

**LEGAL ISSUES CONCERNING  
HOMELESSNESS, PUBLIC INTOXICATION,  
PANHANDLING AND TRANSIENCY**



**Brent Brooks  
Billings City Attorney  
Jim Nugent  
Missoula City Attorney  
Ryan Sudbury  
Deputy Missoula City Attorney  
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# Introduction

## NOT INTENDED AS A COMPREHENSIVE LEGAL REVIEW

- **First Amendment Issues:**
  - **Time, Place, Manner Restrictions**
  - **Obviously important**
  - **Can occupy several hours of discussion/debate**
  - **It is left for another time and place**

## SUMMARY TOPICS

- **Relevant MT Statutes**
- **Billings/Missoula Ord.s**
- **Typical Application to Issues**
- **Summary also intended to generate new ideas for:**
  - **Adapting to and utilizing current legal limitations**
  - **Crafting potential effective Statutory / Ordinance alternatives**

# Common Fact Situations

## OPEN CONTAINER

- Purchase of large cans / bottles of inexpensive alcohol
- Person hides somewhere to drink
  - Park
  - Vacant building doorway
  - Vacant field
  - Parking lots / Alleys
- More daring will drink openly
- Citation / NTA for open container violation

# Common Fact Situations

## TRESPASS

- Often related to open container violations
- Person is asked to leave a business / parking lot / restaurant
- May also be panhandling / soliciting near businesses / ATMs
- Given warning / “no trespass”
- Violation results in citation / NTA

# Common Fact Situations

## PANHANDLING/AGGRESSIVE SOLICITATION

- **Approaching pedestrians - asking for money**
  - **Sometimes an initial question about directions somewhere or borrowing a cigarette, etc**
  - **Or brief account of a family emergency / hard luck circumstance**
  - **Often artful/sometimes convincing**
  - **Then solicitation for money to help the problem**
- **Can be frightening to pedestrian passersby**

# **Common Fact Situations**

## **SLEEPING ON SIDEWALKS / DOORWAYS**

- **Not as common but still a problem**
- **Law Enforcement usually asks person to sit up or otherwise not to lay down on sidewalk**
- **Frustrates businesses**
- **Discourages customers**
- **Missoula Ord. later in presentation**

# Applicable Montana Statutes and Sample City Ordinances

## PUBLIC INTOXICATION

➤ **NOT** a criminal offense standing alone.

- **MCA 53-24-107(1)**

➤ Intoxicated condition and behavior may evolve into:

- Disorderly Conduct
- Trespass
- Assault

➤ Law Enforcement **MAY** “assist” person if in need of help:

- **MCA 53-24-303(1)**

- “Assist” **EQUALS:**

- Take them home, take to “approved private health facility” or “other health care facility”

➤ Law Enforcement **MAY** detain to protect person’s health/safety until no risk to himself/herself or others:

- **MCA 53-24-107(2)**

# Applicable Montana Statutes and City Ordinances

## “PASSIVE” SOLICITATION

➤ Stationary / holding sign seeking something such as:

- Money
- Food
- Job
- Etc.

➤ **NOT** a criminal offense by itself.

➤ However, **MAY** evolve into:

- Trespass if done on private property and person is asked to leave
- Open container violation possible

# Applicable Montana Statutes and Sample City Ordinances

## “AGGRESSIVE” SOLICITATION

- Authority to regulate by **MCA 7-32-4304**:
- Broadly defined
- Includes:
  - Approaching / following / blocking path
  - Using profane language
  - Soliciting money, food, etc.
- **IS** a misdemeanor:
  - BMCC §18-1001(d)(1)-(7)
  - MMC §§ 9.36.010-9.36.050
- Often charged as Disorderly Conduct under **MCA 45-8-101**
- **MCA 61-8-507** prohibits: standing on highway, “soliciting employment, business or contributions” from vehicle occupants unless authorized by City

# Applicable Montana Statutes and City Ordinances

## VAGRANCY “HANGING OUT” OR “LOITERING”

- **NOT** a criminal offense **nor** MI
  - **MCA 7-1-111(14)**
- First Amendment considerations such as:
  - Freedom of assembly
  - Freedom of association
  - To travel
- However, depending on facts:
  - **MAY** involve stop and frisk considerations:
    - **MCA 46-5-401** and *Terry v. Ohio*
      - Older, well-known case on “stop and frisk”
      - Loitering near recent crime scene engaged in suspicious activity

# Applicable Montana Statutes and City Ordinances

## OPEN CONTAINER

### ➤ Defined

- **BMCC Sec. 3-201**
- Publicly drinking carrying/exhibiting open / empty cans, bottles, glass containers of alcoholic beverages

### ➤ **IS** a criminal misdemeanor offense per City Ordinance

- **BMCC Sec. 1-110**

### ➤ Typically offenders:

- Cited (charged)

**AND**

- “NTA” issued setting an appearance date in Municipal Court

# **Applicable Montana Statutes and City Ordinances**

## **OPEN CONTAINER – CONTINUED**

- **Offenders overwhelmingly fail to appear on multiple NTAs and then Judge issues a “bench warrant” for failure to appear and sets bond for this offense.**
- **Law Enforcement then locates/discovers and arrests offender per Bench Warrant, books defendant into jail.**
- **Defendant sits in jail until posting bond or Court appearance/arraignment.**
- **Usually pleads guilty, sentenced to a few days with credit for time already served before posting bond or arraignment.**

# Applicable Montana Statutes and City Ordinances

## OPEN CONTAINER – CONTINUED

- Offense can also involve an "intoxicated pedestrian"
  - prohibited "on a roadway" by **61-8-508, MCA** and a Municipal Infraction at **BMCC Sec, 18-1308**.
- These two laws prohibit being intoxicated on a roadway
- Usually not cited by Law Enforcement
  - Because futile to do so
  - Municipal Infraction is civil and not a jailable offense
- Classic "revolving door" for Law Enforcement
- Creates concern with jail-triggers public policy question
  - ***What type of pretrial / post-sentencing defendant should be incarcerated?***

# Applicable Montana Statutes and City Ordinances

## POSSIBLE LAW ENFORCEMENT ACTIONS OTHER THAN ISSUING CITES/ARREST

### ➤ **MCA 53-24-107(1)**

- “A person who appears to be intoxicated in public ...may be detained by a peace officer for the person’s own protection...”

### ➤ **MCA 53-24-303(1)**

- “A person who appears to be intoxicated in a public place and to be in need of help may be assisted to the person’s home, an approved private treatment facility, or other health care facility by the police.”

# Applicable Montana Statutes and City Ordinances

## UNANSWERED QUESTIONS

- *Where do you take them?*
- *For how long can they be detained?*
- *Who pays for any charges incurred?*
  - May involve “public duty doctrine” exception for Law Enforcement

## INVOLUNTARY ALCOHOL COMMITMENT ?

- **MCA 53-24-302**
  - For a person that “...is an alcoholic who habitually lacks self-control as to the use of alcoholic beverages...” and
  - Threatened / attempted / inflicted harm, etc.
  - AG Opinion - Co. Attys cannot initiate / pursue

# Applicable Montana Statutes and Sample City Ordinances

## STATE OF MT POLICY ALCOHOLISM AS AN ILLNESS

### ➤ §53-24-102, MCA

- Alcoholism is an illness
- Public Intoxication/Consumption:
  - Without more cannot be a crime (§53-24-107(1), MCA)
  - Failed attempts to make it a **local option Misd.** offense-see **SB 360** (2015 session) and **HB 463** (2017 session)
- Continuum of Treatment
  - To lead normal lives
  - Be productive members of society

# Applicable Montana Statutes and City Ordinances

## REGULATING SALES OF ALCOHOL STATE SHARES SOME POWER WITH CITIES

- **§16-1-101, MCA**
  - Overall State control of sale, distribution
- **§16-3-309, MCA**
  - Allows city to prohibit sales in certain areas within city limits
- **Town Pump v. Red Lodge (1998)**
  - Cities may impose local zoning that regulates the sale of alcohol.
  - No State “preemption”
  - Rather - “shared powers”

# Applicable Montana Statutes and City Ordinances

## OVER SERVICE REGULATIONS – STATE DOR

- **§16-3-301(4)(b), MCA**
- *Unlawful to sell alcohol to “actually, apparently, obviously” intoxicated person*
  - License jeopardized
    - Suspension / revocation (4th offense) **ARM 42.13.101**
  - Fines
  - DOR provides training: [AlcoholServerTraining.mt.gov](http://AlcoholServerTraining.mt.gov)

## SALES TO MINORS – STATE DOR

- Illegal to “knowingly” sell
- **MCA §§ 16-3-301(4)(a) and 45-5-623(c)**
  - Misdemeanor
  - License jeopardized
    - Suspension / revocation
  - Fines

# Applicable Montana Statutes and City Ordinances

## INVOLUNTARY MENTAL HEALTH COMMITMENT MCA 53-21-121

- Person must be suffering from “mental disorder” defined at **§53-21-102(9), MCA**
- Evaluation by Mental Health Professional
- Evidentiary hearing before District Court
- Commitment to / placement in “least restrictive environment”
- Emergency detention (cannot be in a jail) - **§53-21-129, MCA**
- Commitment locally or to MSH usually for 2-3 weeks and then released after stabilization of medication

# **Applicable Montana Statutes and City Ordinances**

## **OTHER CONSIDERATIONS**

- **Co-occurring chemical dependency/mental disorder**
  - **Usually follow mental health involuntary commitment process**
- **Commitments are intended to address acute / short term crisis-not chronic long term condition**
- **Costly**
- **Local Group Homes / MSH often at or near capacity**
- **Crisis Center- great assistance for those cooperative**

# Recent Caselaw Concerning Enforcement of Ordinances Against the Homeless

## EIGHTH AMENDMENT CASES – CRUEL AND UNUSUAL PUNISHMENT

- ***Martin v. City of Boise*** - 2019 U.S. App. LEXIS 9453 (amending 902 F.3d 1031)(April 1, 2019).
  - **Held:** “An ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.”
- **Extension of reasoning found in *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968):**
  - The Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.
- **Earlier Federal Cases with Similar Holdings to *Martin*:**
  - *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992)
  - *Johnson v City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994)

# Recent Caselaw Concerning Enforcement of Ordinances Against the Homeless

## EIGHTH AMENDMENT CASES – CRUEL AND UNUSUAL PUNISHMENT

### • *Martin v. City of Boise* - The Footnote Toeholds for Cities?

- (1) Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.
- (2) Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.
- (3) So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures.

“Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the “universal and unavoidable consequences of being human” in the way the ordinance prescribes.”

- See *e.g.*, *Joel v. City of Orlando*, 232 F.3d 1353 (11<sup>th</sup> Cir. 2000) – An ordinance similar Boise’s upheld; cited approvingly by *Martin* court. In *Joel*, Def’s presented unrefuted evidence that shelters had never reached capacity, and plaintiffs always had access to them.

# Recent Caselaw Concerning Enforcement of Ordinances Against the Homeless

## FOURTEENTH AMENDMENT CASES – DUE PROCESS & VOID FOR VAGUENESS

- ***Desertrain v. City of Los Angeles*, 754 F.3d 1147 (2014)**
  - “No person shall use a vehicle parked or standing upon any City street, or upon any parking lot owned by the City of Los Angeles... as living quarters either overnight, day-by-day, or otherwise.” L.A. Municipal Code, Section 85.02
  - Use of “living quarters” and “or otherwise” phrases problematic for the Court.
  - Under the Fourteenth Amendment an ordinance can be unconstitutionally vague on two independent grounds, *Desertrain*, 754 F. 3d 1155-56:
    - (1) It fails to provide adequate notice of what conduct is prohibited, so that ordinary citizens may conform their conduct to the law (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)(involving “anti-loitering” ordinance), and
    - (2) It provides “no standards governing the exercise of... discretion,” and can thus be a tool for harsh and discriminatory enforcement (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)(involving “vagrancy” ordinance).

# **Applicable Montana Statutes and City Ordinances**

## **SUMMARY**

- **Laws have not always kept pace with societal changes / new problems**
- **Competing societal interests/policies/goals:**
  - **Citizens: “get them off the streets, then help them”**
  - **Law Enforcement works hard to enforce often impractical / futile laws**
  - **Treatment professionals address mental / physical health / addictions**
  - **Social organizations try to help with basic needs**
  - **Affected persons often do not want some or any help**

# Applicable Montana Statutes and City Ordinances

## NEW IDEAS AND BEST PRACTICES FROM ELSEWHERE

- **“SIP”**: Serial Inebriate Program
  - San Diego, CA
- **No Serve**
  - Green Bay, WI
- **Street Sweeping**
  - Green Bay, WI
- **MT AG Opinion Request?**
  - Local downtown regulation of large (above 16 oz.) cans/bottles

- **“Campus” for Addressing Needs, Protection, Treatment**
  - e.g. Haven For Hope
  - San Antonio, TX
- **Sleeping/lying/sitting Restriction Ordinance**
  - MMC § 9.34.040
- **Sobering Centers**

# Additional Discussions

## THANK YOU

- Questions?
- Comments
- Suggestions

## CONTACT INFORMATION

**Brent Brooks**

[brooks@ci.billings.mt.us](mailto:brooks@ci.billings.mt.us)

Phone: **(406) 657-8202**

**Jim Nugent**

[jnugent@ci.missoula.mt.us](mailto:jnugent@ci.missoula.mt.us)

Phone: **(406) 552-6025**

**Ryan Sudbury**

[SudburyR@ci.missoula.mt.us](mailto:SudburyR@ci.missoula.mt.us)

Phone: **(406) 552-6024**