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*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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IN THE SUPREME COURT OF THE STATE OF MONTANA

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IN RE THE RULES FOR ADMISSION TO THE  
BAR OF THE STATE OF MONTANA

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COMMENTS OF THE STATE BAR OF MONTANA

The State Bar of Montana submits the following comments in response to the Court's April 20, 2016 Order, which opened a public comment period on the ad hoc committee's recommendation to change the passing score of the Montana bar exam from 270 to 266.

The Board of Trustees met via conference call on May 10, 2016, to discuss the ad hoc committee's recommendation. The Trustees did not reach consensus as to whether to support or oppose the committee's specific recommendation. A poll of Trustees showed that several support the committee's recommendation to lower the passing score, a nearly equal number are opposed, and others are neutral and/or would defer to the ad hoc committee. Nonetheless, the Trustees agreed to submit comments regarding issues that may arise as a result of implementing a lower passing score.

## **The Problem: Decreasing Bar Passage Rates**

Since 2013, when the Court adopted the Uniform Bar Exam (UBE) and raised the passing score from 260 to 270, the passage rate for the Montana Bar Exam has steadily decreased. According to statistics provided by State Bar Admissions Administrator Kathie Lynch, the passage rate for the bar exam dropped from 86% in July 2013 to 67% in February 2015, which was slightly up from the 62% passage rate in July 2015. About half of those taking the Montana Bar Exam graduated from the Alexander Blewett III School of Law at the University of Montana, and half attended law school elsewhere. The passage rates for both groups are comparable.

To better understand the declining bar passage rates of its graduates, the Blewett School of Law formed a Bar Exam Working Group comprised of law school faculty and staff. Dean Paul Kirgis submitted a report to the Court in January 2016 in which he provided a detailed overview of the changes to the bar exam that occurred in 2013, and the diagnostic conclusions reached by the Bar Exam Working Group. Memorandum from Dean Paul Kirgis to Chief Justice Mike McGrath (Jan. 14, 2016).

The working group determined that although the LSAT profile of incoming law students has fallen slightly since 2000, it is “well within [the law school’s] historic norms.” *Id.* at 3. More importantly, the working group determined that the

UM graduates who took the bar exam in 2014 and 2015 “had LSAT credentials similar to or better than graduates of previous years, but failed in much higher numbers than their credentials would predict based on past experience.” *Id.* at 4. The report explained that neither the curriculum nor the method of instruction had changed significantly in the past five years. *Id.* Thus, the report concluded, “[i]f 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.” *Id.* Although “multiple changes were made to the exam” in 2013, the report concluded that the rise in the passing score is probably the single greatest factor in driving down the passage rates. *Id.*

When Montana adopted the UBE, the bar exam changed primarily in the weighting of various components. Even before the UBE, Montana had administered the MBE (multiple choice), MEE (essay), and MPT (performance test). (The Multistate Performance Test (MPT) provides examinees with facts and law from a fictional jurisdiction and asks them to draft a memo, write a brief, or perform some other written lawyering task.) Becoming a UBE jurisdiction meant that Montana was not only required to administer the MBE, MEE and MPT but also to weight each component as specified by NCBE.

The four one-hour essays drafted by Montana lawyers were eliminated altogether, although the Montana bar examiners do not deduct points if examinees

apply Montana law. The multiple-choice MBE went from being 35% of an applicant's score to 50%, the six half-hour essays drafted by the National Council of Bar Examiners (NCBE) are now weighted 30%, and the MPT went from 15% to 20% of an applicant's score. Thus, half of an examinee's score is based on the multiple-choice MBE, and half is based on the written MEE and MPT. The Montana bar examiners grade the MEE and MPT on a scale of 1-6, and those scores are scaled with the nationally graded MBE to produce a final score.

The primary differences in the Montana bar exam pre- and post-UBE, then, are the increased weight of the multiple-choice questions, the elimination of the four one-hour essay questions specific to Montana law, and the increased passing score. As noted, UBE jurisdictions have no discretion in determining the components of the UBE or their weight; every UBE jurisdiction must administer the same test, and weight it the same way.

The passing score, however, is not mandated by NCBE. Each jurisdiction determines its passing score, and NCBE offers no counsel regarding an ideal passing score. About half of the current UBE jurisdictions have a passing score of 270 or higher, and about half have a passing score of 260-270. Within our region, North Dakota's passing score is the lowest at 260. *See* Memorandum from Greg Murphy to State Bar Board of Trustees 8-9 (May 10, 2016), attached as Exhibit A. Wyoming, Washington, and Utah are at 270, while Idaho is at 280 but is seeking to

lower it to 272. Iowa, Kansas, New Mexico, New York, and D.C. -- all UBE jurisdictions -- have set their passing scores at 266. *Id.*

### **The Ad Hoc Committee**

The State Bar's representative to the ad hoc committee, Beth Brennan, reported to the Trustees that the committee met for four hours in Helena on March 9, 2016, and engaged in an in-depth discussion of the bar exam and the passing score. No one at the meeting presented evidence that an examinee's bar exam score is correlated with problems related to character and fitness, disciplinary problems, or malpractice. In fact, Montana's passing score was 260 until 2013 with no untoward effects – and prior to that, all UM law school graduates were admitted under the diploma privilege.

Additionally, before the UBE was instituted in 2013, successful bar examinees were not told their scores, which means no lawyers (other than those who have served as bar examiners) have any idea how close they may have been to the minimum passing score. According to Greg Murphy, a Billings lawyer who formerly chaired the Montana Board of Bar Examiners and the NCBE, and now serves on the NCBE's Uniform Bar Examination Committee, "A larger share of [Montana] graduates tends to score at or immediately around the minimum passing line." Murphy Memorandum at 7. This accounts for the unexpected impact of the change in passing score on bar passage rates. *Id.*

## **The Ad Hoc Committee's Proposal**

The ad hoc committee has recommended that the Court change the passing score from 270 to 266, or from 67.5% to 66.5%. According to statistics provided by Kathie Lynch, the Bar Exam Administrator, this 1% change in the passing score would have changed the bar exam passage rates from 2013 to now in the following ways:

<b>MT Bar Exam Date</b>	<b>% passing at 270</b>	<b>% passing at 266</b>	<b>% passing at 260</b>
July 2013	86%	89%	92%
Feb. 2014	67%	79%	87%
July 2014	64%	69%	76%
Feb. 2015	74%	81%	86%
July 2015	62%	64%	72%
Feb. 2016	67%	72%	76%

Since July 2013, 29 bar examinees have scored 266-269. Of those, according to Ms. Lynch, 17 have since taken and passed the bar exam with a score of 270 or better. Of the 12 who scored 266-269 and have not since passed the Montana bar exam, five are UM graduates and seven are not.

The ad hoc committee discussed whether someone who failed the bar with a score of 266-269 could apply for admission without having to retake the exam. As noted in the committee's report, the committee believed the answer was supplied by the Court's existing rules on admission, which allow applicants from other UBE jurisdictions to transfer their scores to Montana for up to three years after taking

the UBE elsewhere. *See* Rules for Admission I.D.1.a. The committee’s thinking was if an applicant from another UBE state could apply for admission to Montana with a score of 266 from a July 2013 exam, then a Montana applicant should be able to do the same thing.

In fact, though, if the Court decides to lower the passing score and maintain its rules allowing UBE scores to transfer for up to three years after the score is earned, it may wish to amend the language of the Rules for Admission to clarify that Montana applicants may apply using a previously obtained score that is equal to or higher than the new passing score. Section I.D.1 specifically applies to “[a]n applicant who has taken the Uniform Bar examination *in another jurisdiction*.” Rules for Admission I.D.1 (emphasis added). Similarly, section III.E.1 states that “a Montana Bar applicant’s score on the UBE *earned in another jurisdiction* may be accepted and considered valid for a period of three years.” *Id.* III.E.1 (emphasis added).

### **The Board of Bar Examiners’ Letter**

The Board of Bar Examiners urges the Court not to implement any change in the passing score until the February 2017 examination. It states that this will ease the administrative burden on both State Bar admissions staff and on the Commission on Character and Fitness. State Bar staff members have noted that the July bar exam will coincide with the deadline to “transfer” a score from 2013. If

the Court decides to lower the score and maintain the three-year transferability, a grace period of 3-4 months is recommended to ensure implementation of the changes. The State Bar also recommends that the Court provide its commission staff with guidance on the requirements for approval of applicants who may be admitted using prior UBE scores.

### **A Standard Setting Exercise**

In a memo to the Justice Rice and the ad hoc committee, Greg Murphy recommended that the committee consider a standard setting exercise to determine the ideal passing score. Murphy Memo at 10-12. One such exercise is the “Informed Judgment Method,” in which a panel of judges or stakeholders applies a “holistic review” of the test to determine a passing score. *Id.* at 11. In some ways, the ad hoc committee was such a panel, as various stakeholders were represented at the meeting. Nonetheless, the committee discussed at some length the possibility of hiring a consultant to develop a standard setting exercise, and ultimately decided the expense did not justify what is ultimately a matter of judgment by the Montana Supreme Court.

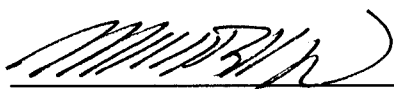
### **Conclusion**

The State Bar Board of Trustees recognizes the controversial nature of the committee’s proposal – controversy that was evident in its conference call of May 10. Based on data from Kathie Lynch, lowering the score from 270 to 266 before

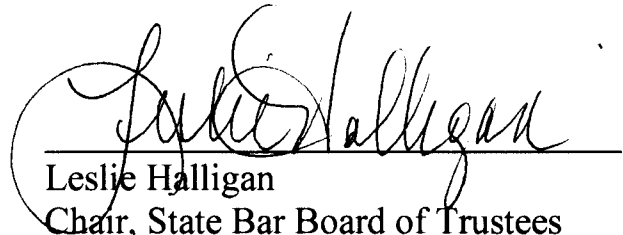


the end of July and maintaining the transferability of a prior score for three years would result in 12 prior examinees who scored 266-269 and would be eligible for admission. It is unknown how many other applicants would apply to the Montana bar for admission upon learning their UBE score of 266-269 would make them eligible for admission. State Bar staff members have noted that the July bar exam will coincide with the deadline to “transfer” a score from 2013. If the Court decides to lower the score and maintain the three-year transferability, a grace period of 3-4 months would ease the burden on State Bar staff.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of May, 2016.



Matthew Thiel  
State Bar President



Leslie Halligan  
Chair, State Bar Board of Trustees