

Alexander Blewett III

## SCHOOL OF LAW

UNIVERSITY OF MONTANA



## MEMORANDUM

**To:** Chief Justice Mike McGrath, Supreme Court of the State of Montana

**From:** Paul F. Kirgis, Dean & Professor of Law

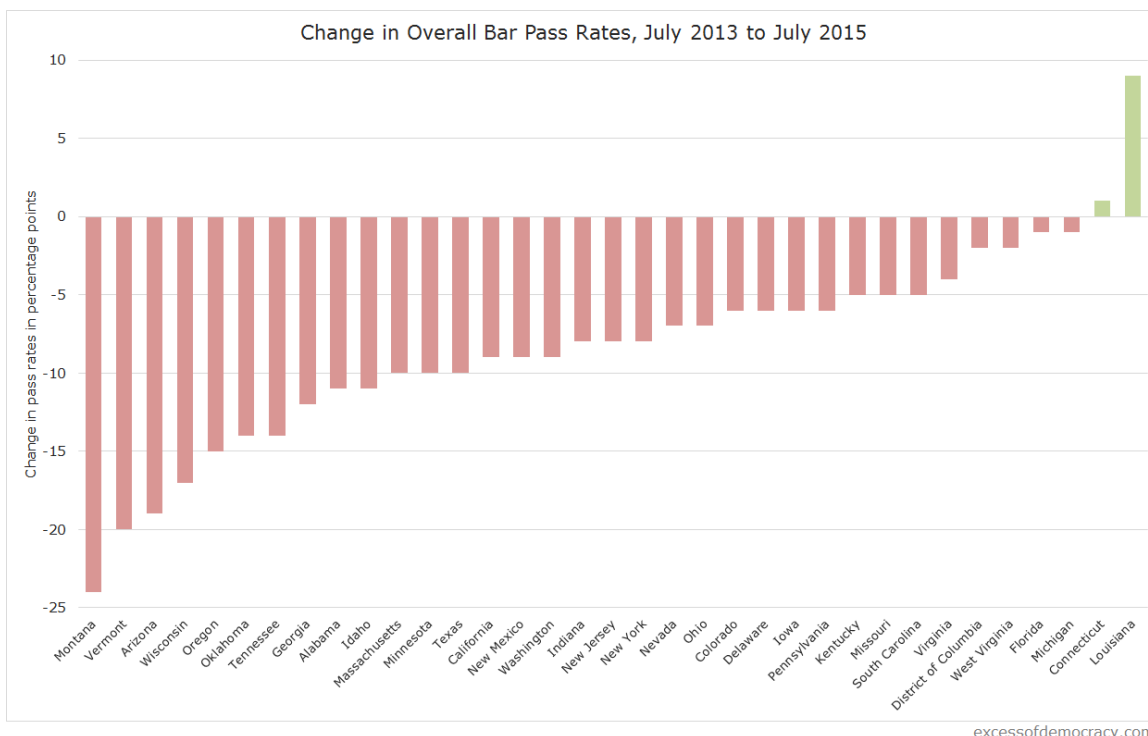
**Date:** January 14, 2016

**Subject:** July 2015 Bar Exam

Pursuant to the Montana Supreme Court's Order of January 30, 2013, *In re Petition to Adopt Amended Rules for Admission to the Bar of Montana*, this memorandum constitutes my report to the Montana Supreme Court on bar admissions for the year 2015. Because I understand my predecessors have not submitted a report of this type previously, I will discuss trends in the bar exam over the past three years.

#### I. TRENDS IN BAR PASSAGE SINCE THE ADOPTION OF THE UBE IN MONTANA

The results from the July 2015 bar examination show a passing rate statewide at a historic low of 62%, down from 64% in July 2014. Recent graduates of the University of Montana School of Law ("School of Law") taking the exam for the first time passed at a rate of approximately 68%, also a historic low, and down from 69% in July 2014. For comparison purposes, the passing rate for School of Law graduates taking the exam for the first time during the 10-year period 2003-2012 averaged about 88%. While passing rates have fallen around the country, Montana has seen the steepest overall declines, as the following chart shows:



The precipitous decline in the passing rate nationwide has caused a great deal of speculation about causes. The President of the National Conference of Bar Examiners (NCBE), Erica Moeser, has declared that the low passing scores are the result of law schools accepting less able students, while a number of law school deans have reacted strongly to those statements. In an effort to diagnose the reasons why School of Law graduates have failed at higher than normal rates and to identify possible responses, the School of Law formed a Bar Exam Working Group of faculty and administrative staff in the fall of 2015. The Working Group has concluded its diagnostic efforts. In the remainder of this memorandum I will summarize the findings and offer some tentative suggestions for further consideration. At the outset, I want to emphasize that, based on the analysis conducted by our Working Group, I believe that the NCBE produces high-quality testing instruments, using state-of-the-art psychometrics to ensure reliability and consistency. Moreover, I believe both the NCBE leadership and staff and the Montana Board of Bar Examiners work with diligence, competence, and integrity in creating and grading the bar exam.

## II. WHY HAS THE PASSING RATE FALLEN?

A number of developments in recent years, both in the bar exam administered by the State of Montana and in the academic credentials of the graduates taking the exam, could have impacted the passing rate. I will describe both. For the sake of brevity, I will not go into all the details of how the bar exam is created, evaluated, and scored. A full explanation of the bar exam is provided in the Petition for Adoption of Uniform Bar Examination submitted to the Supreme Court by the Montana Board of Bar Examiners, attached to this memorandum.

### A. *Changes to the Bar Exam*

Beginning with the July 2013 administration, the State of Montana made several significant changes to its exam. Previously, the exam had consisted of four components: the multistate bar exam (MBE), a multiple choice test that as of 2013 covered Contracts, Torts, Property, Criminal Law, Constitutional Law, and Evidence; the multistate essay exam (MEE), a set of six essay questions covering a broader range of traditional law school subjects; the multistate performance test (MPT), an assessment tool designed to replicate certain aspects of the work a practicing lawyer might do; and a set of four essay questions specifically testing Montana law (MTEE). The first three components were and still are created by the NCBE, while the Montana essays were created by the Montana Board of Bar Examiners. The passing score required in Montana was 260 on a 400 point scale.

For July 2013, the MTEE was dropped from the exam, leaving only the three components created by the NCBE—the MBE, the MEE, and the MPT. Together, these components make up the Uniform Bar Exam, or UBE. As of July 2015, Montana was one of 14 states using the UBE, with several others having plans to begin using the UBE in the coming years. With the modification of the exam to eliminate the 25% of the score allocated to the MTEE, each of the three UBE components gained in importance, with the MBE going from 35% to 50% of the total score, the MEE going from 25% to 30% of the total, and the MPT going from 15% to 20% of the total. As had been the prior practice, members of the Montana Board of Bar Examiners continue to grade both the MEE and the MPT, using rubrics created by the NCBE.

In addition to the adoption of the “pure” UBE, Montana raised the required passing score from 260 to 270 beginning with the July 2013 administration. Further, with the July 2015 administration, an additional subject area, Civil Procedure, was added to the MBE.

The reasons for these changes were outlined in the attached *Petition for Adoption of Uniform Bar Examination* submitted to the Supreme Court by the Montana Board of Bar Examiners. The Board expressed its confidence in the testing methodology developed by the NCBE and noted the advantages

to test-takers of the transferability of scores among jurisdictions using the UBE. The Board saw little harm in dropping the MTEE, noting that a four-question essay test on limited areas of Montana law does not assure broad familiarity with Montana law and that the UBE appropriately tests for the standard of minimum competence.

With respect to the increase in the passing score, the Board was motivated by the fact that most other jurisdictions required higher scores, seeing “no sound reason why Montana should continue with a low minimum passing score.” The Board expressed concern that the low passing score might result in unqualified lawyers coming to Montana to practice: “The Board is aware, anecdotally, of applicants unsuccessful in other states searching for a low-score, high-pass rate state in which to take the exam and become licensed. The Board does not wish for Montana to retain that reputation.”

#### *B. Changes in the Academic Credentials of School of Law Graduates*

The Great Recession and its aftermath have had profound effects on law schools nationwide. Immediately after the recession hit, applications to law schools surged to an all-time high, as college graduates facing a bleak job market sought to ride out the slump. When the recession lingered, and its effects were felt in the job market for law graduates, applications declined precipitously. They are now more than 40% below the 2010 peak.

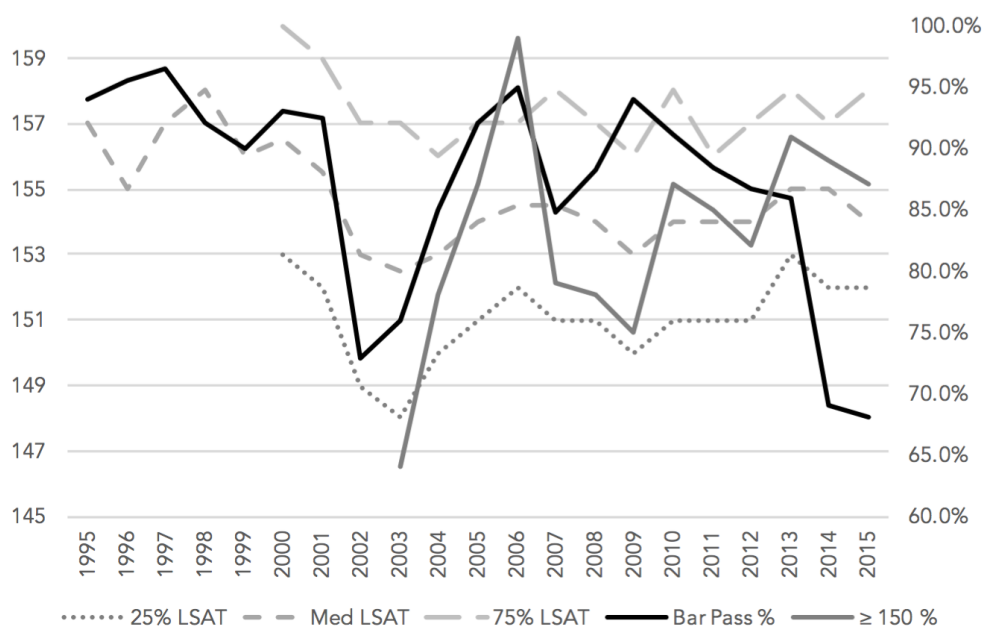
As applications fell, enrollments also fell, as law schools sought to maintain their admissions standards. Enrollments have not fallen as fast as applications, however, so that overall the entering numeric profile of the students admitted to law schools around the country has declined (lower LSAT scores and lower undergraduate GPAs). There is a well-documented correlation between these entering credentials—especially LSAT—and bar pass rate, so we would expect to see bar pass rates fall as the LSAT profile of entering law students falls. (When Erica Moeser and others say that the cause of the lower passing rates is “less able” students, that is what they are referring to.)

Our Bar Exam Working Group analyzed the entering credentials of our students to determine the extent to which the decline in passing rates could be attributed to changes in our students’ entering credentials rather than to changes in the exam. Given the established correlation between LSAT and bar passage generally, the Working Group focused on the LSAT. The working group began by looking for trends in our students’ LSAT profile overall. It then examined bar results for students at specific LSAT scores to identify any correlations between specific LSAT scores and bar performance. The Working Group found a relatively clear demarcation at the 150 level. For the graduating classes from 2013-2015, 79% of our graduates with LSATs at 150 or higher passed, while 46% of our graduates with LSATs of 149 or lower failed. The Working Group then compared the LSAT profiles of our graduating classes since 2000 with our bar results to assess whether the recent plunge likely resulted from enrolling students with weaker LSAT credentials. While we found that the LSAT profile of our students has fallen from its peak of a few years ago, it is well within our historic norms. The following chart depicts the relationship between the LSAT profile and bar pass rate at the School of Law over the past 20 years. The chart shows the LSAT scores of our entering students by quartile, plus the percentage of students at 150 or higher,\* plotted against the passing rate:

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\* We have incomplete data for the year 2006. The percentage of graduates at 150 or higher for that year is extrapolated from the quartile LSAT data for that year.

UM Bar Pass vs. LSAT Quartiles  
(1995 - 2015)



As we would expect, the chart confirms that our bar pass rate has historically fluctuated in sync with changes in our bottom LSAT quartile and in the percentage of students scoring 150 or higher. But the pattern breaks down beginning in 2013. Up to that point, those two LSAT lines always moved in the same direction as the bar pass line. But in 2013, those lines went up—reflecting a class with stronger LSAT credentials than the previous year—yet the passing rate declined. In the years that followed, the discrepancy became much more pronounced. The graduates from 2014 and 2015 had LSAT credentials similar to or better than the graduates of previous years, but failed in much higher numbers than their credentials would predict based on past experience. In other words, while we would expect the passing rate for School of Law graduates to have declined, the unprecedented rates of failure seen in 2014 and 2015 cannot be explained by students' LSAT credentials.

*C. Conclusion: The Increased Passing Score Is Likely the Primary Factor in the Declining Passing Rate*

The evidence strongly suggests that, at least for School of Law graduates, the changes in the bar exam have driven the historic decline in the passing rate over the last two years. Neither the curriculum nor the method of instruction at the School of Law have changed significantly in the past five years. The School of Law still maintains a greater number of required core courses than all but a handful of law schools, and still requires all students to take a clinic, as it has for more than two decades. There has been turnover in the faculty, as is inevitable, but hiring standards have not changed. The School of Law still requires substantial practice experience for all faculty, as it has for many years. Bar courses are overwhelmingly taught by tenured and tenure-track faculty.

If the students compare with previous groups and the course of instruction has not changed, the cause of the unprecedented drop in passing rates must be the changes in the exam. Because multiple changes were made to the exam, we cannot be certain which one or ones had the greatest impact. But it seems likely the rise in the passing score has been the single greatest factor. The NCBE uses sophisticated analytics to ensure that scores are consistent from year to year, regardless of the difficulty

of the questions. So the exam is not “harder” than it used to be, in the sense of causing more people to fail. And the students were taking all three components of the UBE prior to 2013. The only change in the exam composition was the elimination of the Montana essays. We have no information to suggest that dropping the Montana essays would produce a large overall drop in scores.

It is possible that the increase in the share of the exam associated with the MBE would cause scores to drop. If School of Law graduates perform poorly on multiple choice tests (for any reason), then a change that increases the importance of the MBE could adversely affect them. The Bar Exam Working Group analyzed the scores of our graduates on the July 2015 exam to test that possibility. It found no patterns that would suggest the MBE caused the decline in passing scores. Only a handful of graduates who failed earned a passing score on either the written or MBE part of the exam (three and five, respectively).

That leaves the increase in the passing score as the likely cause. Indeed, when the increased score was proposed, data from the NCBE suggested a decline along the lines we have seen. Noting the caveat that increasing the passing score could affect how students prepare for the exam, the NCBE reported that a change from 260 to 270 would have had the following effects for the exam administrations from February 2006 through July 2010:

	Pass Rate 260	Pass Rate 270
Feb 2006	71%	66%
July 2006	84%	74%
Feb 2007	81%	71%
July 2007	76%	67%
Feb 2008	76%	53%
July 2008	86%	73%
Feb 2009	72%	62%
July 2009	80%	71%
Feb 2010	58%	52%
July 2010	85%	76%

Based on those numbers, we would expect that an increase in the passing score from 260 to 270 would result in a decrease in the passing rate of roughly 10 percentage points. The numbers for the past two summer administrations are consistent with that data. Here are the percentages actually passing at 270 and the percentages that would have passed had the score remained at 260 for all takers in the July 2014 cohort and for first-time takers in the July 2015 cohort:

	Pass Rate 260	Pass Rate 270
July 2014 (all takers)	76%	64%
July 2015 (first-time)	79%	68%

In sum, the precipitous decline in the passing rate over the past two years appears to be attributable to a combination of two factors. First, based on the lower LSAT credentials of law students nationwide and in Montana over the past few years, we would expect a decline in the passing score into the mid-70 percent range. That rate would have been low by historical standards, but not unprecedented. Instead, the passing rate fell into the low-60 percent range, well below any July administration we have seen. That drop appears to be primarily the result of the rise in the passing score.

### III. IS THERE A PERSUASIVE JUSTIFICATION FOR THE INCREASE IN THE PASSING SCORE AND RESULTANT DECLINE IN THE PASSING RATE?

In recommending the increase to a 270 passing score, the Board of Bar Examiners started from the position that Montana should not have a passing score lower than most other jurisdictions. That position evidently arose out of concerns that a perception might grow that Montana has low standards and that Montana could become a haven for unqualified attorneys. (To give some context, six states currently have a passing score of 260 or lower, while thirty-one states currently have a passing score of 270 or higher.)

The problem with those rationales is that we have no basis for concluding that a passing score of 270—or of 250 or of 280—on the bar exam accurately predicts ability as an attorney. The Chair of our Working Group and I asked the Board of Bar Examiners at a meeting in October 2015 whether they had evidence that applicants who score between 260-269 on the bar exam perform less well as attorneys than those who score above 270, as might be demonstrated by lack of employment, bar complaints, legal malpractice claims, or any other metric. We were told there is no evidence of such an effect. And it would be surprising if there were such an effect. At most, the bar exam measures cognitive legal analytical ability. It does not and cannot measure critical skills a lawyer needs, including judgment, negotiation, legal research, fact investigation, oral advocacy, and many others. Moreover, the score cut-offs are arbitrary. Even conceding that the bar exam is a good measure of cognitive legal analytical ability, we have no way to know precisely what score indicates the minimum cognitive legal analytical ability needed to practice law effectively.

For more than two decades after the requirement that all new attorneys take the bar exam was adopted, Montana required aspiring lawyers to attain a score of 260 on the bar exam to be eligible to practice law in Montana. There is no evidence that the attorneys who scored between 260-269 during all those years lacked either the intellectual ability or professional judgment to practice law effectively in the service of this state. For the past three years, Montana has required a score of 270 for an aspiring lawyer to be eligible to practice law in Montana. As a result, over those three years, as many as two dozen graduates of Montana's only law school were barred or delayed in becoming lawyers in Montana for the sole reason that they graduated from law school at the wrong time. From the July 2015 administration alone, eight School of Law graduates failed with scores that would have enabled them to enter the profession three years earlier.

### IV. CONCLUSION & RECOMMENDATION

The Supreme Court's Order of January 30, 2013 directs the Dean of the School of Law to submit recommendations for rule revisions when necessary. The NCBE's Code of Recommended Standards for Bar Examiners, in paragraph 31, provides that "each jurisdiction should have an active committee on cooperation, consisting of representatives of the bar examining authority, the law schools, the judiciary, and the bar, which meets at least annually to consider issues relating to legal education, eligibility, and admission to the bar." Based on conversations with representatives of the Montana Board of Bar Examiners, the Montana Supreme Court, and the State Bar of Montana, I believe there exists an interest

in convening such a committee to consider these issues. My recommendation is for the prompt formation of that committee. I commit the School of Law to active participation in such a committee.

In closing, I want to emphasize that as educators, all of us at the School of Law understand how difficult it is to create a fair and reliable mechanism for assessing competence to practice law. We have genuine appreciation for the work—often done without recognition or thanks—that the members of the Board do. We believe that we share with the Board, and with the Supreme Court, the goal of ensuring that the State of Montana admits capable attorneys with the ethical standards and the dedication to the people of Montana to serve the legal needs of this state. We look forward to working with all interested parties to achieve that goal.

**CC:**       Jacqueline T. Lenmark, Esq.  
              Matthew B. Thiel, Esq.