January 29<sup>th</sup>, 2010*, his research with repeat offenders indicated felony DUI offenders conservatively estimate that they have driven 369 times per conviction. Other studies suggest it may take anywhere from 200-2000 incidents of driving under the influence before being arrested. (Borkenstein, 1975; Jones & Joscelyn, 1978; Voas & Hause, 1987; Beitel Sharp, & Glauz, 2000 as referenced in *Law Enforcement Guide* produced by the Foundation for Advancing Alcohol Responsibility.org.

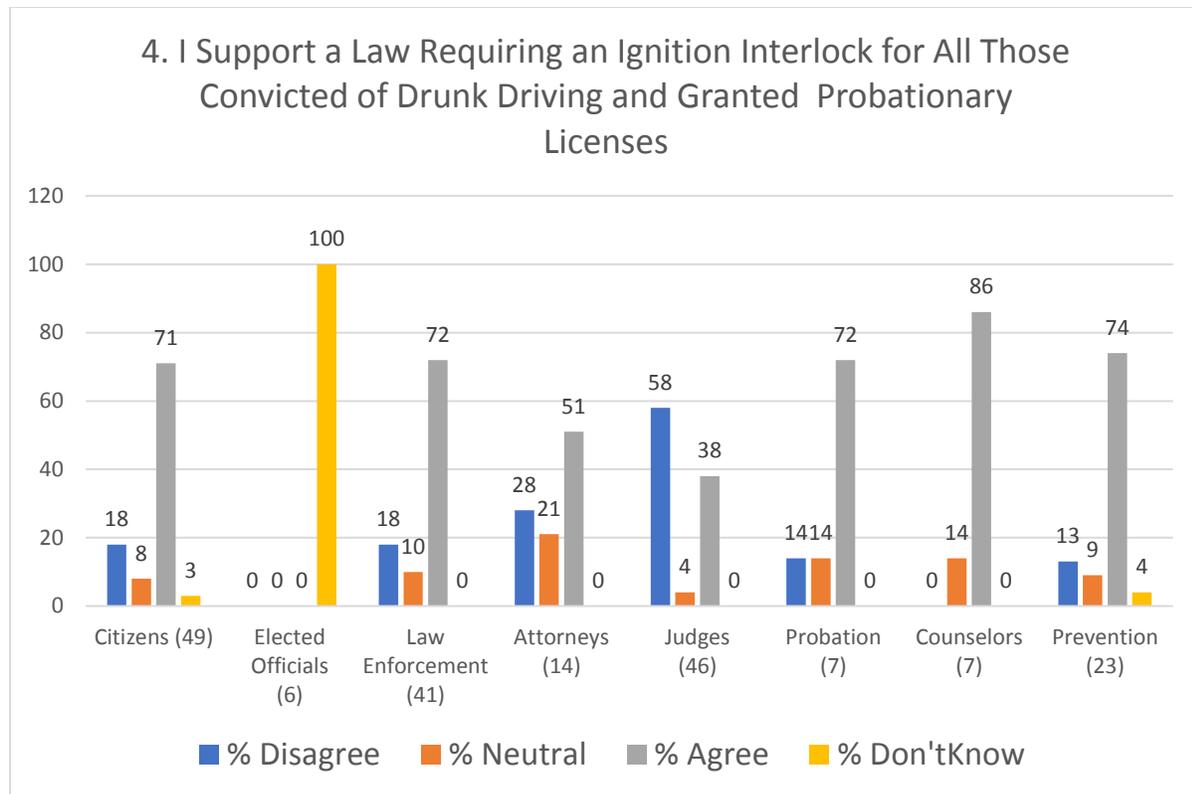
Repeat DUI offenders need effective addiction treatment that works. In addition to the WATCH program offered to inmates by the Department of Corrections, DUI Courts are also very effective with repeat DUI offenders and utilize a carrot and stick approach to encourage offenders to change.

Longer prison terms can protect the public from repeat DUI offenders, especially those who do not respond to treatment and continue to drive, but long term prison sentences don't appear to reduce DUI recidivism. Research has shown that jail is the most severe and most contentious of the DWI sanctions. Jail is expensive. Judges and prosecutors may be reluctant to use limited jail space for DWI offenders rather than "real" criminals. Offenses with mandatory jail terms may be pled down, or judges simply may ignore the mandatory jail requirement (Robertson & Simpson, 2002b). Research on the effectiveness of jail is equivocal at best (Voas & Lacey, 2011, pp. 215-216; NTSB, 2000). Very short (48-hour) jail sentences for first offenders may be effective (NTSB, 2000) and the threat of jail may be effective as a deterrent (as is done in DWI and Drug Courts), but other jail policies appear to have little effect. Wagenaar et al. (2000) reviewed 18 studies and concluded: "The balance of the evidence clearly suggests the ineffectiveness of mandatory jail sentence policies. (all contained in *Countermeasures That Work, 2015*).

Making a third DUI a felony will cost money because of increased incarceration time and intensive treatment, but such upfront costs can save costs to the government in the long run by reducing later incarcerations, and injury and death to the public from repeat DUI offenders not

getting earlier treatment. Funding can be made available using suggestions of the NHTSA in its 2016 Impaired Driving Assessment for Montana. These recommendations include 1) a 10 cent per drink tax to go to prevention programs and the treatment of alcohol abuse and impaired driving; 2) increasing the percentage of DUI fines going to these program; and 3) relooking at alcohol taxes to increase prevention funding. Another option is to increase the beer tax rate, which is already one of the lowest rates in the nation. Historically, the state legislature has been reluctant to increase taxes, including those on liquor, beer, and wine. The result has been a serious underfunding of law enforcement DUI efforts; treatment programs, jail and prison facilities, offender monitoring, and alcohol and drug addiction prevention programs across the state. This funding shortage was amply documented in responses to this DUI survey. Question 13 has further discussion on potential sources of funding to reduce DUI's.

**Question 4. "I support a law requiring an ignition interlock for all those convicted of drunk driving who are granted probationary licenses."** Requiring ignition interlocks for all those convicted of drunk driving is a well-evaluated countermeasure that works, and 25 states now make them mandatory for everyone convicted of a DUI (*Countermeasures That Work*, NHTSA, 2015). Currently, Montana law requires an ignition interlock only for a second or subsequent DUI conviction when the defendant is granted a probationary license. There was a strong consensus supporting this idea by all groups except attorneys and judges. They wanted discretion and not mandatory requirements. Some favored close monitoring, instead, since it motivates the offender not to drink, while ignition interlocks only keep them off the highways. Cost of ignition interlocks to the offender was another factor. Likelihood of reoffending while serving a DUI sentence was also thought to be rare.



**Recommendation: Require either close monitoring or ignition interlocks for first-time DUI offenders, giving judges the discretion of which to require based on availability, costs, and needs of the offender and society. Costs shall be paid for by the offender, except where the indigent may need local or state government assistance to accomplish the required monitoring or use of interlock devices.** This is a key countermeasure advocated by NHTSA. It is essential that first-time DUI offenders get the message that impaired driving is not acceptable.

Proven for reducing recidivism, an alcohol ignition interlock prevents a vehicle from starting unless the driver provides a breath sample with a BAC lower than a pre-set level, usually .02. Interlocks typically are used as a condition of probation for DWI offenders to prevent them from driving while impaired by alcohol after their driver’s licenses have been reinstated. Ignition interlocks can also serve as a form of monitoring that may be less available in rural areas. A review of 15 studies of interlock effectiveness found that offenders who had interlocks installed in their vehicles had recidivism rates that were 75% lower than drivers who did not have interlocks installed. Findings were similar for first offenders and repeat offenders. After interlocks were removed, however, the effects largely disappeared, with interlock and comparison drivers having similar recidivism rates. Interlocks help keep drunk drivers off the road but are not a replacement for effective addiction treatment when needed. (Countermeasures That Work, 2015)

Judges have an understandable desire for discretion in sentencing, and that is addressed by giving them the flexibility to require either ignition interlocks or close monitoring when

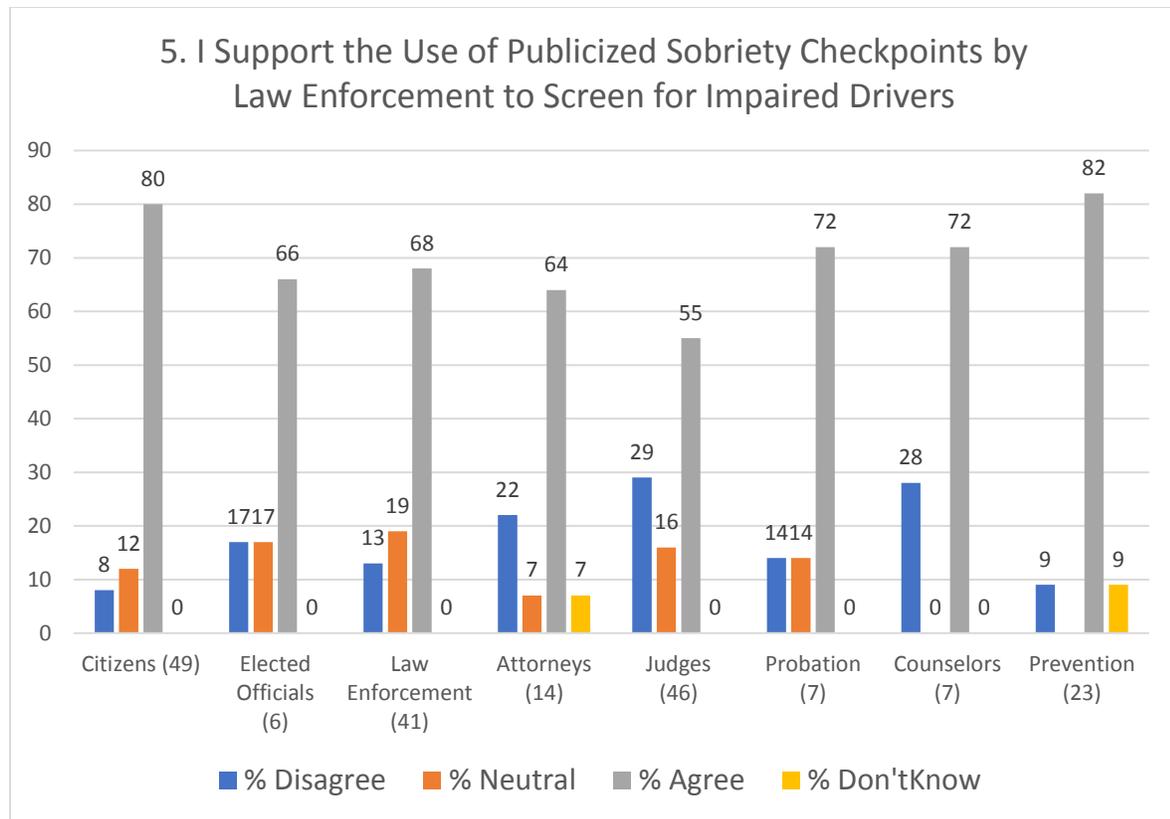
sentencing first time offenders. Close monitoring is discussed in the recommendations for Issue #6. Requiring either close monitoring or ignition interlocks for first time offenders was not asked in the survey, but would likely garner more support from judges and attorneys because it gives them more discretion.

Stiffer requirements are important. Close monitoring greatly reduces drinking while on probation, and ignition interlocks help keep impaired drivers off the road. 80% of repeat DUI offenders in a study indicated that more severe sanctions at their first DUI conviction would have prevented subsequent drunk driving arrests and convictions (*Stopping hard core drunk driving: Offenders' perspective on deterrence*. The Foundation for Advancing Alcohol Responsibility, Washington, DC. 2007).

Additional research on first time offenders is revealing. "Seen as a whole, most DWI offenders have, are developing, or will go on to develop, a serious substance-related problem" (White & Gasparin 2007). Some additional statistics show that:

1. "40-70% of so-called first time DWI offenders have a prior history of alcohol or drug related criminal offenses. (Taxman & Piquero, 1998; Chang and Lapham, 1996; Kochis, 1997)
2. An "average" DWI offender has driven impaired many times before their first arrest. Some studies suggest it may take anywhere from 200-2000 incidents of DWI to statistically generate one arrest. (Borkenstein, 1975; Jones & Joscelyn, 1978; Voas & Hause, 1987; Beitel Sharp, & Glauz, 2000).
3. The vast majority of DWI offenders are found to have a significant problem in their relationship with alcohol and/or drugs." (Lapham et al, 20 The Refusal Problem (all research cited in this paragraph is contained in *Law Enforcement Guide*, Foundation for Advancing Alcohol Responsibility.org).

**Question 5. "I support the use of publicized sobriety checkpoints by law enforcement to screen for impaired drivers."** Publicized sobriety checkpoints are a well evaluated countermeasure that deters DUIs and are authorized in 38 states (*Countermeasures That Work*, NHTSA, 2015). Vehicles are stopped at a predetermined location and at some regular interval to check drivers for impairment. There was strong consensus in support of these sobriety checkpoints from all groups except attorneys and judges. Attorneys were strongly in favor (64%), and the majority of judges (55% were in favor). This idea is ripe for action.



**Recommendation: Require the use of well-publicized Sobriety Checkpoints by law enforcement in Montana Annotated Code and provide additional funding to encourage their regular use for maximum effectiveness.** This is a key countermeasure advocated by NHTSA. The Center for Disease Control’s systematic review of 15 studies found that sobriety checkpoints reduce alcohol-related fatal crashes by 9% (*Guide to Community Preventive Services*, 2012). Similarly, a meta-analysis found that checkpoints reduce alcohol-related crashes by 16% (*Countermeasures That Work*, 2015, NHTSA). Sobriety checkpoints are effective not because they catch a lot of impaired drivers, but because of the perception they generate that the risk of being caught drinking and driving is higher. That perception is greatly needed in Montana.

Sobriety checkpoints have been used in the past in Montana, but were discontinued a number of years ago for various reasons, including perceptions by some that they may be in conflict with the state’s constitution.

The use of temporary roadblocks was debated in the 2017 legislative session, and it was argued and accepted that law enforcement could not issue tickets at such roadblocks to anyone stopped for secondary offenses, including driving drunk or otherwise impaired. Concerns were likely expressed about the importance of privacy and freedom from unreasonable searches as described in the Montana constitution. That same document, however, in Section 3 states the inalienable right of its citizens to safety, health, and happiness. Is that right not being taken

away when one in every 7 Montanan's can expect to be in a vehicle crash involving an impaired driver in their lifetime? (Based upon a state population of 1.05 million in 2017, with 2000 impaired driving crashes reported annually for the state and a life expectancy of 78.5 years in 2017).

There are non-invasive means at temporary roadblocks to check for the presence of alcohol, including instruments that detect alcohol in the air of a passenger compartment. There are also trained law enforcement officers adept at spotting impaired drivers. Sobriety checkpoints would typically be used when the danger of impaired drivers is greatest, typically on Friday nights and weekends. Their frequency and duration of use would necessarily be limited in scope by the resources needed to conduct them. As a result, their use would directly impact few Montanan's. Their use would likely decrease drunk driving by 10 to 16% or more as evidenced in many research studies.

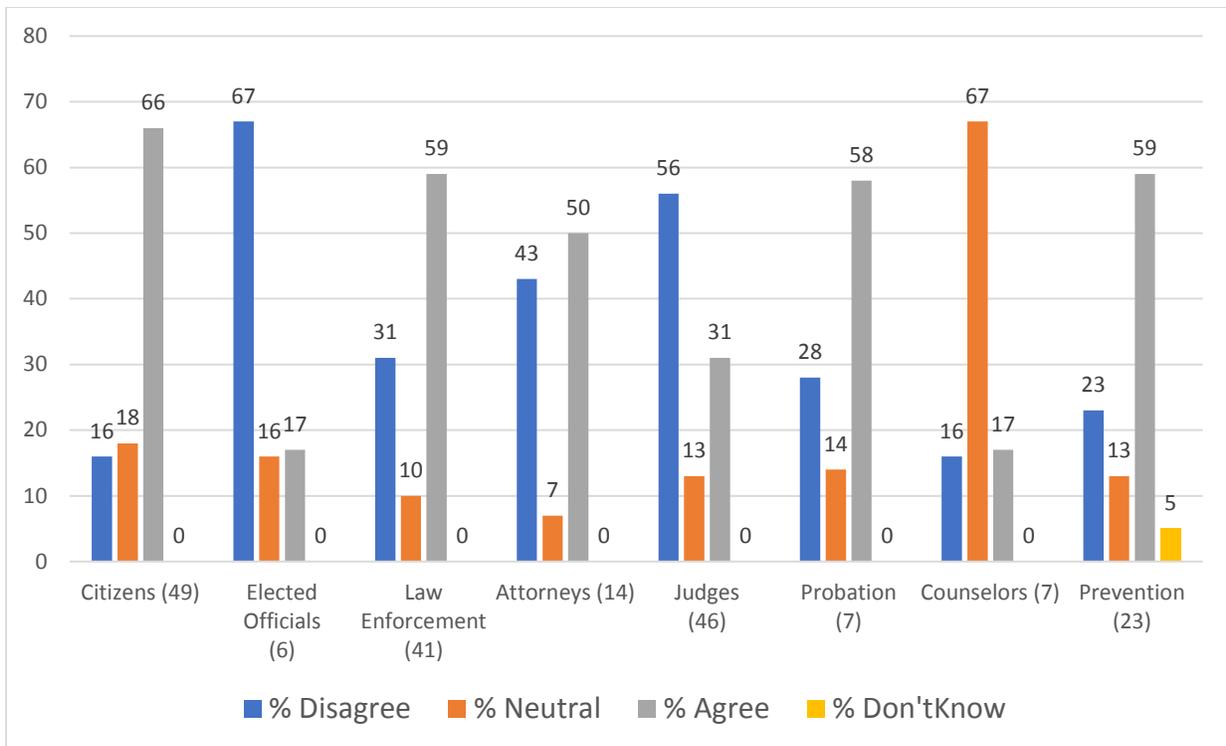
Why doesn't Montana adopt a countermeasure already used by 38 states? Montanans want to be able to drive safely. As stated earlier in this report, 65% of Montanans support enacting new laws to reduce alcohol abuse and more than 80% favor increasing enforcement of existing alcohol-related laws, while nationally 96% of Americans felt it was unacceptable to drink and drive. Are we really of the belief that Montanans' safety is less important than a perception by some that privacy rights would be infringed with sobriety checkpoints?

Cost-wise, one survey respondent from law enforcement said costs of these checkpoints will be a serious factor in their future use, although studies have shown that fewer officers at each checkpoint can be used and still have effective checkpoints. The key is that they need to be well publicized and conducted on a regular basis to be effective. Sobriety checkpoints may need additional funding to be successful. Potential funding sources are described under Questions 2 and 13. For more information on checkpoints see Appendix B p. 138.

**Question 6. "The current 24/7 Sobriety Program should be required for first-time DUI offenders."** Montana law requires the 24/7 Sobriety Program, or a court-approved equivalent, for those convicted of a second or subsequent DUI offense. "The most successful method for controlling convicted DUI offenders and reducing recidivism is monitoring offenders closely, (*Countermeasures That Work*, NHTSA, 2015). Support for this was very mixed, with the majority of four groups in favor, including citizens (66%), prevention specialists (59%), law enforcement (58%), and probation officers (58%). Those not strongly agreeing included attorneys (50%), judges (32%), and addiction counselors (17%, with 67% being neutral). These results need further analysis.

#### 6. The Current 24/7 Sobriety Program Should be Required

##### For First-Time DUI Offenders



**Recommendation: Require either close monitoring or ignition interlocks for first-time DUI offenders, giving judges the discretion of which to require based on availability, costs, and needs of the offender and society. Costs shall be paid for by the offender, except where the indigent may need assistance from local or state government to accomplish the required monitoring or use of interlock devices.** In Montana 24/7 sobriety monitoring requires either twice a day monitoring or the use of a SCRAM monitor, which provides continuous alcohol monitoring for hardship cases.

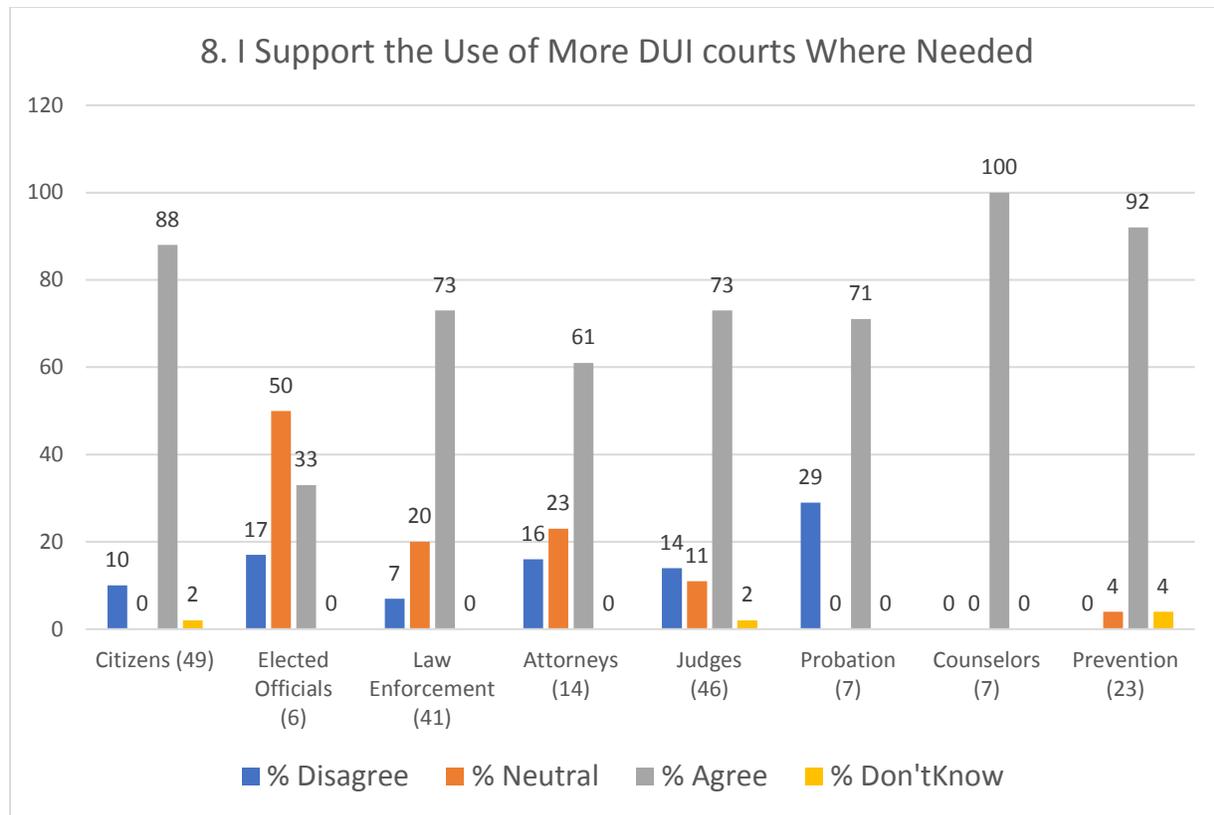
Close monitoring is a key countermeasure advocated by NHTSA. The most successful methods for controlling convicted DWI offenders and reducing recidivism have the common feature that they monitor offenders closely. Close monitoring can be accomplished at various levels and in various ways, including a formal intensive supervision program, home confinement with electronic monitoring, and dedicated detention facilities. Ignition interlocks are described in Question 4. Requiring either close monitoring or ignition interlocks for first time offenders was not asked in the survey, but would likely garner more support from judges and attorneys..

Home confinement with electronic monitoring, and dedicated detention facilities all have been evaluated in individual settings and show substantial reductions in DWI recidivism. Two studies of South Dakota’s 24/7 Sobriety Program have found reductions in recidivism of up to 74% among program participants. Recidivism was reduced by one-half in an intensive supervision program in Oregon and by one-third in an electronic monitoring program in Los Angeles County, California. A dedicated detention facility in Baltimore County had a 4% recidivism rate one year after program completion, compared to a normal recidivism rate of 35% for offenders.

All close monitoring programs are more expensive than the standard high-caseload and low-contact probation but less expensive than jail. Offenders in 24/7 programs typically pay \$4 per day for breath testing, while electronic monitoring fees typically range from \$5 to \$10 per day. A goal of 24/7 programs is to be self-sufficient (i.e., entirely funded by offenders). New Mexico estimated that intensive supervision costs \$2,500 per offender per year compared to \$27,500 per offender per year for jail. Dedicated detention facility costs can approach jail costs: \$37 per day in the Baltimore County dedicated detention facility compared to \$45 per day for jail. Offenders can bear some program costs, especially for the less expensive alternatives. (all of the above research from *Countermeasures That Work, 2015*)

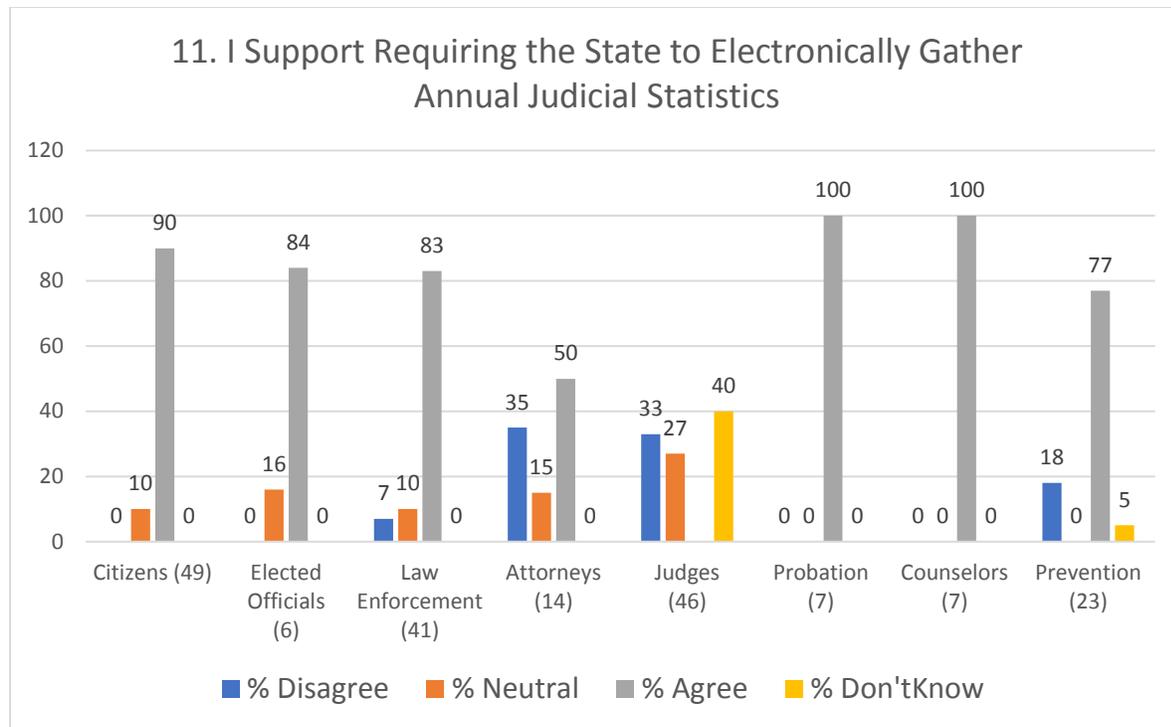
In a Montana 2015 study by Rand Corporation monitoring 3500 alcohol-involved offenders between 2010 and 2014 that had 24/7 sobriety monitoring requirements, well over 99% of the tests came back clean. Two-thirds of the participants violated at least once, but 96% of scheduled tests were taken and passed. Rand Corporation suggested that 24/7 sobriety monitoring reduced the likelihood of offenders being rearrested with 12 months of their arrest by 45-70%, although they did not have complete criminal history information and the effects may be somewhat different. For more information on close monitoring see Appendix A p. 141.

**Question 8. “I support the use of more DUI courts where needed.”** In Montana there are seven DUI Courts (Yellowstone County Impaired Driving Court, Butte-Silver Bow DUI Court, 7th Judicial District DUI Court, Hill County DUI Court, Billings Municipal DUI Court, Beaverhead County DUI Court, Fort Peck DUI Court). Based on the drug court model, DUI courts are specialized courts dedicated to changing the behavior of DUI offenders through intensive supervision and treatment and are an effective countermeasure that works, (*Countermeasures That Work, NHTSA, 2015*). There was a strong consensus or strong majorities from all but elected officials in support of having more DUI courts where needed. Elected officials may have been concerned about who would pay for these courts. Currently existing DUI courts rely on funding from soft state grants and federal grants and not from state hard funding. This idea is ripe for action.



**Recommendation: Create and fund more DUI courts where needed, utilizing state hard dollar funding for district courts and local government funds for lower courts.** This is a key countermeasure advocated by NHTSA. These courts are highly recommended to reduce recidivism and help counselors working with judges work out treatment and penalties that motivate offenders to solve their addiction problems. These courts are not currently available in most rural areas. There are likely opportunities for counties to cooperate in establishing these courts. Costs should be covered by regular annual or biennial hard dollar government funding, rather than forcing such courts to seek grants for funding in order to exist. See Appendix B p. 139 for more information on DUI Courts.

**Question 11. “I support requiring the state to electronically gather annual judicial statistics, by judge, on the number of DUI cases heard, the number of DUI cases dismissed, the number of DUI cases pled to lesser offenses, and the number of DUI cases resulting in DUI convictions.”** The idea of the state providing annual court statistics on DUIs was overwhelmingly supported by all but attorneys (50%) and judges (40%). Their reasons included the feeling that each case is different and that statistics wouldn’t fairly show anything. There was also a concern that defense attorneys would accuse prosecutors of trying to improve their annual statistics by prosecuting their clients unfairly. Nevertheless, this idea is ripe for action. Gathering court data is no different than other data, and statistics are useful to all interested in the courts and how they are functioning.

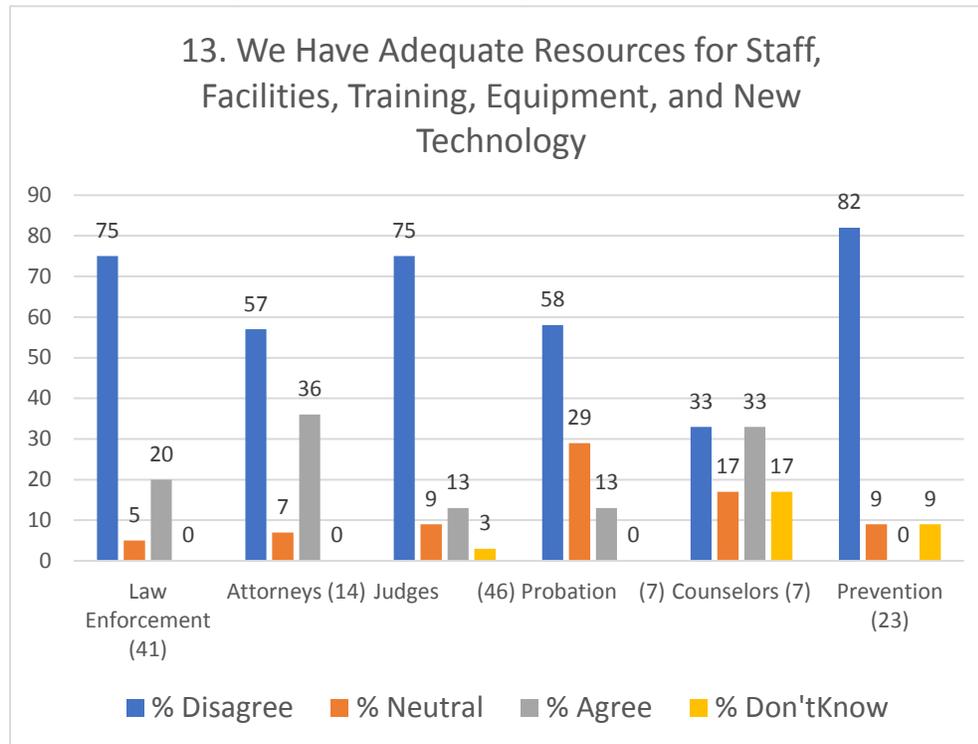


**Recommendation: Require the state to electronically collect annual DUI case statistics by court and judge, including the number of DUI cases heard, the number of DUI cases dismissed, the number of DUI cases pled to lesser offenses, the number of DUI cases resulting in DUI convictions, and any other statistics that help the state assess the effectiveness of these courts in dealing with DUI cases.** The NHTSA in its 2016 Impaired Driving Assessment of Montana recommended similar collection of court and other data to be able to monitor how DUI’s are being adjudicated. They recommended the state “Identify and track interim impaired driving program measures, such as conviction and recidivism rates, to follow the progress of system achievements and identify those areas that might be in greatest need of improvement.”

It is yet unclear how much of this data is already available. In 2016 it was not. Montana Dept. of Transportation is currently working to review court data from the state Dept. of Justice to address concerns that some courts have excessive plea bargaining, reduction of DUI charges to lesser charges, and dropping DUI charges altogether. They would then attempt to provide additional training, where needed, to judges and prosecuting attorneys. They have funding issues with being able to accomplish this.

Currently, our recommendation is that such data be made available only to appropriate state agencies needing the data to monitor our courts’ effectiveness in dealing with DUI’s, but if their efforts aren’t effective, whether due to lack of budget or unwillingness by some problem judges to self correct, such annual statistics should be made public to Montana citizens, who elect judges and district and county attorneys.

**Question 13. “We have adequate resources for staff, facilities, training, equipment, and new technology to combat the DUI problem.”** A strong consensus of prevention specialists (80%), law enforcement (75%), and judges (75%) disagreed with this statement. All other professions, except for addiction counselors, had strong majorities that also disagreed with the statement. It is very possible the small number of counselors taking the survey are not representative of the current situation. Other comments by survey takers strongly suggest that inadequate staffing is a big problem, along with a lack of adequate treatment facilities for those with substance abuse problems. This shortage of resources deserves further analysis.



**Recommendation: The legislature needs to analyze the adequacy of resource funding to combat DUI problems, and increase it where needed.** Having adequate resources reflects a key characteristic of an efficient and effective DWI control system (*Countermeasures That Work, 2015*). An adequate anti-DUI program with good laws and motivated personnel can’t function well without adequate funding at all levels of government and in all professions dealing with the problem. In the 2016 Impaired Driving Assessment of Montana by NHTSA it repeatedly recommended the state seek additional funding sources to reduce DUI’s. These recommendations included 1) a 10 cent per drink tax to go to prevention programs and the treatment of alcohol abuse and impaired driving; 2) increasing the percentage of DUI fines going to these programs rather than to state and county general funds; and 3) relooking at alcohol tax distributions to increase prevention funding.

Currently, fines from Justice Courts go half to county general funds and half to the state’s general funds, while fines from District Courts all go to the state’s general fund. The only

current exceptions to this are fines from speeding in school zones and property seized in drug-related convictions. None appear to be required annually to fund anti-DUI efforts.

Liquor revenues to the state of Montana from liquor sales, excise taxes, and liquor licenses were \$39.9 million in Fiscal Year (FY) 2017. Only \$7 million of that was specifically required by law to annually go to treatment and prevention efforts by the Department of Health and Human Services. The remainder went to fund other operations of state government. About 25% of beer tax revenues go to fund treatment and prevention programs. In FY 2017 beer taxes generated \$4 million in revenue and just \$1 million went to fund treatment and prevention programs. 25% of wine and cider taxes to fund treatment and prevention programs and total revenues generated to the state in FY2017 were just over \$3.5 million, with 25% of that going to the Dept. of Health and Human Services for treatment and prevention efforts.

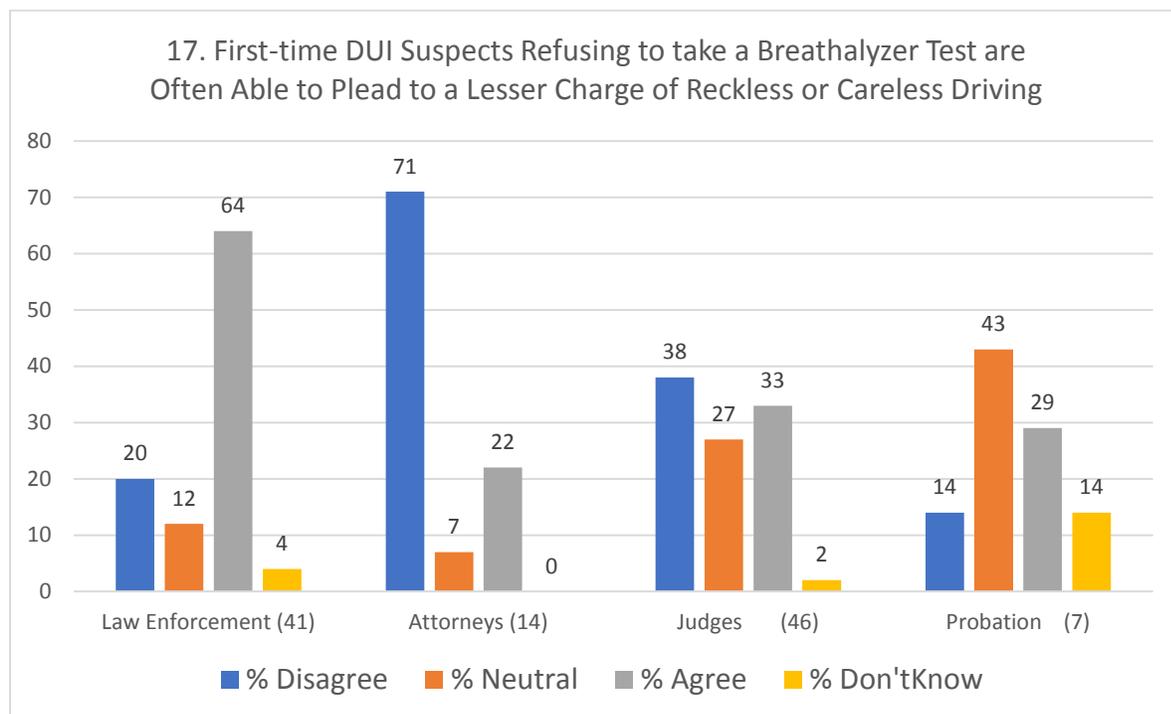
Currently, liquor excise taxes (currently at 16% of the wholesale price of liquor) all go to the state's general fund. In Fiscal Year(FY) 2017 those taxes generated over \$17 million dollars for the general fund. If liquor use is helping generate a serious DUI problem for Montanans, it appears that an inadequate amount of those funds is being spent to reduce the DUI problem they help create. Montana's DUI problem can be reduced by either requiring a higher percentage of these funds annually go to solving the DUI problem, or increasing the liquor excise tax rate to help fund DUI reduction efforts, or a combination thereof.

Liquor license taxes generated over \$10 million in FY 2017, with 65.5% or about \$7 million going to the state's Department. of Health and Human Services for addiction treatment and prevention while the remainder went to the state's general fund. Is this enough funding for treatment and prevention? DUI survey results indicate total funding for these activities is inadequate for the size of the problem.

While Montana is the second heaviest beer drinking state in the country, its beer tax rate of \$1.40 per gallon is lower than about 80% of the rest of the states. That is just 1.3 cents per 12 ounce can of beer! Only 23% of those beer taxes go to the Dept. of Health and Human Services for drug and alcohol addiction and prevention programs while 77% go to the state's general fund. Beer tax revenue was just \$4 million in FY 2017, and generated only \$1 million for addiction and prevention programs. Beer taxes should either be increased, or a higher percentage of those taxes be required, annually, to be spent on reducing the DUI problem, or a combination thereof. Past efforts to revise distribution of alcohol-related revenues have failed.

More discussion on potential funding sources to reduce DUI's is in Question 2. References to Montana liquor and beer tax and license revenues are from Montana State Department of Revenue's Liquor Enterprise Fund, Report of Operations for FY 2017. More information on NHTSA recommendations to the state in 2016 can be found in Question 2 above. See analyses for each profession's surveys in the Appendix for more specific information on where additional funding is needed.

**Question 17. “First-time DUI suspects refusing to take a breathalyzer test are often able to plead to a lesser charge of reckless or careless driving.”** Only law enforcement (64%) strongly agreed with this statement. Twenty-nine percent of probation officers agreed, while 43% were neutral. Only 33% of judges and 21% of attorneys agreed. Those directly involved in court cases strongly disagreed, but the perception by law enforcement, who often testify in these cases, is concerning. One attorney indicated later that in his experience, those refusing a breathalyzer test would always have a BAC exceeding 0.08% if a blood test were required and alcohol was the suspected culprit. Current law 61-8-402(5) does not allow a search warrant to draw blood for first time DUI offenders refusing a breathalyzer test.



**Recommendation: Allow law enforcement to obtain a telephonic warrant to determine the blood alcohol content of a first-time DUI suspect who refuses to take the breathalyzer test.** Another option is to increase the mandatory driver’s license suspension period from six months to one year for those that refuse the breathalyzer test to increase overall willingness to take that test. The NHTSA recommended in the 2016 Impaired Driving Assessment for Montana that there be a penal penalty for anyone refusing to take a breathalyzer, rather than just a license suspension. That is a third option.

A key issue is that 46% of Montanan’s suspected of a DUI refuse to take the breathalyzer test in 2016 (Montana Department of Motor Vehicles Website, Alcohol-Related Offenses). This is twice the national average of 24%. ((Jones & Nichols, 2012; and Namuswe, Coleman, & Berning, 2014 as contained in *Countermeasures That Work*, 2015).

The absence of a BAC test can make it more difficult to convict the impaired driver. If the penalties for refusal are less severe than the penalties for failing the test, many drivers will refuse. Reduced test refusal rates will help the overall DUI control system by providing better BAC evidence. Having driver BACs may increase DUI and high-BAC DUI convictions, increase the likelihood that prior DWI offenses will be properly identified, and provide the courts with better evidence for offender alcohol assessment. Zwicker, Hedlund, and Northrup (2005) found that test refusal rates appear to be lower in States where the consequences of test refusal are greater than the consequences of test failure. No study has examined whether stronger test refusal penalties are associated with reduced alcohol-impaired crashes. (Countermeasures That Work, 2015), but increasing drivers license suspension times is a common sense means of increasing willingness to take the breathalyzer test.

In U.S. Supreme Court Decision 2016 (Birchfield vs. North Dakota) it was determined that states have the right to require use of a breathalyzer-type device without a warrant or permission, but not blood alcohol tests without consent or a warrant. Field breathalyzer tests are used to indicate whether or not an individual needs further testing. They are typically not used in courts, but the field test can point the officer to the need to have either a blood sample or breathalyzer test done in the office. Breathalyzer tests are accurate and stand up well in courts because they must be approved by a government agency. Breath tests are not invasive and are not an invasion of privacy, whereas blood tests are, and require consent or a warrant. The court stated “For all these reasons, we reiterate what we said in Skinner: A breath test does not “implicate significant privacy concerns.” After a discussion of the impact of drunk driving, the decision said, “The laws at issue in the present cases, which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function. Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great. We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.”

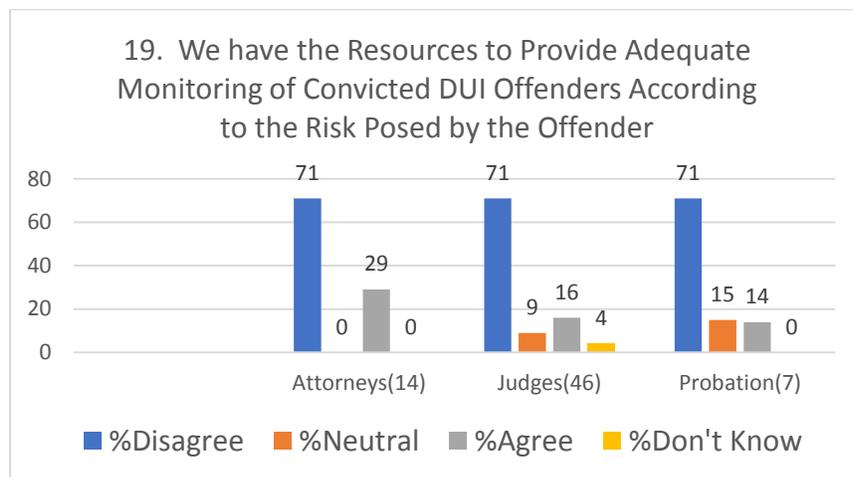
In a 2002 study on DWI prosecutions, three-fourths of the prosecutors interviewed said the BAC test was the single most critical piece of evidence needed for a conviction, evidence they are frequently without (Simpson and Robertson 2002). Some states report refusal rates of up to 50 percent for drivers with a prior DWI (Jones and Lacey, 2000). Even without the test results, DWI charges may still be brought against the offender, but conviction depends entirely on the law enforcement officer’s observations and subsequent testimony. Without evidence of the driver’s BAC, the evidence supporting a DWI charge is limited to an officer’s observations of the driver during the course of the investigation. Without BAC evidence, DWI cases are more

difficult to prove, resulting in fewer DWI convictions. (*Law Enforcement Guide*, Foundation for Advancing Alcohol Responsibility.org.)

Several states and local jurisdictions address this problem by following the request for a breath sample with the demand via a search warrant for a blood sample in refusal cases. In practice, once confronted with this eventuality and realization that his/her initial refusal does not terminate law enforcement’s ability to obtain a chemical test, the drivers often become less likely to refuse the breath tests. Additionally, he/she may now be subject both to implied consent sanctions for refusing as well as a blood draw that may contain the BAC evidence that he/ she sought to avoid. Either way, law enforcement obtains chemical evidence relevant to any subsequent impaired driving prosecution. There are multiple benefits of proceeding with search warrants in the case of a refusal. With the blood evidence:

- a. Hardcore offenders with high BAC results are identified,
- b. Fewer cases are pled down to lesser charges,
- c. Defendants more often plead guilty
- d. More DWI convictions are obtained
- e. Fewer cases go to trial
- f. More cases are disposed more quickly
- g. Court time is reduced. ( *Law Enforcement Guide*, Foundation for Advancing Alcohol Responsibility.org.)

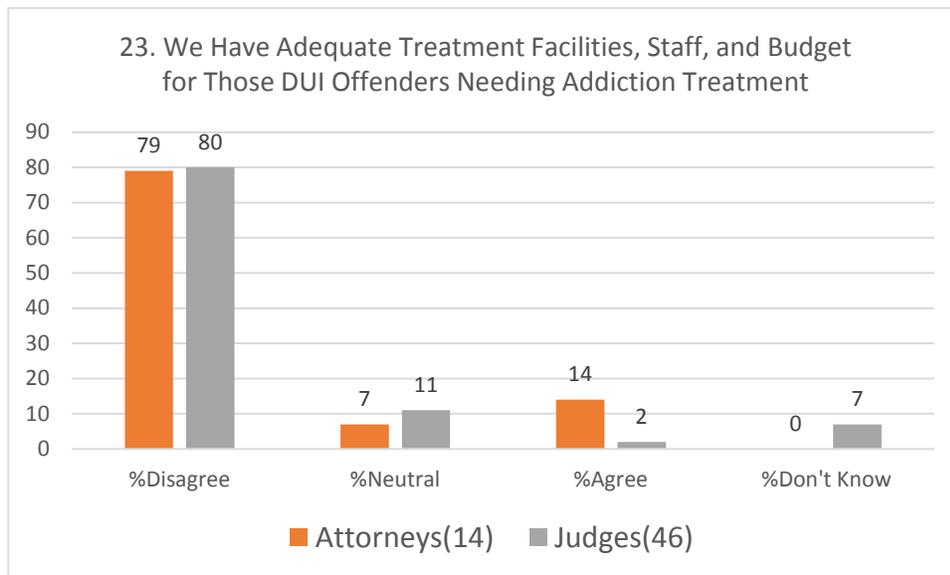
**Question 19. “We have the resources to provide adequate monitoring of convicted DUI offenders according to the risk posed by the offender.”** A consensus of 71% of both judges and prosecuting attorneys disagreed with this statement, pointing out the need for more resources to accomplish this. This is a serious problem because it allows the offender to reoffend or perceive that they can reoffend and not get caught, thereby risking the public. This is likely a bigger problem in more remote parts of the state with small populations. This deserves additional study.



**Recommendation: The state and local governments need to provide adequate funding to provide highly important close monitoring of DUI offenders.** This is a key countermeasure advocated by NHTSA. Potential funding sources are discussed in Question 2 and 13 above. Those offenders that can afford such monitoring should have to pay for it. Making probation services available to limited jurisdiction courts (lower courts or misdemeanor courts) for post-conviction monitoring of offenders was also recommended in the 2016 Impaired Driving Assessment for Montana by NHTSA, indicating such probation monitoring is not available or adequately available in all lower courts.

**Questions asked only of prosecuting attorneys and judges:** (Question numbers were taken directly from their surveys. Please note that the format of the following graphs has changed but responses from the various professions can still be determined.)

**Question 23. “We have adequate treatment facilities, staff, and budget for those DUI offenders needing addiction treatment.”** There was very little agreement with this statement, and 80% of judges and 79% of attorneys disagreed. Only 2% of judges and 14% of attorneys agreed. This is very concerning in that treatment is typically the only current solution to helping drivers with alcohol or drug addictions. These answers also reflect other individual responses to other questions in this survey about lack of adequate resources to deal with the DUI problem. It deserves further analysis.



**Recommendation: The State Legislature needs to provide adequate funding for more treatment facilities and staff.** Providing adequate treatment options for those addicted to drugs or alcohol is essential to break the cycle of repeated impaired driving offenses. There is no way around this.

The available research is quite clear on these points:

- Education does not correct drug dependence: it is not simply a problem of lack of knowledge.
- Consequences of drug use (e.g. hangovers, loss of job, arrest, etc.) appear to be important stimuli leading to entry into drug abuse treatment.
- Very few addicted individuals are able to profit from a corrections-oriented approach by itself. Relapse rates are over 70 per cent from all forms of criminal justice interventions (Note from DUI Law Committee authors: This applies to simple imprisonment, and not to treatment programs that are offered by the Montana Dept. of Corrections that can be very effective)
- Addiction is not simply a matter of becoming stabilized and getting the drugs out of one's system. Relapse rates following detoxifications are approximately the same as those following incarceration.
- Based on these findings, drug abuse is best treated by combinations of continuing outpatient therapy, medications and monitoring, with the goal of retaining drug abusers in that treatment/monitoring regimen to maximize and maintain the full benefits of treatment. (All from *Investing in Drug Control Treatment*, United Nations, 2003)

Comments by several surveyed also recommend assisting the indigent in paying for their treatment. Currently, if the indigent don't have insurance or other means to pay for treatment, they don't get it. Even when it can be afforded, treatment is often not available when the need and motivation is there to take it, and long waiting periods are common before being able to take treatment. Rural areas particularly struggle with inadequate or unavailable treatment facilities and staff. Having adequate treatment facilities is a key countermeasure advocated by NHTSA. See potential sources of funding in Questions 2 and 13 above.