

ORIGINAL

FILED

July 15 2011

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

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF-11-0244

IN RE THE PETITION TO ADOPT  
THE UNIFORM BAR EXAM

COMMENTS SUBMITTED BY  
INDIVIDUAL FACULTY  
MEMBERS OF THE  
UNIVERSITY OF MONTANA  
SCHOOL OF LAW

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INTRODUCTION

The undersigned individual members of the University of Montana School of Law faculty<sup>1</sup> submit these comments,<sup>2</sup> which raise significant concerns about the Montana Bar Examiners' Petition to Adopt the Uniform Bar Exam (UBE). We respectfully request the Court to deny the Petition and appoint a commission to explore the unanswered issues raised by the Bar Examiners' proposal.

The Bar Examiners have proposed the following changes to the Montana Bar Exam:

- (1) Eliminate the four one-hour Montana essay questions;

<sup>1</sup>The individuals signing this letter taught as tenured, tenure-track, and contract faculty at the University of Montana School of Law through the academic year ending May 31, 2011.

<sup>2</sup>These comments reflect the individual opinions of those signing it; the University of Montana School of Law neither supports nor opposes the Petition to Adopt the UBE. *See* Letter from Dean Irma Russell, Univ. of Montana School of Law, to Chief Justice Mike McGrath, Montana Supreme Court (May 20, 2011), attached as Exhibit A.

- (2) Eliminate the current requirement that examinees apply Montana law (rather than general legal principles) to the six Multistate Essay Exam questions;
- (3) Increase the weight of multiple-choice questions from 35% to 50%, with a corresponding decrease in the weight of the written portion of the exam from 65% to 50%; and
- (4) Increase the minimum passing score from 130/200 to 135/200 (from 65% to 67.5%).

The first three of these proposed changes flow directly from the Bar Examiners' proposal to adopt the Uniform Bar Exam (UBE); they are mandatory requirements of the UBE. The fourth proposed change – increasing the passing score – is unrelated to the UBE.

In a faculty meeting at the law school last fall, the Bar Examiners stated that they are not trying to solve any specific problems through their proposal.

Because this proposal has the potential to create unintended consequences, and because it proposes changing more than one variable at a time, we request that the Court deny the petition as proposed and appoint a commission comprised of lawyers, judges, faculty members and citizens to investigate the intended and unintended effects of the proposed changes prior to making any decisions.

## **THE CURRENT MONTANA BAR EXAM**

The current Montana Bar Exam consists of three components prepared by the National Conference of Bar Examiners (NCBE) and one component prepared by the Montana Bar Examiners. The NCBE portion consists of:

- (1) the Multistate Bar Exam, consisting of 200 multiple choice questions (35% of an applicant's score), to which applicants apply general legal principles, not Montana law;
- (2) the Multistate Essay Exam, consisting of six 30-minute essay questions (25% of the applicant's score), to which applicants apply Montana law; and
- (3) the Multistate Performance Test, consisting of two 90-minute tests designed to assess an applicant's legal analysis and problem solving skills by asking applicants to review a file and write a memo or other legal document ( 15% of the applicant's score).

Additionally, the exam includes four Montana essay questions prepared by the Montana Board of Bar Examiners, comprising 25% of the applicant's score. Applicants are instructed to apply Montana law.

Thus, 50% of the current Montana Bar Exam tests applicants' knowledge of Montana law through ten essay questions. Six of those essay questions are written

by the NCBE and four are written by the Montana Bar Examiners. Notably, the six multistate essay questions must be read, analyzed, and answered in a mere 30 minutes; in contrast, applicants are currently allowed 60 minutes to read, analyze and answer the four Montana essay questions. At the same time, however, the Montana essay questions are not always written by experienced test writers; as faculty members we can attest to law students' uncanny ability to find unintended ambiguities in test questions. The fact that the national questions are tested before being used makes them inherently more reliable than the test questions written by Montana practitioners and used without any reliability testing.

The Multistate Performance Test is a relatively new addition to the bar exam. Applicants have 90 minutes to study a client file and write a memo or other document reflecting their analysis of the problem and possible solutions. According to the NCBE, the test is designed to assess applicants' skills in legal analysis, fact analysis, and problem solving, as well as their ability to resolve ethical dilemmas, organize and manage a lawyering task, and communicate with a client or senior partner. <http://www.ncbex.org/multistate-tests/mpt/>.

### **CHANGES MANDATED BY THE UBE**

The UBE will result in several changes. First, it will eliminate entirely the four Montana essay questions. Applicants will answer six essay questions rather

than ten, and will apply general legal principles rather than Montana law. We believe this is one of the most significant changes proposed by the Bar Examiners, and needs to be stated plainly: The Montana Bar Exam will no longer test applicants' knowledge of Montana law. Reviewing Montana law for the bar can help lawyers prepare for the practice of law in Montana. This may be especially true for lawyers in small or solo firms who may not have adequate resources to obtain training elsewhere.

The Bar Examiners have proposed replacing the Montana-law bar exam questions with an open-book, online exam that tests Montana law. This educational component is not part of the bar exam; it is a mandatory supplement that can be taken online, using study materials, at a time other than during the bar exam. It is not clear when applicants will be required to take this exam, whether there is a minimum passing score, or what the ramifications of failing to achieve a passing score will be.

This online educational component is modeled after a similar one in Missouri, which was one of the first states to adopt the UBE. According to the Missouri Bar Examiners' website, the "Missouri Educational Component" is a "mandatory open book test . . . for all applicants to complete as a condition of licensure." <https://www.mble.org/appinfo.action?id=1> (visited July 7, 2011). "The

review materials ('Missouri Materials') include ten outlines on the subjects of Torts, Civil Procedure, Real Property, Trusts, Estates, Family Law, Business Associations, Administrative Law, Missouri Courts and Evidence." *Id.* Applicants must take the online test and submit a Certificate of Completion. *Id.* Applicants for admission to the Missouri bar must complete the educational course "no earlier than the date of initial application to take the bar examination and no later than one year after the date of written notification to the applicant of passing the bar examination or of acceptance of the examination score earned in the Uniform Bar Examination taken in another jurisdiction." Rule 8.08, Missouri Rules Governing the Missouri Bar and the Judiciary (Apr. 8, 2010). Thus, applicants have a window of about 18 months in which to take this exam, and may take it repeatedly until they reach the requisite score of 25 out of 30 possible points.

Replacing 50% of the Montana Bar Exam's current testing of Montana law with a mandatory supplemental online test is a significant change whose potential effects should be seriously considered prior to being adopted. For instance, knowing that Montana law is no longer tested on the bar exam may affect curricular choices in University of Montana law school classes, especially over time. It is unclear how many small and solo law firms depend on their new associates having an educational background in Montana law. While bigger firms may have resources

for training new lawyers, the vast majority of lawyers in Montana practice in very small firms. What effect, if any, will the elimination of Montana law from the Montana Bar Exam have on those firms? This question has not been adequately explored and discussed.

Second, the total number of essay questions on the Montana Bar Exam will be reduced from ten to six. Applicants will have 30 minutes to read, analyze and answer each of those questions. Currently, applicants have four hours of Montana essay questions (60 minutes each) and three hours of national essay questions (30 minutes each). Thus, the Montana Bar Exam will move from one day (seven hours) of written essay testing to one morning (three hours) of written essay testing.

Multiple-choice questions assess different things than essay questions do; they are tied to different kinds of skills. One is not *per se* good or bad; each is a unique assessment tool. We have not heard any rationale for reducing the written essay portion of the bar exam. In the absence of an evidence-based discussion, it is impossible to know why this change is being proposed or whether it is a choice that is best for Montana.

Third, Montana will no longer have any discretion in determining the weight of bar exam components; all UBE states must apply the same weight to the three components of the exam. Historically, each state determines how to assess new

lawyers' competence, including how much weight to give different portions of the bar exam. For example, legal education nationwide is experiencing a renaissance in recognizing the importance of practical skills – a discovery the University of Montana School of Law made and institutionalized more than 30 years ago. As teachers of practice-based legal education, we are curious why the bar exam is moving away from written practice-based assessment toward standardized multiple-choice testing at a time when legal education is making the opposite move.

Moreover, we question the decision to assign greater weight to the multiple-choice component of the exam. Multiple-choice questions currently comprise 35% of the Montana Bar Exam. Under the Bar Examiners' proposal, multiple-choice questions will account for 50% of an applicant's score. We have seen no evidence that multiple-choice testing is a better way to assess new lawyers' competence than written essay exams.

The specifics of the weighting change are important, but equally important is the loss of local control over a determination that can reflect a state's belief in the importance of legal skills as well as legal knowledge, state-law knowledge as well as general-law knowledge, and essay-based testing as well as multiple-choice-based testing. We believe that should be a matter for discussion among the bench and the bar as well as interested citizens.

The UBE promises some potential benefits – primarily, portability of scores for the first three years after law school, and more consistent essay questions from a national testing service that prepares the questions and verifies their reliability. Nonetheless, these benefits are outweighed by the lack of information and the lack of broad-based discussion addressing many of the concerns we have raised. We therefore cannot conclude that the UBE is in the best interest of the Montana bar or Montana citizens, and do not believe the Court should move forward until these issues are discussed and addressed.

### **RAISING THE PASSING SCORE**

The Bar Examiners also propose raising Montana's current passing score from 130 to 135, on a scale of 200. Although this proposal is part of the Bar Examiners' petition, it is wholly distinct from the UBE.

While Montana's current passing score of 130/200 (65%) is among the lower passing scores in the nation, it is not the lowest, and is not aberrant. Using the chart attached to the petition, 40 jurisdictions' passing scores can be compared to Montana's. Of those, 17.5% (seven states, including Montana) have passing scores of 130 or lower. An additional 10 jurisdictions have scores between 130 and 134. Thus, 42.5% of the jurisdictions that can be compared to Montana have a score of less than 135. The Bar Examiners have offered no rationale for their choice of 135.

We are unaware of any evidence indicating that applicants with scores between 130 and 135 are incompetent or have been more frequently involved in malpractice claims or disciplinary matters. In fact, an informal phone call to ALPS revealed that their top reasons for legal malpractice claims are missing a statute of limitations or failing to communicate with a client. It is not clear that there is any connection between lawyers who score in the low 130s and those lawyers' abilities to serve their clients.

This might be less important were it not for the fact that increasing the passing score while also changing the weight of multiple-choice questions may disproportionately affect those who have historically faced barriers to the legal profession. When asked about this by the law school faculty, the Bar Examiners stated they had not studied the potential for disproportionate impact.

A recent law review article examined bar passage rates among whites, African Americans, Hispanics and Asians. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. Legal Educ. 3 (Aug. 2010). Ms. Yakowitz relied on several different studies, all showing that a greater percentage of whites pass the bar exam the first time than any minority group. *Id.* at 19 (Table 6-1). While most applicants who fail the bar exam the first time will take it again, about 12.5% will not. *Id.* at 11. Statistics

from a variety of sources show that minorities – whether African American, Hispanic, or Asian – are twice as likely as whites to be “never-passers.” *Id.* at 20.

In the Montana State Bar’s recent survey of its members, only 3% of respondents identified themselves as minorities. *See Montana Lawyer* at 5 (June/July 2011). Increasing the diversity of bar membership is one of the Montana State Bar’s priorities. State Bar of Montana Strategic Plan 2011-2012, <http://www.montanabar.org/associations/7121/files/BOT%20Strategic%20Plan.pdf>.

Increasing access to justice is the number one priority of the Montana State Bar’s 2011-2012 Strategic Plan. *Id.* The Court has also identified access to justice initiatives as crucial to the profession. Equal Justice Task Force, *Montana Access to Justice 2011 Report to the Montana Supreme Court*. Access to justice is at least tangentially – and perhaps centrally – connected to diversity in the profession. Diversity in the legal profession is especially important in a large Indian Country state like Montana. Access to justice studies conclude that American Indian lawyers are far more likely to choose to work with American Indian organizations and groups than are non-American Indian lawyers. While we cannot predict with certainty the effects of placing greater weight on multiple-choice testing and raising the overall passing score, these proposals should be assessed in light of their potential adverse effects on diversity and access to justice in Montana.

We wholeheartedly agree that all citizens who seek legal assistance deserve competent representation, but we have not seen any evidence that increasing the weight of multiple-choice testing will increase lawyers' competence. We have not seen any evidence that lawyers who pass with lower scores are more likely to commit malpractice, or otherwise serve their clients poorly. When combined with the unknown and unexamined effects of these changes on historically disadvantaged people, we believe the Bar Examiners' petition has the potential to create negative unintended consequences. We would like the Court to slow the process down and ask for a deeper investigation into these complex questions prior to making a final decision.

### **CONCLUSION**

The Bar Examiners' proposal recommends changing more than one variable at a time, which will make it impossible to assess the impact of any one of them. Forging ahead with a proposal that is not designed to fix any problem, has not considered potential impacts, and changes more than one variable is likely to result in unintended consequences. We are grateful to the Bar Examiners for opening an important discussion; however, we believe the petition should not be granted until the Court is satisfied that the questions raised herein have been adequately addressed. The Bar Examiners have not voiced any pressing need for change,

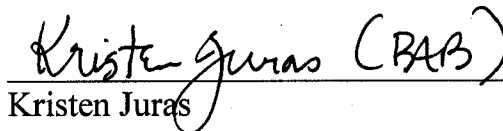
although they would like to implement these changes by the February 2012 bar exam.

Given that the Bar Examiners are not attempting to solve any particular problem, it inures to the benefit of everyone in Montana – lawyers and non-lawyers alike -- to take time to further discuss and explore the intended and unintended ramifications of this complex proposal. For these reasons, we respectfully urge the Court to appoint a committee of practitioners, bar examiners, faculty, judges, and other interested constituents to investigate and address these concerns before making any changes to the Montana Bar Exam.

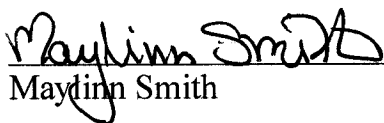
Dated this 14<sup>th</sup> day of July, 2011.



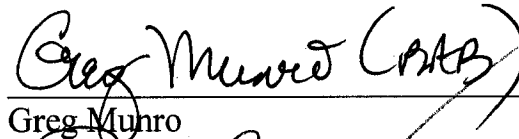
Beth Brennan



Kristen Juras



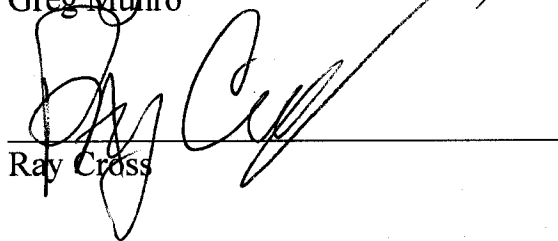
Maylinn Smith




Greg Munro




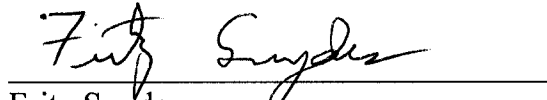
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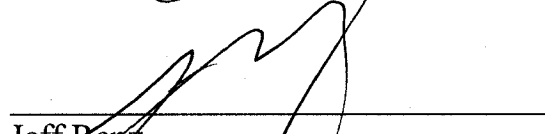


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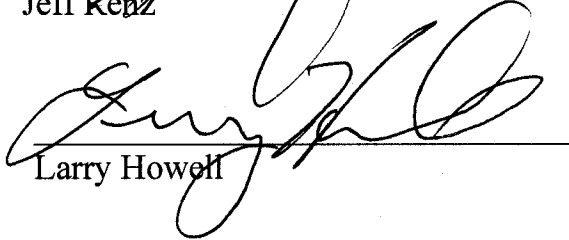
  
Hillary Wandler

  
Sally Weaver

  
Fritz Snyder

  
Jeff Renz

  
Michelle Bryan Mudd

  
Larry Howell



School of Law  
The University of Montana  
Missoula, Montana 59812-6552  
Phone: (406) 243-4311  
FAX: (406) 243-2576  
www.umt.edu/law/

May 20, 2011

Montana Supreme Court  
215 N. Sanders  
P.O. Box 203003  
Helena, Montana 59620-3003

Dear Chief Justice and Justices of The Supreme Court of Montana:

Last month, the Montana Board of Bar Examiners ("Board") petitioned the Supreme Court of Montana for authority to adopt use of and administer the "Uniform Bar Examination" ("UBE") as the testing component of the Montana bar admissions process. The University of Montana School of Law appreciates the dialogue with the Board. The purpose of this letter is to reply to the statement of the petition and to indicate the likelihood that individual faculty members intend to file comments with the Supreme Court.

In its Petition, the Board included a short narrative of the interaction of The University of Montana Law School with the Board on the issue of the UBE. The petition stated: "The University of Montana Law School and the State Bar have been alerted to this proposed change in the bar examination, and were provided advance copies of various drafts of the petition. The faculty of the University of Montana Law School invited Board Chair, Randy Cox, and former Board Chair, Greg Murphy, to attend a faculty meeting, and that meeting was held with extensive discussion and interchange of ideas.... Comments were solicited, and received, from the State Bar and the law school faculty." Additionally, the petition notes the optimism of the Board about the view of The University of Montana School of Law: "While the Board does not presume to speak for either the State Bar or the UM law school, the Board has been in close and regular contact, and we are optimistic that they will support the recommendations made in this petition."

In reading this statement, it is reasonable to assume that the Board anticipates a response from the School of Law. In light of this statement, The Law School believes that it is appropriate to report the action by the faculty regarding the UBE. The faculty of the School of Law determined that currently it neither supports nor opposes the petition. The collective judgment of the faculty is that individual faculty members may have useful input and may file individual comments relating to the petition before July 15, 2011, as provided by the Supreme Court of Montana.

Very truly yours,

Irma S. Russell  
Dean and Professor