**MINUTES**

**MONTANA SENATE**
**58th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON JUDICIARY**

**Call to Order:** By **VICE-CHAIRMAN DAN McGEE**, on February 24, 2003 at 9:00 A.M., in Room 303 Capitol.

**ROLL CALL**

**Members Present:**
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

**Please Note.** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**
Hearing & Date Posted: SB 447, 2/20/2003
Executive Action: SB 37, SB 362

## HEARING ON SB 447

**Sponsor**: **Sen. Duane Grimes, SD 20, Clancy.**

**Proponents**: **John F. Sullivan, Attorney at Law**
**Riley Johnson, representing NFIB**

**Opponents**: **Darrell Holzer, representing the AFL-CIO**
**Mike Meloy, Attorney at Law**
**Al Smith, Montana Trial Lawyers Association**
**Jerry Driscoll, AFL-CIO**
**Don Judge, Teamsters Local 190**
**Gene Fenderson, Progressive Labor Caucus**
**Terry Minow, MIA-MFT**
**Montana Public Employees Association**

**Opening Statement by Sponsor**:

**Sen. Duane Grimes, SD 20, Clancy,** opened the hearing by stating Sen. Taylor introduced a bill in 1999 which would give relief to a problem being experienced with reference checks among employers. Employers are in a precarious position because if they are contacted for a reference check, they almost cannot say anything. **SEN. GRIMES** feels, in some instances, not saying anything can have implications. Smaller employers may not know that they place themselves in jeopardy by mentioning anything positive or negative regarding a past employee. In 1999, the bill passed but had unintended consequences, and after the 1999 Legislature, the problem was even bigger. At the end of the 1999 session, **SEN. GRIMES** put in a bill draft request for the 2001 session, which became SB 1. Unfortunately, the bill died in the House. The primary purpose of SB 447 is to allow employers latitude when responding in good faith to requests for reference information. There are dire implications with regard to efficiency of a person's operations, but also things which could really provide a risk to an employer and/or the customers of that employer.

**Proponents' Testimony**:

**John F. Sullivan, Attorney at Law,** does a fair amount of employment law in Helena, and primarily represents employers. **Mr. Sullivan** did his best to convince the sponsor of the bill in the 1999 session that the bill, as drafted, was a mistake. He felt the bill posed a great threat in leading small employers into a false sense of security in believing they could speak with immunity about former employees. The bill attempted to deal with

the subject of employment references by changing only one section of the law and was dealing with the subject outside of the scope of the laws of Montana which deal with libel, slander, and defamation. Defamation is the principle weapon of choice for a plaintiff's lawyer. In addition, Montana had a set of blacklisting statutes, which have hardly ever been litigated. These statutes do not contain a definition for blacklisting. These statutes could have a relationship to employment referencing, and they need to be dealt with, as does the issue of defamation law. As the bill passed in 1999, the Governor created an amendatory veto. SB 447 is intended to remedy some of the problems with the law as passed in 1999. The bill as passed in 1999 only applied to non-public employees which, in **Mr. Sullivan's** opinion, makes the law quickly and easily subject to an equal protection challenge. Under the amendatory veto, the standard of liability for an employee is one of criminal negligence. Criminal negligence defined in criminal code is very complicated, and should not be applied to civil liability.

The amendatory veto also eliminated language from the bill allowing references to be given upon consent. **Mr. Sullivan** referred to the *Restatement of Torts* where scholars attempt to codify the common law and make a black letter law statement of the common. The consent language in SB 447 comes from the *Restatement of Torts*. In Griffin v. Opinion Publishing Company, the Supreme Court stated Montana would recognize the consent defense, but it has never been placed in the statute.

The final problem with the current law is that if litigated, it could create a serious question of insurance coverage for employers in situations where they are sued about an employment reference. Most general liability insurance policies contain coverage for being sued for libel or slander.

Under the previous bill, because it is not part of the defamation laws and not part of the libel and slander laws, an insurance company may reject defense.

**Mr. Sullivan** submitted a summary of his written testimony as a proponent of SB 447. **EXHIBIT(jus41a01).**

**Riley Johnson, representing NFIB**, submitted a Witness Statement supporting SB 447. **EXHIBIT(jus41a02).**

**Opponents' Testimony**:

**Darrell Holzer, representing the AFL-CIO**, stated the primary reason for opposing the new language is two-fold. In particular, on page one, lines 19-20, he is not sure what "publication"

covers. **Mr. Holzer's** major opposition has to do with the phrase "or has reason to know." **Mr. Holzer** feels this phrase is subjective, at best. In addition, he feels the language is unnecessary, and will put the defamed individual at a disadvantage.

**Mike Meloy, Attorney at Law,** attended both the hearing in 1999 and 2001. He came today because he practices employment law and represents employees. He also specializes in defending defamation claims, and also handled most of the Montana Supreme Court cases construing defamation law in Montana. **Mr. Meloy** came in 1999 to oppose the bill that was passed, not because it was amending the sections involving employer references, but because it eliminated a provision of the statute regularly relied on by employees in firming up the reasons for discharge, so the employer could not go beyond those reasons once a lawsuit was started. The old statute contained language which the Supreme Court construed to restrict an employer to the reasons given in the discharge statement. An employer now has fairly carte blanche in explaining why an employee was discharged.

In the 2001 session, **Mr. Meloy** felt that the amendment to the defamation law was a bad idea. **Mr. Meloy** pointed out most things said to a perspective employer by a prior employer is opinion. Opinions are not actionable, and a person cannot be sued for giving an opinion. Also, truth is an absolute defense in a defamation claim.

***(Tape : 1; Side : B)***

This bill will immunize an employer from telling a lie about a prior employee. He reads the bill as providing for consent, but wonders why anyone would consent to letting his former employer tell a lie about him. **Mr. Meloy** believes that when an employee lists a prior employer on an application for a new job, that probably constitutes consent to have the new employer check with the previous employer. This bill will immunize that prior employer for saying something false about the employee if the employee has a reason to know the prior employer did not like him. **Mr. Meloy** feels the bill could be fixed to alleviate that problem by providing that naming a prior employer does not constitute consent. The consent provision is going into the section of the defamation statute that is an absolute privilege. This provision immunizes a person even if the defamation is malicious. Essentially, this would not only immunize an employer from untruthful statements, but also from untruthful statements made with malice. **Mr. Meloy** does not feel this is a good policy decision.

**Al Smith, Montana Trial Lawyers Association**, directed the Committee's attention to page 2, Section 2. This language will require an employee to take an affirmative step and request a written reason for discharge within 30 days of their discharge. Lines 13 through 15, also require the employee to advise the employer that the statements the employer is making maybe used in litigation and the consequences of failing to provide the statement. This will require every employee who is discharged to be an expert on this particular statute, or require them to hire an attorney immediately upon discharge to preserve their rights. **Mr. Smith** suggested changing Section 39-2-801 to read "An employer who discharges an employee from service shall furnish the discharged employee with a written statement of reasons for the discharge within thirty days of discharge." An employer can give that statement to the employee when they are discharged. Lines 13-15, subparagraph (2) can then be deleted, as can subsection (3) on lines 16 through 20.

**Mr. Smith** feels the one thing that should be supported in the bill is the new subsection (5) on page 3, which repeals the current statute. The current law, which was passed in 1999, was termed "the ugliest bill of the session." **Mr. Smith** feels it would be good to get rid of that law. **Mr. Smith** informed the Committee it is perceived there has been a glut of lawsuits over reference checks when, in fact, there have been very few lawsuits. **Mr. Smith** suggested it is bad policy to make laws based on perception rather than fact. **Mr. Smith** urged the Committee to consider the best defense for all of these actions is the truth.

**Mr. Smith** informed the Committee the reason the current statute only deals with private employers is that public employers will require a two-thirds vote since it is granting immunity to governmental entities. If people are being hired for sensitive positions, it should be a duty upon former employers to disclose information. SB 447 is a one-way street giving employers immunity and nothing to employees. **Mr. Smith** feels this bill cannot be fixed and urged the Committee to just kill it.

**Jerry Driscoll, representing the AFL-CIO**, testified that employees only put down references that will be favorable. If you put down your employment history, you have consented for the employer to contact your past employers. Statistics show people will change jobs seven times in their lifetimes. Perspective employers will call your past employers, not your references. If a past employer fails to give an employee a reason for discharge, he loses his privilege. Conversely, if a past employer does furnish the reason, then the employee has consented. Consent is

given just by simply asking for a reason. **Mr. Driscoll** urged the Committee to table the bill.

**Don Judge, representing Teamsters Local 190,** was present when the original bill was passed. **Mr. Judge** wanted to remind the Committee how prevalent the distribution of information about employees is. There are firms that collect and sell information about employees, particularly with regard to issues such as workers' compensation claims. These claims may or may not have any bearing on a person's ability to do a job. It is estimated that hundreds of millions of records on employees are sold in this country every year, primarily by six major firms. This legislation does not limit the employer's ability to say anything they want. There are reasons employers do not like certain employees that have nothing to do with job performance. If the employee happens to drink, smoke, has a different religious preference or political stand, an employer can still be protected. Most employees do not know the law regarding employer references and consequences to employers for failing to provide a statement of reasons for discharge. There is no provision in SB 447 for a quid pro quo on the kind of protection given to employers. Finally, **Mr. Judge** has difficulty with use of the term "agent" because it is too broad. **Mr. Judge** feels the bill says blacklisting is okay in one part of the bill, and prohibited in another. **Mr. Judge** feels the bill is too broad and too confusing.

**Gene Fenderson, representing the Progressive Labor Caucus,** opposes SB 447 because it weakens the blacklisting law as currently understood and on the books. **Mr. Fenderson** submitted we have all seen employees that have never met an employer that was good enough, and he has seen many employers, and employer supervisors, who have never had an employee that was good enough. This balance is working in the state now, and he feels the law should be left the way it is.

**Terry Minow, representing MEA-MFT and Montana Public Employees Association,** is concerned about SB 447 because it is confusing and unclear. In addition, it takes away an employee's protection from defamatory statements if the person has a reason to believe it may be defamatory. **Ms. Minow** urged the Committee to take a long hard look at the bill to determine if it is really necessary.

**Questions from Committee Members and Responses**:

**SEN. MIKE WHEAT** feels the bill has the appearance that all obligations are on the employee to make demands for written statements, and wondered why it is not the duty of the employer

to advise the employee in writing every reason why they are discharged.

**Mr. Sullivan** stated the answer to that question lies in history and the interpretation of the blacklisting laws. **Mr. Sullivan** explained employees would request statements of reasons for discharge, which was allowed by the blacklisting laws, and the employer would respond. Later, the employee would sue the employer, and the employer would find additional reasons for the discharge in an effort to defend the lawsuit. The Supreme Court has said if the employer did not provide those reasons in the original written statement, an employer cannot bring them up later. The blacklisting laws were amended in 1999 to require that if an employee requests a statement of reasons, they must notify the employer that the statement of reasons can be used in litigation. This bill does not touch this process at all. This bill attempts to give employees a remedy if the employer does not respond to the employee's request for a statement of reasons. There are time limits built in for this response.

**SEN. BRENT CROMLEY** is bothered by the thirty-day time limit to request the statement of reasons for discharge.

**Mr. Sullivan** stated most employees who leave employment file for unemployment compensation. The employer is then required to submit a statement of reasons for termination to the Unemployment Compensation Bureau. **Mr. Sullivan** believes there is nothing necessary golden about the thirty-day time limit.

**SEN. CROMLEY** asked what the time limit is for an employer to respond to a claim for unemployment compensation.

**Mr. Sullivan** did not believe there was a time limit for the employee to file a claim. The employer is required to respond to the claim within ten days after the employee makes the claim.

**SEN. GARY PERRY** heard objection from **Mr. Judge** to language on page 2, Section 3, that it is in essence saying on one hand blacklisting is okay, and then again that blacklisting is not acceptable. In light of those comments, **SEN. PERRY** reviewed Sections 3 and 4, and observed that Section 4 adds words to clarify. **SEN. PERRY** wanted to know if **Mr. Sullivan** agreed.

***(Tape : 2; Side : A)***

**Mr. Sullivan** also heard **Mr. Judge's** testimony, but did not quite understand what **Mr. Judge** was saying. Some of the changes made were changes made by Legislative Council drafters in an attempt to clean up the language.

**SEN. PERRY** asked if, in **Mr. Sullivan's** opinion, the changes in Section 3 are also a clarification of law.

**Mr. Sullivan** stated the moving of the phrase from line 30 to line 29 allows giving a truthful reason for discharge to any person who has applied for employment. The statement "a truthful statement of the reason for discharge" was hanging on the end of the sentence and was moved by the bill drafters. **Mr. Sullivan** stated these changes were phrasing changes and do not affect the meaning of the language.

**SEN. PERRY** stated the original law required a written demand from the employee to the employer.

**Mr. Sullivan** reported there was a problem created by the 1999 bill when language was added in to reverse some old Supreme Court decisions. This language said when the employee makes a written demand, he must notify the employer that the statement being furnished by the employer may be used against the employer in litigation. That language was a mistake because in reality some employees would telephone previous employers and make an oral demand and would bypass having to inform the employer that the statement of reasons the employer was furnishing could be used against them in litigation. This new language strikes "written" and ensures that any demand the employee makes, under the blacklisting laws for a statement of reasons, must advise the employer that the statement can be used against the employer in litigation.

**SEN. PERRY** questioned use of the phrase "alleged to have been defamed" since at the point the phrase is used, there has been no alleged defamation. He wondered if this language is clear.

**Mr. Sullivan** believed what is important is there be recognition in Montana's defamation laws of the consent privilege. Consent privilege exists in Montana because of case law. **Mr. Sullivan** read a statement by the Montana Supreme Court in Griffin v. Opinion Publishing Company, a 1943 case, which recognizes consent as an absolute privilege. There is no statement of the consent privilege in privilege statues dealing with defamation, libel, and slander. **Mr. Sullivan** believes consent privilege should be recognized in the statute. The definition of consent in the bill was taken from *Restatement of Torts.* A jury will decide whether a certain person had reason to know a statement that would be made by someone may be defamatory. The idea of consent privilege is that a plaintiff shall not be allowed to entice another person into a lawsuit. There has to be consent to give some type of statement. If, an employee consents and knows the employer will make defamatory comments, the employee gives up the right to sue.

**SEN. PERRY** asked if the converse holds true and can an employee entice other people to say negative things about a former employer.

**Mr. Sullivan** explained the plaintiff has to consent to having something said about them. If the employer is the plaintiff and does not consent to the employee making the statement, then there is no consent privilege that becomes operative.

**SEN. PERRY** asked again if it was defamation for an employee to entice other persons to say negative things about the employer for purposes of an court action against the employer.

**Mr. Sullivan** stated this could create a situation where an employee may be a party to being a defendant in a defamation suit by the employer if untruthful and unprivileged things are said by others about that employer.

**SEN. JEFF MANGAN** agrees with **SEN. GRIMES** that many employers do not give references at all. **SEN. MANGAN** wondered if not giving a reference makes a negative implication about the employee.

**Mr. Sullivan** responded it could be viewed that way by a prospective employer. However, he does not believe there is liability for the person asked for the reference. **Mr. Sullivan** believes in the area of safety, a former employer could be held liable for not speaking out if it puts others at risk.

**SEN. MANGAN** remembered **Mr. Meloy** stating that the truth is always an absolute defense, but feels sometimes the truth is not the truth until it is discovered.

**Mr. Sullivan** agreed and stated that is part of the dilemma. What has been recognized in the law is that an employment reference is subject to a conditional privilege, and suit will not be allowed against the employer unless malice is shown on the part of the employer. This has been litigated in all kinds of jurisdictions and is supported by substantial case law. SB 447 is attempting to give conditional privilege for an employment reference. **Mr. Sullivan** disagreed with **Mr. Meloy** that most of what is said by employers is opinion, and that opinion is something you cannot sue for under defamation law. Statements of opinions can be the subject of defamation claims, and the Montana Supreme Court agrees. **Mr. Sullivan** agreed that there are not a lot of lawsuits filed over employer references. However, he feels if the 1999 statute is left on the books, someone will get hurt.

**SEN. MANGAN** asked **Mr. Meloy** what the employer's burden is as far as truth, and if circumstantial evidence guides or whether it is preponderance of the evidence.

**Mr. Meloy** responded an employer needs to be certain before discharging an employee to avoid liability exposure.

**SEN. CROMLEY** asked for a reference to the *Restatement of Torts* referred to in Section 1 of the bill.

**Mr. Sullivan** did not have the exact cite, but believed it was around § 600 of *Restatement of Torts 2d.*

**SEN. CROMLEY** asked if listing a previous employer on an application would constitute sufficient consent, if the application indicated previous employers would be contacted.

**Mr. Sullivan** replied simply listing a prior employer would not be consent, and there needs to be something which specifically allows a contact to be made and information to be provided. Simply listing someone was a former employer would not, in **Mr. Sullivan's** judgment, be sufficient consent. There must be specific consent.

**SEN. WHEAT** asked if **Mr. Sullivan** would agree that specific consent would be written consent.

**Mr. Sullivan** replied it did not have to be written, but it would be more clear if the consent were in writing.

**SEN. WHEAT** is concerned since most applications ask for an employment history. If you leave someone off, you are not being truthful with your new employer. If the employee does provide the name of a past employer, and it has been past the thirty days, **SEN. WHEAT** feels that past employer can say just about anything they want.

**Mr. Sullivan** disagreed and directed **SEN. WHEAT** to look at the section that defines "employment reference" it has to be a statement regarding a person's job performance or suitability for employment. Also, there would not have been consent, so consent privilege would not be applicable. The common interest privilege would be applicable and every court recognizes the common interest privilege.

**SEN. WHEAT** asked why the code could not require the employer to give written reasons for the termination and give the employee the ability to sign if they agree disagree. This would provide

written consent, and the employee would know the reasons for termination.

**Mr. Sullivan** felt there were several problems with that approach. First, the Supreme Court would say once the employer gives a statement of reasons, the employer would never be allowed to talk about anything else, even if later the employer discovers additional information. This would change the law of blacklisting, and requires the employee to initiate the request for a statement of reasons. The question of consent may come up at a much later point in time. It may be a question of consent that the employee wants to authorize the employer to speak five years after they have left.

**SEN. WHEAT** feels like it is a matter of fundamental fairness and logic that when an employer is dissatisfied with an employee that the employer can articulate the reasons at that point in time. It does not seem fair to **SEN. WHEAT** that if there is sufficient grounds to justify termination, that at some later date they can hire someone to come in and review records in search of other reasons to justify termination. If an employer is going to terminate, they should be able to articulate the reasons for doing so on the date of termination.

**Mr. Sullivan** stated some employers do just that because they are subject to the Wrongful Discharge Act and other laws which may require them in some other context to discover further information. **Mr. Sullivan** stated he is just trying to deal with employment references and an attempt is being made to place the laws relating to references where they belongs in the defamation laws and ensure the blacklisting statutes do not conflict.

**SEN. WHEAT** asked **Mr. Meloy** to respond to his concerns regarding termination.

**Mr. Meloy** stated that is what **Mr. Sullivan** is attempting to do, but the way the bill is written, that is not what will happen. **Mr. Meloy** does not know of any way the bill could be fixed to provide for what **Mr. Sullivan** would like. In **Mr. Meloy's** opinion, SB 447 will not fix the way employers give references.

***(Tape : 2; Side : B)***

**Closing by Sponsor**:

**SEN. GRIMES** stated this issue has been dealt with in previous sessions, and he feels this law will work quite well. In addition, employers know the obligations they are under and the processes they have to go through with regard to terminations.

What is lacking in Montana are clearly defined ways for employers to be able to provide and obtain reference information. This is a constant struggle for employers since no one wants to give references.

## EXECUTIVE ACTION ON SB 37

**Discussion**:

**Ms. Valencia Lane** informed the Committee that the gray bill represents SB003704.avl with the changes made by the Committee. **EXHIBIT(jus41a03).**

**Motion**: **CHAIRMAN GRIMES** moved **amendment SB003706.avl BE ADOPTED.** **EXHIBIT(jus41a04).**

**Discussion**:

**CHAIRMAN GRIMES** stated amendment SB003706.avl represents **Brenda Nordland's** recommendations.

**Ms. Nordland** explained the amendment simply coordinates interlock restrictions in Section 61-5-208, as amended by the Committee, and what is necessary in Section 61-8-714 and 61-8-722 in terms of criminal penalties. The gray bill refers to the interlock restriction in a permissive manner at less than .16 and applies to subsections (1), (2), and (3). Those subsections represent the first, second, and third offenses. **Ms. Nordland** stated it was the intent of the Committee to apply this to only the first offense in a permissive manner. For the second and third offense, the intent of the Committee was to adopt the HB 195 repeat offender interlock restriction, which would be placed on an offender after the one year hard period of license revocation had been served. This amendment accomplishes what **Ms. Nordland** believed the Committee intended to do.

**SEN. CROMLEY** stated for clarification, the amendment will go on page 12, lines 14 through 27, and page 13, lines 13 through 26, of the gray bill.

**SEN. MANGAN** pointed out that **Ms. Nordland** is correct in that HB 195 included the federal mandates, including the one year hard suspension. This amendment is in line with that requirement.

**Vote**: **CHAIRMAN GRIMES'** motion that **amendment SB003706.avl BE ADOPTED carried UNANIMOUSLY.**

**Motion**: **CHAIRMAN GRIMES** moved **amendment SB003707.avl BE ADOPTED. EXHIBIT(jus41a05).**

**Discussion**:

**CHAIRMAN GRIMES** explained that this amendment reinserts the language about the Department of Corrections reporting to the Department of Revenue on a monthly basis the names of fourth-offense felony offenders. After discussing this with **Mark Staples**, **CHAIRMAN GRIMES** and **Greg Petesch** came up with this language which does not give absolute immunity, but the last line reads, "No liability arises for failing to check the list." In addition, **CHAIRMAN GRIMES** replaced "provided by" with "available." **CHAIRMAN GRIMES** felt that way it would not imply the state would be providing a list, but the list is available if anyone wants it.

**SEN. WHEAT** likes the language and feels it makes it clear the list is available to anyone who wants to refer to the list.

**SEN. CROMLEY** asked about the list referenced as being in Section 4.

**Ms. Lane** explained the former amendments were SB003702.avl and the first two instructions of that amendment were adopted and incorporated into the gray bill. Therefore, it will now be Section 2.

**Mr. Staples** expressed concern about saying no liability attaches for failure to check the list implies that once you have checked the list, liability does attach. Therefore, as an attorney, he would advise that no one check the list.

**CHAIRMAN GRIMES** suggested adding "or use" to the proposed language.

**Mr. Staples** conveyed that would alleviate his concern.

**SEN. DAN McGEE** suggested tweaking the language to "failure to check or use".

**SEN. MANGAN** remembers in **REP. HARRIS's** bill and the DUI stamp on the driver's license that the idea was to help car rental agencies identify offenders who were trying to skirt interlock devices. He asked if this list could be sent to car rental agencies.

**CHAIRMAN GRIMES** stated they were trying to avoid a fiscal impact, so the list was going to be available on a website. Although the

Committee had not discussed this, car rental agencies would be able to access the list.

**SEN. JERRY O'NEIL** asked where the list was mentioned in the gray bill.

**Ms. Lane** replied Section 61-8-731 is not in the gray bill at this time and would need to be added.

**SEN. CROMLEY** does not know if the Department of Revenue has ever been asked to prepare the list, and wonders if they need to be specifically given a mandate to prepare the list.

**Ms. Lane** stated the only place it appears is in Section 61-8-731. If the Committee feels it is necessary, section 2 could be amended to include an affirmative duty stating the Department of Revenue shall maintain a list.

**SEN. CROMLEY** gave discretion to **Ms. Lane** in adding that mandate to the Department of Revenue.

**SEN. WHEAT** feels that since the Committee is specifically contemplating the list being on a website, he feels that should be stated in the bill.

**CHAIRMAN GRIMES** suggested putting in "electronic" before the word "list."

**Ms. Lane** suggested thought be given to who would be responsible for updating and maintaining the list.

**SEN. O'NEIL** does not feel the Department of Revenue should have to maintain the list and feels it should be done by the Department of Corrections since they already maintain a website with sexual and violent offenders. **SEN. O'NEIL** feels it would reasonable for the Department of Corrections to maintain this list as well.

**CHAIRMAN GRIMES** asked if the Department of Revenue is the regulatory agency through the Liquor Division.

**Mr. Staples** replied this is a hybrid since records are kept by the Department of Justice, and a distribution list kept by the Department of Revenue. Revenue would be the conduit which would best get to all licensees. Data collection, however, is kept by the Justice Department.

**Ms. Lane** stated she believes the Department of Corrections is responsible for data collection.

**CHAIRMAN GRIMES** explained that in 1994 during the reorganization effort, there was a great deal of discussion where the Liquor Division should be, and it was decide to leave it with the Department of Revenue.

**SEN. O'NEIL** elaborated that when the Committee was discussing mailing the list to various taverns, it made sense to have the list with the Department of Revenue. However, if the list is going to placed on a website, it seems the Department of Corrections is the logical place.

**CHAIRMAN GRIMES** stated the language will need to be ironed out substantially.

**SEN. MANGAN** pointed out Department of Corrections has the victims page and Department of Justice has the web page for sex offenders.

**Vote**: **CHAIRMAN GRIMES'** motion that **amendment SB003707.avl BE ADOPTED carried UNANIMOUSLY.**

**Note**: Amendment SB003708 was delivered to the Committee Secretary later that afternoon. **EXHIBIT(jus41a06).**

**Motion/Vote**: **SEN. MANGAN** moved **SB 37 DO PASS AS AMENDED.** The motion **carried UNANIMOUSLY.**

***(Tape : 3; Side : A)***

## EXECUTIVE ACTION ON SB 362

**Discussion**:

**CHAIRMAN GRIMES** gave the Committee members a spreadsheet regarding current MIP laws and proposed changes. **EXHIBIT(jus41a07).** In addition, **CHAIRMAN GRIMES** distributed pages 71-73 of the Desired Outcomes and Strategy Recommendations of the Alcohol, Tobacco and Other Drug Control Policy Task Force, **EXHIBIT(jus41a08),** and directed the Committee's attention to Section 6.2.4. This recommendation addresses the age group of 18-21 and the problem was what constituted possession of alcohol. **CHAIRMAN GRIMES** proposed striking the whole section dealing with guilt by association and dealing with youth under the age of 18. The one exception is that **CHAIRMAN GRIMES** would like to add a word on line 17 between the words "person's" and "possession" add the word "proximate." **CHAIRMAN GRIMES** stated he is attempting to add some definition to the area of control.

**SEN. WHEAT** stated as a prosecutor he would interpret "proximate" to mean just about anywhere in the area a person could see or get to. **SEN. WHEAT** stated there may be people there who are not consuming and do not have alcohol in their possession, but it is in their proximate possession. This is guilt by association.

**CHAIRMAN GRIMES** stated the point that MADD would like to make is these kids should not be at the parties.

**SEN. WHEAT** stated his 19-year-old son is sometimes at parties, not drinking, and his son makes the argument that this is where all of his friends are, and he wants to be there in case somebody needs his help.

**CHAIRMAN GRIMES** talked about a case in Miles City where a young man was giving a ride home to some kids as a designated driver and was given a $50 fine.

**CHAIRMAN GRIMES** suggested pulling all the language from Section 1 out of the bill and wanted to only deal with the age group 18 and below.

**SEN. O'NEIL** asked what the reason was for not wanting minors to be at wedding parties.

**CHAIRMAN GRIMES** conceded that he heard the point **SEN. O'NEIL** was making.

**Ms. Lane** felt using the words "proximate possession" was an oxymoron as a person either possesses or he does not. **Ms. Lane** did not feel there was such a thing as proximate possession.

**CHAIRMAN GRIMES** stated the Committee surfaced the issue, recognized the problems and the difficulty law enforcement experiences, and stated this issue will have to be saved for the interim committee and the next legislative session.

Addressing the issue of MIPs for ages 18 and below, **CHAIRMAN GRIMES** stated that kids feel MIPs and community service are a joke. Therefore, the Task Force recommends doing what 31 other states do and revoke drivers' licenses. **Ms. Nordland** had pointed out this causes a lot of problems, so **CHAIRMAN GRIMES** suggested the judge confiscate the driver's license. Regarding the fine imposed, the Task Force did not want to make the fine a hardship on families, but at the same time, they want to send a message. The Task Force recommended a minimum $100 to $150 fine for the first MIP. Parents will need to accompany the young people to an information course. The driver's license will be confiscated for 30 days until completion of the course. If the parents do not

show up at all, the driver's license will be confiscated for a period of 90 days.

For second and subsequent offenses, the Task Force recommended a fine of $100 to $300. The license will be confiscated for six months. Kids and parents will be required to attend treatment. If the parents do not show up, the license can be confiscated for one full year. Tailored assessment will be required for youth to determine if they have addiction problems. Language will be inserted that will require DPHHS to come up with confidentiality standards so that law enforcement can access MIPs.

**SEN. MANGAN** asked about the community-based substance abuse information course and then the reference to treatment. This could be two different things. Treatment as referred to in second and subsequent offenses may require different language than community-based substance abuse information course. **SEN. MANGAN's** second concern is if it is treatment they are requiring and a parent chooses to use a facility which is not approved by the Department of Public Health and Human Services (DPHHS), those would not necessarily be entered into the data base. **SEN. MANGAN** is not sure that option should be taken away from parents.

**CHAIRMAN GRIMES** envisions this as being just the information course, as opposed to treatment. In addition, he feels if the parents show up, those information courses will become better and less of a joke. **CHAIRMAN GRIMES** stated there have been suggestions that whenever they talk about treatment, there should be options for private treatment programs.

**SEN. MANGAN** stated if treatment is not going to be discussed, the language is fine the way it is since alcohol information courses are approved by DPHHS and can be tracked.

**CHAIRMAN GRIMES** spoke about **Mary Haydahl** and the lack of treatment options available to her daughter.

**SEN. MANGAN** felt tailored assessments are not going to be performed within a substance abuse information courses, but would be completed by treatment professionals. **SEN. MANGAN** was unclear if the tracking was to include the assessments. If the Committee did want them included in the tracking, then there is a problem with the language. If not, the language is fine as is.

**SEN. PERRY** encouraged increasing the fine for first offense to $100 to $300. For second and third offense, he encouraged the Committee to double the first offense fine, making it $200 to $600. He feels the penalty for some people is not stiff enough and there needs to be consequences for the parents. One of the

most important things to a kid is the loss of privileges. Therefore, he suggested adding monitoring as an option for the judge.

**CHAIRMAN GRIMES** confessed the Task Force had that same desire, but in reality, judges and probation officers do not follow through. There are a great number of MIP violations which never get reported. Therefore, if the Task Force asks to much, they were told it would become less of a tool. **CHAIRMAN GRIMES** felt electronic monitoring would have some repercussions.

**SEN. McGEE** agreed with **SEN. PERRY** regarding the fines and asked if the license confiscations were hard.

**CHAIRMAN GRIMES** assured **SEN. McGEE** that they were hard confiscations.

**SEN. WHEAT** also felt the fines should be increased because we are trying to get the attention of, not only the young people, but the parents. **SEN. WHEAT** feels the driver's license confiscation is critically important to the MIP laws.

***(Tape : 3; Side : B)***

**CHAIRMAN GRIMES** felt if increasing the fines is the will of the Committee that is fine. Therefore, the first offense fine will be $100 to $300 and subsequent MIPs will be $300 to $600.

**SEN. MANGAN** works with a lot of kids and parents are a huge problem. If the parents do not care, and the youth does what they need to, but the parent does not follow through, this creates a double strike against the kid. **SEN. MANGAN** feels this would not be fair to the youth. **SEN. MANGAN** knows there are no easy answers, but he hates to see the youth suffer a negative consequence for a positive step forward.

**SEN. O'NEIL** asked what happens if a youth gets put into foster care and does not have someone to attend substance abuse classes. **SEN. O'NEIL** feels the judge should maybe have an opt out.

**SEN. McGEE** feels this is setting a policy statement for the state of Montana. It is unfortunate when someone receives a MIP and has a parental structure which is non-supportive. The public has a right to a reasonable determination that they are going to be safe when they are out on the roads. **SEN. McGEE** hopes this will be a wake-up call to those parents who are not as responsive as they should be. **SEN. McGEE** stated he is not trying to be punitive, but he is trying to be severe. **SEN. McGEE** feels, "If you can't do the time, don't do the crime."

**SEN. WHEAT** is sensitive to everything said, and feels the problem can be solved by giving discretion to the judge who confiscates the license. If a person gets their first MIP and they do everything they are supposed to do, but the parents simply do not want to participate, the judge could have the discretion to return the license based on the conduct of the youth.

**SEN. CROMLEY** had a problem with making a distinction about serving alcohol to people ages 19 to 21, but conceded that is not part of this bill anymore. He is concerned about the language on line 27 requiring the parent's participation since a person is emancipated at the age of 18.

**CHAIRMAN GRIMES** clarified that in addition to striking lines 20 through 22, page 1, that the language on page 2, line 26 through page 3, line 11, will be stricken as well. In addition, the amendment will be drafted to give discretion to judges for the additional sanctions past the hard confiscation, and the fines will be raised. **CHAIRMAN GRIMES** expressed concern about the tailored assessment. He then asked **Ms. Nordland** to weigh in on what the Committee had decided.

**Ms. Nordland** clarified the Committee is going back to the original language applying to 18- to 21-year-old young adults, and all amendments will be stripped which apply to these individuals.

**CHAIRMAN GRIMES** stated that if an individual under 18 and they get the second or third MIP, he would have that six-month hard confiscation stick, whether they turned 18 in the middle of that process.

**Ms. Nordland** did not think this would be a problem because a court would have misdemeanor jurisdiction for a year after an individual turns 18. **Ms. Nordland** thought language could be borrowed from Section 61-8-732(9)(b), which would give the court the ability to monitor the assessment and treatment for a period of time. Subsection (10) of that same section extended the jurisdiction of the courts to monitor treatment and that language could also be useful.

**Julie Ippolito, representing Mothers Against Drunk Drivers,** commented that she heartily agrees with using DPHHS as a clearing house and confiscating driver's licenses. The only concern she still has lies with the Universities.

**CHAIRMAN GRIMES** stated he did not feel he could be successful with any language for that age group or a guilt by association

provision since there was very little support. **CHAIRMAN GRIMES** added this should be the focus of the next interim.

**ADJOURNMENT**

Adjournment: 11:55 A.M.

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SEN. DUANE GRIMES, Chairman

_____
SEN. DAN McGEE, Vice-Chairman

_____
CINDY PETERSON, Secretary

DG/CP

**EXHIBIT(jus41aad)**