

ORIGINAL

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July 15 2011

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. AF 11-0244

IN RE

THE PETITION TO ADOPT THE UNIFORM
BAR EXAMINATION.

COMMENTS OF
GREGORY G. MURPHY

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Introduction

I thank the Court for the opportunity to submit a comment on its Board of Bar Examiners' petition to adopt the Uniform Bar Examination, approve creating a Montana Educational Component to the bar admissions process, and raise the minimum passing score from 130 to 135 on a 200-point scale, or 260 to 270 on a 400-point scale.¹ In reviewing the comments submitted in response to its invitation, Court may take into consideration the knowledge base of those commenting. Therefore, please bear with me will I provide an outline of my experience in bar admissions and legal education.

Background in Bar Admissions and Legal Education

I was born and raised in Helena, received a bachelor's degree from the University of Montana, and a J.D. from the University of Notre Dame. After law school I served as

¹ The UBE will be on a 400-point scale. Therefore, if the Court approves the Board's proposal, it may want to provide that the minimum passing score be the equivalent of 67.5 on a 100-point scale, which translates into 135 on a 200-point scale, or 270 on a 400-point scale.

a law clerk for a judge on the U.S. Court of Appeals for the Ninth Circuit. My wife and I returned to Montana to raise our family. I have been practicing law with the same Billings firm for more than 30 years.

In 1985, Bob Poore recommended me for a seat on this Court's Board of Bar Examiners, and the Court followed his recommendation. I had only been practicing five years, and was both surprised and humbled by the honor. The appointment launched my career in bar admissions and legal education for which I will be forever grateful. For over 25 years I have devoted the lion's share of my work *pro bono publico* to these activities. I estimate that I have devoted two months of otherwise billable time to these activities in each year. Some of my partners think I am crazy, but for me it has been, and remains, a labor of love.

In 1986, I was appointed to the Multistate Bar Examination Committee. I served on the MBE Committee for over the decade and chaired the committee for several years.² I was elected and served as chairman of the National Conference of Bar Examiners. I continue to help draft the Multistate Performance Test.³ I currently serve on the Conference's Long-Range Planning Committee which is leading a content validity study on the bar examination, asking whether we are testing what we should be testing, and

² Like many, I was an initial skeptic of the MBE. But, as I came to understand the principles and techniques of psychometrics. I came to understand the MBE's power and validity as an assessment tool in bar admissions.

³ Of particular interest to the Court may be the fact that I was the principal author of an MPT item which focused on a problem related to tribal jurisdiction.

whether changes in the examination should be made to better serve the public, the bench, the bar, and applicants.⁴

I served on the Montana Board of Bar Examiners continuously from 1985 until 2002. I chaired the Board from the early 1990s until 2002 when I resigned for two reasons: (1) while it is very important to have depth of experience on the board, some turnover is a good idea and 17 years was a long tenure; and (2) I was asked to serve on the Law School Accreditation Committee of the Section of Legal Education and Admissions to the Bar of the American Bar Association. The Accreditation Committee pulls the laboring oar in law school accrediting. I have been told that I am one of the very few, if not the only, practicing lawyers to have chaired the Accreditation Committee in modern times. I was recently nominated for election to the Council of the Section. In short, I have devoted a significant portion of my professional career to administering, studying, and improving the bar admissions process and legal education.

I am now serving as chairman of the Special Committee on a Uniform Bar Examination. This committee arose out of the realization that many states, including Montana, already administer all or some of the components of what has become known as the UBE: The Multistate Bar Examination, the Multistate Essay Examination, and the Multistate Performance Test. The question began to dawn on bar examiners that if applicants are taking the same test, as a matter of fairness their scores ought to be

⁴ Yes, in the future there may be more changes to the bar examination for it must evolve with the practice of law.

transferable to other jurisdictions administering the same components, at least for a period of time for which the scores ought to be considered valid.⁵ Approving the UBE in Montana will not work a revolution in the bar examination in Montana.⁶

The Weighting of the Examination

It is not my purpose to reiterate the justifications for the Board's proposal relating to the UBE, the passing score, or the Montana educational and testing component. But, I would like to comment on some of the psychometric aspects of the matter since that is where I have greater expertise than those who comment elsewhere.

The most significant psychometric change in Montana would be to accord 50% weight to the MBE, and 50% weight to the MEE and the MPT. This makes eminent sense for two reasons: (1) there is no question that MBE is by far the more reliable⁷ component of the examination because it contains 200 items and is equated⁸; and, (2) half of the time

⁵ How long a score should be considered transferable is a policy decision for the Court.

⁶ I will largely refrain from rebutting the arguments made by those who oppose the Board's proposal. But, it bears noting that those who oppose appear to have little or no background in bar examining or the field of psychometrics. The Montana Board has much greater knowledge and experience, and its views should be accorded greater weight.

⁷ "Reliability" and "Validity" are terms of art in the field of psychometrics, which is generally the science of assessment. A reliable measure measures a construct consistently across time, individuals, and situations. A valid measure measures what one intends to measure. So, a reliable bar examination measures applicants consistently from examination to examination, and is consistent internally among its components. A valid bar examination assesses minimum competency to practice law. An examination could be reliable without being valid, but an examination which is not reliable is not valid.

⁸ Equating means that the examination has the same relative difficulty as the examination given the year before, and the year before. The MBE can be equated

on the examination will be spent on the MBE. Moreover, combining the essay scores with the MBE scores on the MBE scale creates equating effects for the essay scores. Without the combining of the essay scores with the MBE on the MBE scale range one cannot have any assurance that the essay portion of the examination is as difficult as the one given last year. Whether an applicant passes the examination should not depend upon which edition of the examination the applicant takes.

I do not intend this comment to turn into a full-blown defense of the MBE. But I recognize that it is at least somewhat counter-intuitive to many that one may test through multiple choice questions knowledge of the law and the ability to apply the legal method of reasoning to resolve a problem. Some skepticism appears in comments already submitted to the Court on the UBE question. Therefore, some discussion of the MBE in the context of a comment about the UBE is order.

The MBE was launched in 1972. For good reasons, it has become the anchor of bar examinations in this country. With the exception of Louisiana which holds to its Napoleonic Code tradition, every other state has approved the use of the MBE as a component of its examination.⁹ The MBE is also administered in the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa. Since the MBE is so

because every MBE contains questions from other examinations. By doing a statistical comparison of how applicants, including the more able and the less able, performed, a "raw score" can be computed to a "scaled score," which is the score which should be used for purposes of making decisions in high-stakes examinations like the bar examination.

⁹ Washington, which previously did not use the MBE, recently decided to use the UBE because it believes the UBE will be a fairer examination and serve the purposes of the examination better than Washington's existing essay examination.

important to the bar examination, a high stakes affair, the MBE has been studied and tested much over the last 40 years. It has been found to be psychometrically valid and reliable. The MBE is not your grade school, high school, college, or even law school multiple choice test. Indeed, the psychometric studies performed on the MBE show that it is as good, or perhaps better, test of legal reasoning ability as it is knowledge of the law. Since the MBE consists of 200 questions rather than a typical essay test of less than 20 items, the likelihood of obtain in a more accurate picture of a person's capability and knowledge over the six topic areas¹⁰ is enhanced with the MBE. There should be no hesitancy on the part of the Court to accept the Board's recommendation to accord 50% weight to the MBE.

The Multistate Essay Examination ("MEE") is a classic essay test. It tests an applicant's ability to spot issues, apply generally accepted principles of law, come to a conclusion, and to express it all in writing. The Multistate Performance Test ("MPT") is also a written examination, but is more complex. The applicant is provided a file of materials and assigned a task such as writing a summary judgment brief or a memo to a senior partner. A file might come an assignment memo, and interview, statutes, and case law. All the law necessary to answer the problem is contained in the materials. In reviewing how MEE and MPT tests perform one looks at the correlation with the MBE. One does not want a one-to-one correlation because that would mean one has not effectively tested

¹⁰ The MBE currently has six topic areas: (1) Contracts; (2) Property; (3) Evidence; (4) Criminal Law; (5) Torts; and (6) Constitutional Law. Serious consideration is being given to adding Civil Procedure.

different skills. One also does not want to see a poor correlation because the skills necessary to perform on the MBE or similar too and related to the skills necessary to perform well on the MPT.

The Purpose of the Examination and the Montana Component

In considering whether to approve use of the UBE, or indeed in evaluating any aspect of the bar examination, one should always keep in mind the fundamental purpose of the bar examination. I respectfully submit that the purpose is to help assure that those licensed to practice law are at least minimally competent—that they have absorbed and understand generally accepted principles of law and are able to apply the legal method of reasoning to apply those principles appropriately to a problem. The bar examination should not be used to protect a cartel from competition, nor should it represent an unreasonable barrier to entry to the profession. Clients should be able to choose their attorneys, and competent persons should be licensed. The U.S. Supreme Court long ago held unconstitutional residency requirements.

Success on a bar examination should not turn upon knowledge of some arcane rule of law. It is not fair to the applicant, nor frankly is it fair to the public for an applicant to be denied admission because she missed an arcane rule or two in an essay or two, rules necessary to answer correctly. The UBE is not based on arcane rules, but rather upon generally accepted principles of law. Due to the rigorous development process each component undergoes, and the economies of scale employed by the NCBE, the UBE is of better quality than is achievable by a jurisdiction acting alone. The question for the

Court is not whether the existing bar examination or admission process is broken, but whether it can be made better. The UBE is better.

The Court and others might ask whether UBE scores from other jurisdictions can be trusted. In my view, the answer is yes. Use of the UBE will be limited to those who agree to defined conventions for the administration and grading of the test, and the NCBE will monitor that. In my 26 years of bar examining I have met and spent many hours with members of courts and bar examiners from every state. If I know anything it is that they are dedicated to the fair administration of bar examination and the licensing process. Each state has an interest in assuring that only the minimally competent are admitted. Every state has boards of bar or law examiners who have been hand-picked by the admitting authority for their qualities of professionalism and knowledge of the law. In my view, we in Montana can trust UBE scores from other states, as they will trust ours. This is particularly true with the MBE as the anchor.

The Board has proposed dropping the Montana Essay Component of the bar examination and replacing it with an educational component administered through an online examination process. At the outset, it must be noted that adoption of the UBE does not mean that the Montana Essay Component must be eliminated. Montana can adopt the UBE and continue with the current essay component, scaling the scores to the UBE. But, like the Board, I have become thoroughly convinced that we can do a far better job of achieving the ends of the Montana essay component through other means that a four-

question essay test. We can achieve a better “bang for the buck” if we eliminate the Montana essay and implement an educational component to the bar admissions process.

The point of the Montana essay, as I understand it, is to help assure that applicants are knowledgeable about Montana law. Those who ask, “Do you mean to tell me that with the UBE you will admit persons to the practice of law in Montana who have never cracked the Montana Code Annotated or the Montana Reports?” ask a fair question.¹¹ But, the issue is more complex than that. In the main, Montana law is not all that different than the law elsewhere in this country. For example, we have the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Business Corporation Act. While not identical, our Montana Rules of Civil Procedure are based on the federal rules, and our Montana Rules of Evidence are based on the Federal Rules. The list goes on and on.

Our law does differ from the law elsewhere, and sometimes in very important respects.¹² There are many Montana rules of law I would contend that all Montana lawyers

¹¹ The answer to this question is, of course, “No!” The point of the Montana Educational Component and test will be to address in a straight-forward way this issue. It bears noting that Robert Bennett was admitted on motion. It is doubtful that he knew the rule of *Chunkapura*, or that today he knows the *Ridley* doctrine. I do not suggest that Mr. Bennet is not competent to practice in Montana. He undoubtedly is. He might be more competent if he were exposed in an organized fashion to some of our unusual rules. My point is that one can be minimally competent without knowing all our arcane rules, but made aware they exist. The public will be better served if we have assurance that all newly licensed lawyers are made aware of the unusual rules the bench, bar, and academy think are important.

¹² It has been suggested that law is different than medicine in that the body and disease processes are the same everywhere, whereas the law and legal problems are not. Therefore, it is suggested, a uniform examination is appropriate for medicine, but not for law. The Director of Testing at the NCBE, who was formerly with the entity that creates the Medical Boards, disabused me of that notion. The incidents of disease and conditions vary

should know about in order to possess a general license. For example, in my view every Montana lawyer should be aware of our law relating to duties of insurance companies to claimants, of our law that a warrant is required for an undercover officer to wear a wire while interviewing someone in a public place, and that under the Montana Rules of Evidence one may not use conviction of a crime to impeach a witness. There are many other such rules. The question is how to best assure that newly licensed Montana lawyers are aware of them.

The Montana Educational Component and test as proposed by the Board would also allow us to inform and test applicants on other aspects of the law in Montana not typically suited for an essay examination. For example we could educate and test on our basic structure of government, including the various levels of the judiciary, the executive and administrative structure, and our legislature. We could introduce applicants to the Uniform District Court Rules and the locals rules of the various districts, both of which can be very important in particular matters. These are but just a few examples.

I submit that a more effective tool for the protection of the public than the limited four-question Montana essay would be to use the educational and test method proposed by the Board. Indeed, it is this part of the Board's proposal that appeals to me most for the

around the country. For example, we have Rocky Montana Spotted Fever, and Florida does not. Medicine faced the same question presented here long ago, and decided that a better examination could be constructed and administered through a more uniform process.

purpose of protecting the public. Survey the bench, bar, and the academy and come to a consensus, and then educate as part of the admissions process.

The Minimum Passing Score

Whether to approve the proposed increase in the minimum passing score is a policy question for the Court. Based on my experience and knowledge of admission standards around the country, I support the Board's proposal. Beyond that, I merely note that the proposed increase is modest. An increase from 130 to 135¹³, or from 460 to 470 on a 400-point scale represents only a 2.5 increase, or from 65 to 67.5 on a 100-point scale with which most of us are more familiar. Requiring a 67.5% correct response is not unreasonable for a licensing examination to practice law in Montana, and would also be more consistent with what is expected elsewhere.¹⁴

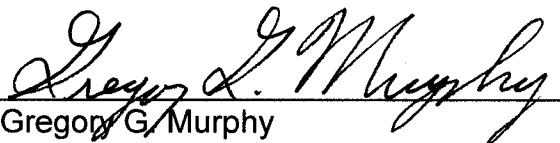
¹³ When the Court first approved use of the MBE, it set the minimum passing score at 135. I will spare you here how the score migrated to below that number. It was not a psychometrically sound process.

¹⁴ Raising the minimum passing score slightly usually has the effect of producing greater effort by examinees. One cannot properly take an old exam and just compare how many would have passed and how many failed under the new standard because we are not dealing with a static process. (Raising tax rates affects taxpayers' behavior) I would expect little effect on the overall passing rate in Montana as a result of implementing the proposed very modest increase in the minimum passing score. When New York raised its minimum passing score, historically disadvantaged minorities actually did better than whites. It bears noting that just looking at passing percentages can be deceiving. New York is generally regarded as a "difficult" bar exam because of its lower passing percentage than many other states, including Montana. But, New York allows foreign applicants who have not graduated from ABA-approved law schools to take the examination. Those applicants fail at a high rate, and thereby pull down the overall average. Bar examining data can be complex, and if not understood well, misleading. In any event, the question should not be what number pass or in what percentages, but rather whether the minimum passing score reflects an appropriate level of knowledge and skill. Again, the purpose of the exam is not to protect a cartel, but to protect the public.

Conclusion

The Court has appointed a Board of Bar Examiners. The members are independent thinkers. They had been administering and grading the bar examination for many years. They know its strengths and weaknesses. They have studied the examination and they have carefully considered how the examination and the bar admissions process may be improved to better serve its fundamental purposes. The Court should give great weight to the opinion of its Board. I mean no disrespect to those who have voiced opposition to the Board's proposal when I note that the Board has vastly more experience and far greater knowledge about the process and what works. The Board did not file its petition without first giving the matter considerable thought and conducting much discussion. I urge the Court to adopt the Board's proposal.

Dated this 14th day of July, 2011.


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