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

Case Number: AF 11-0244

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 11-0244

IN RE  
THE RULES FOR ADMISSSION TO  
THE BAR OF MONTANA

COMMENT OF  
ANTHONY JOHNSTONE

This Comment addresses the Court's order of April 20, 2016 accepting public comment on the *Ad Hoc* Committee's recommendation to lower the passing score of the Montana Bar examination from 270 to 266. *See* April 20, 2016 Committee Report ("Report"). I write as a twelve-year active member of the Montana Bar admitted by exam who was previously admitted to the New York Bar by exam. I also serve on the faculty of the University of Montana's Blewett School of Law, where I am chair of the Strategic Planning Committee, co-chair of the ABA Accreditation Self-Study Committee, a member of the Bar Exam Working Group. Finally, although I did not attend the School of Law, I am admittedly a partisan of its students and graduates—from the beneficiaries of the diploma privilege all the way up to those who will graduate at tomorrow's commencement. This Comment is written on my own behalf, and does not necessarily reflect the views of the School of Law's administration or faculty.

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## **I. INTRODUCTION**

The Court's move to the Uniform Bar Examination ("UBE") was a sound move, supported by the evidence and vindicated by experience. The adoption of a passing score of 270, however, was neither supported by evidence at the time nor vindicated by experience since its adoption. In retrospect, it was an untested experiment to combine the well-supported adoption of the UBE with the less-supported adoption of the 270 passing score in Montana. Rather than accepting a compromise passing score of 266, the Court should keep the Uniform Bar Exam and return the passing score to 260.

## **II. BACKGROUND**

### **A. The Basis for the Uniform Bar Exam**

The Board of Bar Examiners' Petition for Adoption of the Uniform Bar Examination argued in considerable detail the merits of the UBE.<sup>1</sup> First, it was endorsed by the Conference of Chief Justices and ABA Section of Legal Education and Admissions to the Bar, and was well known to several justices of the Court.<sup>2</sup> Second, the UBE is superior to other tests because its development process "produces testing items of the highest quality."<sup>3</sup> Third, the UBE offers score transferability and local control, allowing Montana to retain control of admission

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<sup>1</sup> See April 29, 2011 Board Petition ("Pet.").

<sup>2</sup> See Pet. at 2-5.

<sup>3</sup> Pet. at 5-7.

standards including the passing score.<sup>4</sup> In adopting the UBE, the Court explained “these tests represent the state of the art in bar examining to discern whether an applicant has absorbed and understands generally recognized principles of law and can apply legal methods of reasoning to come to acceptable conclusions.”<sup>5</sup>

### **B. The Basis for a Passing Score of 270**

In contrast, the Board’s Petition spent little more than a page addressing why “[t]here appears to be no sound reason why Montana should continue with a low minimum passing score.”<sup>6</sup> The Petition asserted that Montana maintained a reputation for admitting “applicants unsuccessful in other states searching for a low-score, high pass-rate state in which to take the exam and become licensed.”<sup>7</sup> Notably, the Petition explained a key element of this purported reputation was Montana’s relatively high pass rate of around 90%, which “exists because Montana has a comparatively low passing score.”<sup>8</sup> The Board’s Response to comments added its judgment “based on nearly a hundred years of combined experience and the reading and grading of thousands of exam answers—the 130 score is too low.”<sup>9</sup> Moreover, the Board anticipated that “[r]aising the passing score by 2 1/2%, as proposed, does not necessarily mean that more people will fail,” suggesting that

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<sup>4</sup> See Pet. at 7-10.

<sup>5</sup> July 3, 2012 Order (“Order”) at 2.

<sup>6</sup> Pet. at 10.

<sup>7</sup> See Pet. at 11.

<sup>8</sup> *Id.*

<sup>9</sup> August 16, 2011 Board Response at 5 (“Resp.”).

examinees would simply spend more time preparing for the exam.<sup>10</sup> In adopting the passing score, the Court explained “setting the score at 135 (270 on the 400-point scale of the UBE) would bring Montana’s minimum passing score more in line with other jurisdictions.”<sup>11</sup>

### III. ANALYSIS

The bar exam is only one of five qualifications necessary to practice law in Montana. In addition to passing the bar exam, successful applicants to the state bar must graduate from an ABA-accredited law school, prove their character and fitness to the Character & Fitness Committee of the State Bar, pass the Multistate Professional Responsibility Exam, and attend the Montana Law Seminar.<sup>12</sup> The bar exam is no more important a qualification to law practice in Montana than a legal education, character & fitness, ethics, and familiarity with local law, yet it is the most uncertain factor of whether an applicant will succeed in admission to the bar.

Notwithstanding the apparently minor 2.5% upward revision of the passing score from 260 to 270, the interaction of the increased passing score with the adoption of the UBE in Montana led to a drop in overall bar passage rates by nearly 25% from 90% to 65%, unprecedented on a national scale.<sup>13</sup> No one

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<sup>10</sup> Resp. at 5.

<sup>11</sup> Order at 3-4.

<sup>12</sup> *Rules for Admission to the Bar of Montana*, No. AF 11-0244 (Dec. 17, 2015).

<sup>13</sup> See January 14, 2016 Dean Kirgis Memorandum to Chief Justice McGrath (“Memo”) at 1, 5.

predicted such a severe decline from such a seemingly minor policy change.

Mustering detailed state-specific quantitative evidence for the first time in this policy discussion, Dean Kirgis concluded the increased passing score likely is the primary factor in the sharply declining passage rate.<sup>14</sup> Despite a national trend of declining law student indicators, there is no evidence of a decline in School of Law graduate indicators over the relevant period.<sup>15</sup>

In view of this unforeseen drop in bar admissions, the *Ad Hoc* Committee recommends reducing the passing score “based on Montana’s experience and expertise, the realities of current legal education and the School of Law’s posture in particular, a survey of other states, and a consideration of bar exam trends, including psychometrics and the validity of the UBE.”<sup>16</sup> The Committee recommends a “Montana solution,” compromising at a new passing score of 266.<sup>17</sup>

Based on anonymous UBE scores from the July 2014 and July 2015 exams, this change to 266 would increase the first-time pass rate on a typical UBE less than 5%. A return to the original passing score of 260 would increase the first-time pass rate by roughly 10% from 70% to 80%. This is a small sample to be sure, and the School of Law has been unsuccessful in obtaining more detailed data, including

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<sup>14</sup> Memo at 5.

<sup>15</sup> See Memo at 4.

<sup>16</sup> Report at 6.

<sup>17</sup> Report at 4, 6.

information tied to law school performance and the breakdown of the relatively higher scores from July 2013.<sup>18</sup> Given the rigor of the UBE, under either passing score it is unlikely the pass rate would return to the roughly 90% that prevailed under the former Montana bar exam.

Since the Court again faces a line-drawing exercise without an objective criterion for competency, it may be helpful to reframe the question around pass rates instead of passing scores. With a pass rate of around 90%, the former Montana Bar Exam screened out the bottom 10% of takers with a passing score of 260 (about 16 takers) assuming an annual cohort of 160 takers.<sup>19</sup> According to the calculations above, with the same passing score of 260 the UBE likely would screen out the bottom 20% of test takers (about 32 takers). The UBE likely would screen out at least the bottom 25% of takers with a passing score of 266 (about 40 takers). The current UBE with a passing score of 270 screens out at least the bottom 30% of test takers (about 48 takers).<sup>20</sup>

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<sup>18</sup> To the extent there are unknowns, an incomplete record favors a more cautious approach and reconsideration rather than maintenance of the highly disruptive passing score increase.

<sup>19</sup> The number of first-time takers has been steadily declining from 205 in 2012 to 135 in 2015, but the number of admissions by transferred UBE score increased to 51 in 2015, partially offsetting the decline. See NCBE, *The Bar Examiner* at 13 (March 2013); NCBE, *The Bar Examiner* at 21, 34 (March 2016). The cohort of 160 is a conservative estimate of annual first-time takers and score transfers impacted by a change in the passing score, assuming some share of transfers practice in Montana); a small number of repeat takers also would be impacted.

<sup>20</sup> These first-time passing rates are consistent with, but higher than, the overall passing rates analyzed in the State Bar's Comment. See State Bar Bd. of Trustees' Comment (May 17, 2016). First-time passing rates may be a more appropriate indicator of the passing score's costs on excluding takers from admission for a year or more even if they retake and pass a later exam.

Thus, the UBE with a passing score of 270 screens out an additional 32 potential Montana lawyers every year relative to the former Montana Bar Exam. Half of those takers are screened out as the result of the move to the UBE itself.<sup>21</sup> Half of those takers are screened out as a result of raising the passing score from 260 to 270. This is a significant loss of human capital, income, and access to legal services that otherwise would have been realized for the decades the prior exam was administered. The Court's Access to Justice Commission recently concluded that there was a significant gap in the demand for legal services to underserved communities and the supply of lawyers serving these communities.<sup>22</sup> The screening out of dozens of potential lawyers annually under the UBE and the increased passing score further shrinks the supply available to meet these demands.

The benefits of the UBE in terms of rigor and uniformity are established, and the Court had a rational basis to conclude these benefits outweigh the costs in terms of lost legal services. The remaining question is: what are the benefits from the passing score increase, and are they worth the additional costs? Unlike the documented benefits of the UBE, the benefits of the increased passing score largely were assumed and untested. Three years on, we can test those assumptions.

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<sup>21</sup> The Petition's attribution of Montana's formerly high pass rate to the passing score is only partially correct. The overall decline in scores suggests the Montana essay component also played a significant role in driving the high pass rate, which explains the decline in the pass rate even if the passing score held at 260.

<sup>22</sup> See Montana Supreme Court, Access to Justice Commission, *The Justice Gap in Montana: As Vast as Big Sky Country* (2014).

**A. Are Takers Who Score Under 270 Incompetent?**

The Board's Response to comments on its Petition claimed "the 130 [260 on the UBE scale] cutoff score is too low," because "examinees scoring in the 130 range clearly struggle with understanding and expressing basic concepts and principles of law."<sup>23</sup> This claim that takers scoring under 270 on the UBE are fundamentally incompetent would be astounding if true. Under the Montana Bar Exam, around 144 (90%) of annual takers passed. Under the UBE and a 270 passing score, around 112 (70%) of annual takers now pass. This would imply that under the old exam, around 32 takers or nearly a quarter of those who passed the bar exam every year were incompetent, adding up to nearly one thousand incompetent lawyers over three decades. I am aware of no evidence of such widespread incompetence in one out of four lawyers admitted in Montana. Nor is there evidence of any decline in the competence of lawyers practicing in Missouri, Minnesota, New Mexico, or North Dakota, all states with a 260 passing score under the UBE.

The sole basis for assessing as incompetent a substantial share of potential lawyers—and by implication, a substantial share of practicing lawyers admitted under the previous exam—is the Board's extensive experience reading and grading

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<sup>23</sup> August 16, 2011 Response at 5 ("Resp.").



essay exams.<sup>24</sup> But the Board grades only the written half of the exam, and the scores it awards are scaled based on the multiple-choice MBE component. So it would be surprising if any grader could discern the written component of a passing exam at 270 from that of a failing exam at 260. Indeed, in the two past July examinations for which detailed data is available (238 exams), the written scores predicted 10 false positives (10 takers had “passing” written scores, but failed the exam) and 15 false negatives (15 takers had “failing” written scores, but passed the exam). Such an “error” rate of just over 10% is commendable overall and suggests the Board’s rigor in scoring the UBE; however, even this slight imprecision would overwhelm any accurate justification for a 2.5% swing between 260 and 270 on a 400-point scale. Of 29 written essays from July 2014 and July 2015 that scored within the critical range between 130 and 135 (the equivalent of the 260 and 270 total scores), 12 exams passed with a 270 score, 11 exams would have passed with a 260 score, and 6 exams would have failed under either passing score. Without more, these grading anecdotes cannot add up to reliable data to support an increased passing score.

Although the Board is careful to avoid the comparison, other comments suggest the scaled 260 passing score (65% of 400 points) is equivalent to a criterion-referenced “D” grade for unsatisfactory work in law school. There is no

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<sup>24</sup> *Id.*

useful comparison between individual course grades and bar exam scores assessing a dozen different subjects over twelve hours. Indeed, the most demanding bar exam passing score in the country (Delaware's 290) is equivalent to a C-minus on a criterion-referenced scale. The apparently higher standard of 270 still would rank a straight D on a criterion-referenced scale at the School of Law, just like the passing scores of 266 and 260. Most passing scores fall below the C-or-higher good standing requirements at most law schools when placed on a percentage-based scale. Percentages alone tell us little about passing scores.

Perhaps the most practical way of determining whether a passing score accurately divides the competent from the incompetent is to consider the employment market. Legal employers, many of whom hire law students as interns and all of whom draw on information from academic transcripts, interviews, and work portfolios, arguably make the most informed judgment of a new lawyer's competence. Graduates of the School of Law historically have enjoyed strong placement rates, mostly with Montana legal employers. For the three years prior to Montana's increase in passing score, an average of 69% of Montana graduates placed in legal jobs, compared with 58% of Idaho graduates and 69% of Wyoming graduates.<sup>25</sup> In the first three years after the UBE, and under a better economy, an

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<sup>25</sup> ABA Employment Summaries, *available at* <http://employmentsummary.abaquestionnaire.org>. Here, "legal jobs" means long-term, full-time, bar required or J.D. advantage jobs, nine months

average of 75% of Montana graduates placed in legal jobs, compared with 77% of Idaho graduates and 70% of Wyoming graduates.

Legal employers in our region apparently see no difference in lawyers admitted under a passing score of 260 (pre-UBE Montana) and a passing score of 270 (post-UBE Montana and Wyoming) or 280 (Idaho). Yet the increased passing score considerably narrows some Montana graduates' job prospects. Of the 49 graduates who passed the July 2015 UBE in Montana, 46 found legal jobs by April of this year.<sup>26</sup> Of the other three, two had entered LLM programs and the last had relocated to the West Coast and was looking for work there. In other words, as a practical matter, virtually every Montana graduate who passed the bar found work. In contrast, the overwhelming majority of those who failed the bar did not find work or, more troublingly, had accepted offers or placed in jobs that they had to leave after failing the bar. Given the virtually full employment of Montana graduates who pass the bar, the bar exam is screening out at least a few graduates (from Montana and elsewhere) who are employed, otherwise qualified for admission, and likely would have passed the bar exam in prior years, all without any evidence—other than a UBE score between 260 and 270—that those graduates are incompetent to practice law.

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after graduation. Including other employment and graduate study, the overall placement rate for Montana law graduates is closer to 80%. *See* <http://www.umt.edu/law/careerservices/placement>.

<sup>26</sup> Based on internal Blewett School of Law placement data.

## **B. Does a Score of 260 Attract Bad Lawyers?**

The Petition also asserted that Montana maintained a reputation for admitting “applicants unsuccessful in other states searching for a low-score, high pass-rate state in which to take the exam and become licensed.”<sup>27</sup> Notably, the Committee later consulted with an NCBE representative who advised that cross-state comparisons are not “particularly informative” because “applicant pools are different in each jurisdiction,” so they are not necessarily “apple to apple” comparisons.<sup>28</sup> This expert advice undermines the primary basis for raising the passing score: that Montana’s passing score was lower than some other states.

Still, the hypothesis that a lower passing score draws more out-of-state takers looking for an easier bar exam can be tested. If a state with a lower score systematically attracts inferior bar applicants who would not come to the state but for the lower score, we would expect that state to see fewer out-of-state exam takers when the score increased. According to NCBE and ABA data, 175 first-time takers sat for the Montana Bar Exam in its final July 2012 and February 2013 administrations under the 260 passing score, 75 of whom were Montana graduates, leaving 100 takers who came from out of state (57%).<sup>29</sup> The same data shows 183

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<sup>27</sup> Pet. at 11.

<sup>28</sup> Report at 4.

<sup>29</sup> NCBE data are collected at <http://www.ncbex.org/publications/statistics>; ABA data are collected at <http://www.umt.edu/law/careerservices/placement>.

applicants taking the UBE in its first July 2013 and February 2014 administrations under the 270 passing score, 68 of whom were Montana graduates, leaving 115 takers who came from out of state (63%). This increase in out-of-state takers from 100 to 115 (15%) *after* the increased passing score is inconsistent with the hypothesis that a lower passing score attracted takers who did not think they could pass the bar in other states. Starting in 2014, out-of-state takers fell, but not because they were dissuaded by a higher passing score; instead, more than half of out-of-state applicants now are admitted through transfers of UBE scores, and as of 2016 many more out-of-state lawyers may be admitted on motion. The new UBE score transferability and admission on motion policies, not the old passing score policy, appears to attract more out-of-state lawyers to Montana.

Another approach to this question considers a cross-state comparison. Again, if a 260 passing score attracted out-of-state lawyers who would not take the exam in states with higher passing scores, we should see an effect in those states. Montana and its neighbors Idaho, North Dakota, and Wyoming are rural western UBE states each with a single flagship public law school, but North Dakota has a 260 passing score while Idaho (280) and Wyoming (270) have higher passing scores (Idaho also has a provisionally accredited new private law school). Turning back to NCBE and ABA data for 2014 (the most complete available), of the “high” passing score states Idaho had 142 first-time takers, 68 from out of state (48%),

Montana had 155 first-time takers, 92 from out of state (59%), and Wyoming had 69 first-time takers, 31 from out of state (45%). North Dakota, a “low” passing score state, had 97 first-time takers, 47 from out of state (48%); recall Montana had 57% out-of-state takers in its most recent exams under a 260 passing score.<sup>30</sup>

Montana attracts more out-of-state takers than its neighbors with or without a “low” passing score. Perhaps this fact is better explained by the relative regional desirability of practicing law in Montana than by a slight change in the passing score. Or it may be explained by Montana’s historical lack of reciprocity for lawyers admitted to other state bars—a factor that would have inflated the pre-UBE out-of-state numbers, further diminishing any evidence of inferior lawyers swarming to the state for a low passing bar. It is even less likely that Montana would become a national bar exam of last resort beyond neighboring states, given that Montana has the lowest annual median wage for lawyers in the country.<sup>31</sup>

### **C. Does 270 Lead to Increased Preparation, Not Failures?**

The most surprising result of the increase in the passing score, based on the Board’s prior arguments, is the nationally unprecedented jump in the number of takers failing the bar exam in Montana. The Board anticipated that “[r]aising the

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<sup>30</sup> NCBE data are collected at <http://www.ncbex.org/publications/statistics>.

<sup>31</sup> Bureau of Labor Statistics, Occupational Employment and Wages: 23-1011 Lawyers (May 2015).

passing score by 2 1/2%, as proposed, does not necessarily mean that more people will fail,” because examinees would spend more time preparing for the exam.<sup>32</sup>

In retrospect, however, it may have been naïve to anticipate that exam takers would compensate for a higher passing score simply by spending more time preparing. Law students already invest substantial amounts of money for law school and bar review courses, and substantial amounts of time for academic performance and preparation for practice. To the extent a higher passing score requires additional bar preparation time, students must take that time from their legal education and early employment. So students engage in triage, taking less time to prepare for a career in practice so they can give more time to prepare for the bar exam. This is true not only for those few students most in need of remedial work, but also for at least half of every class. For any student who finds herself below the class median, the group most at risk of failing the bar exam, a 70% pass rate suggests a probability of failure unlike even an 80% pass rate.

These tradeoffs occur at the law school level too. Although graduates of the School of Law typically account for less than half of the first-time bar exam takers in Montana, and these graduates generally have performed as well as graduates of other law schools on the Montana exam, the increased passing score requires triage in the curriculum. Teaching to the test is becoming even more urgent given the

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<sup>32</sup> Resp. at 5.

ABA's current consideration of an accreditation standard requiring "[a]t least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation."<sup>33</sup> Recent repeat pass rates fall close to that line.

When a law school responds with a targeted bar exam preparation course, as the School of Law has, it necessarily replaces other courses that may be more relevant to practice. The roughly half of the graduating class who take a bar prep course for law school credit (before the usual commercial bar prep course) take it to the exclusion of subjects not tested on the UBE: skills courses like Negotiations; access-to-justice courses like Child Advocacy; economic development courses like Natural Resource & Energy Law; courses with distinct relevance to the Court's work like Montana Constitutional law; or commonly practiced but untested areas like Insurance Law, Bankruptcy Law, Employment Law, or Administrative Law. Almost half of the top 20 substantive fields most commonly practiced by Montana lawyers are not tested on the UBE.<sup>34</sup> Law school prep courses may be a good idea

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<sup>33</sup> ABA Standard 316 Draft for Notice & Comment (March 2016), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20160325\\_notice\\_and\\_comment\\_memo.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160325_notice_and_comment_memo.authcheckdam.pdf)

<sup>34</sup> See State Bar of Montana Membership Survey at 9 (2014) (Administrative law and governmental agency matters, Labor and employment law, Insurance law, Environmental and natural resources law, Bankruptcy, Appellate law, Alternative dispute resolution, Taxation, Elder Law & Indian Law (tie)).

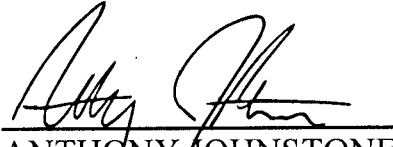


in isolation,<sup>35</sup> but they have real costs in terms of other relevant subjects they replace in a student's course of study for the practice of law.

#### IV. CONCLUSION

This matter is about more than 270, 266, 260, or any of the other numbers presented here and in other comments. It is about real people: a dozen or more otherwise qualified potential Montana lawyers, employers ready to put them to work, and clients in need of legal services. There is no evidence that the public has benefitted significantly from excluding these potential lawyers from practice with a passing score increase from 260 to 270. In light of the significant real costs and only speculative benefits, the Court should take this opportunity to return the passing score to 260 unless and until the benefits of an increased passing score demonstrably exceed the costs.<sup>36</sup>

RESPECTFULLY SUBMITTED,



ANTHONY JOHNSTONE

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<sup>35</sup> A law school can increase its bar passage rate substantially by replacing substantive courses with a bar review course that teaches test-taking tactics. *See* David L. Hudson Jr., "Schools add bar exam class to curriculum and find success," ABA Journal (April 1, 2016).

<sup>36</sup> Alternatively, given the thin record supporting the increased score and the possibility that more detailed research could substantiate its costs or benefits, the Court could return to 260 on a probationary basis and call for a reevaluation after five years of administering the UBE in 2018.