

**ORIGINAL**

**FILED**

August 16 2011

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

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 11-0244

**FILED**

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IN RE PETITION TO ADOPT  
UNIFORM BAR EXAMINATION

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

**RESPONSE OF BOARD OF BAR EXAMINERS TO COMMENTS  
REGARDING PETITION TO ADOPT UNIFORM BAR EXAMINATION**

**INTRODUCTION**

The petition to adopt the Uniform Bar Examination (“UBE”) has generated a fair bit of comment. In order to provide as concise a response as possible, the Board has sorted the comments into the following categories:

1. Raising the Passing Score to 135 from 130, a two-and-a-half percent increase, from 65% to 67.5%.<sup>1</sup>
2. Elimination of the Montana Essay Examination (“MTEE”).
3. Replacing the MTEE with an on-line test patterned after the Missouri Educational Component Test.
4. UBE Score Portability
5. Cost and Responsibility.

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<sup>1</sup> With the adoption of the UBE, the minimum passing score is 270 because the UBE is scored on a 400-point scale instead of the present 200-point scale.

Prior to addressing these important points, the Board wishes to address the suggestion of certain UM Law School teachers who suggest a “go slow” approach and appointment of a committee to further study this issue.<sup>2</sup> The Board respectfully notes that a committee has studied this issue for approximately three years, has devoted hundreds of hours to it and has attended numerous meetings, discussions and reviews. That committee is the Board of Bar Examiners, a group with over a hundred years of combined bar examining experience, and far more as practicing lawyers and educators, that unanimously supports this Petition.

The Board’s experience does not, of course, mean we are right. We do believe, however, that our combined years of dedication to the task of bar examining counts for something.

By way of review, the Montana Bar Examination presently consists of four components, with all scores scaled to the MBE,<sup>3</sup> and with the MBE accorded 35% weight in the final score. The components are the Multistate Bar Examination

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<sup>2</sup> A/K/A, death by a thousand paper cuts.

<sup>3</sup> Some comments suggest a vague distrust of the MBE, with one making reference to it as a “multiple guess” test. The criticism, though understandable, is unfounded. As Greg Murphy noted in his comment, the MBE is very reliable psychometrically, far more reliable than any essay examination. This is one of the chief reasons that the Board scales the essay scores to the MBE. The July 2011 MBE reliability score was 0.90, which psychometricians consider excellent for a high stakes examination. Every state except Louisiana uses the MBE – and for good reason. The Board has great confidence in the MBE.

(MBE), the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT), and the Montana Essay Examination (MTEE). The MTEE consists of four locally-drafted questions.

On the MEE, students are instructed to “answer these questions using the prevailing principles of federal and Montana law, including the common law.” The MTEE is written to be answered and graded with a Montana law background. However, the Board consistently tries to draft questions that do not turn on specific knowledge of unique points of Montana law but, rather, are questions upon which an examinee can demonstrate competence by applying general principles of the common law.<sup>4</sup> A passing score is 130. Greg Murphy correctly noted in his comment that the original passing score was 135 but migrated downward in the early years following abolition of the diploma privilege. The 130 passing score is correctly regarded as an artifact of that era and is the equivalent of a 65% passing score.

The UBE Petition submitted by the Board retains three components of the existing bar exam – the MBE, the MEE and the MPT. The Board proposes the

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<sup>4</sup> A study of MTEE exam questions administered over the course of the past few years would reveal inevitable exceptions to this statement. Nevertheless, the Board in both its drafting and grading pays attention to the issue and tries not to tie performance on this high-stakes examination to knowledge of arcane or unique aspects of Montana law. We believe that doing so is both unfair and unnecessary to demonstrate a minimum level of competence to practice law in Montana.

following changes and requirements with adoption of the UBE:

1. Adopt the UBE and agree to accept UBE scores from other UBE jurisdictions, just as those jurisdictions will agree to accept Montana UBE scores.
2. Eliminate the four essay questions making up the MTEE.
3. With the elimination of the MTEE, weight the examination as follows – 50% MBE and 25% each MEE and MPT. This tracks the amount of time spent on each portion of the examination and allows the more psychometrically-reliable MBE to play its proper role.
4. Replace the MTEE with an on-line educational component and open-book test, a concept that has been significantly modified and improved from how it was proposed in the initial Petition, as explained below.
5. Return the passing score to 135, placing the score more in line with neighboring jurisdictions and at least in the mainstream nationally.

With that background, we turn to discussion of the six topic categories raised by the comments submitted in response to the Petition.

**1. Returning the Passing Score to 135 from 130, a two-and-a-half percent increase.**

That Montana's passing score has, for the past several years, been 130 instead of 135 – where it started under Board Chair Bob Poore – is historical artifact, more than anything else. Nevertheless, the passing score is now 130, and the Board proposes returning it to 135. The Board's proposal is based on two

indisputable propositions: (1) The 130 passing score is one of the lowest passing scores in the country, and (2) in the Board's view – 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. While it is difficult to convey a judgment based on experience, our collective and strongly-held view is that examinees scoring in the 130 range clearly struggle with understanding and expressing basic concepts and principles of law. Over the years, the Board members have become firmly convinced that 135 is a necessary, though still low, passing score.

The MTLA and State Bar support the proposal to raise the passing score. Some comments specifically chose not to address the issue. The comments opposed to an increased score fall into two categories. The first is the “let’s be nice” category, best captured by the comment, “I do not see any real reason to fail more people.” To be clear, it is not the Board’s intent to “fail more people.” The Board strongly believes, based on its experience, that the 130 cutoff score is too low. Raising the passing score by 2 ½ %, as proposed, does not necessarily mean that more people will fail. As noted by Greg Murphy, tax laws affect taxpayer behavior. Increasing the passing score will, we suggest, affect examinee behavior positively.

The more serious comments are offered, somewhat surprisingly, by members of the University of Montana faculty.<sup>5</sup> On the issue of raising the passing score, the Board is surprised to read a defense of an undeniably low score on the basis that “it is not the lowest . . . .” As we understand it, law school faculty strive for excellence and for pushing students to perform at a high level. Acceptance of a passing score that is acceptable because “it is not the lowest” seems contrary to a commitment to excellence. While the faculty members commenting might be willing to accept a passing score that is, as they put it, only in the “lowest 17 ½ % in the country,” the Board – based on its experience reading and grading thousands of bar exam essays over the years – is not.

The second point made by commenting faculty is equally troubling, with its focus on the potential effect of raising the passing score on minority students and the concomitant effect on diversity in the legal profession. Without saying so, the comment seems to suggest – with no supporting data – that minority students do poorly on bar exams and that raising the passing score would compound the problem.<sup>6</sup> Apart from the patronizing nature of the comment, it is not a valid

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<sup>5</sup> It is worth noting that the official position of the UM Law School – from a committee specifically appointed to address the issue – is to neither support nor oppose the Petition.

<sup>6</sup> On this topic, the Board has no information because it collects no data regarding race or national origin of examinees. Grading is blind to identity.

argument against raising the passing score.<sup>7</sup>

No one can deny that Montana has a low passing score – one of the lowest in the country. The Board is concerned about that and believes, based on its experience, that it should be raised, modestly, to 135 (more accurately, to 270 on the UBE scale). We believe some applicants take the exam in Montana for no reason other than our low pass score and high pass rate. The Board does not believe Montana should administer the bar exam of last resort.

The Board respectfully suggests that if the Court changes nothing else about the bar exam that it return the passing score to 135. While other issues raised by the comments are appropriately debatable, this one is not.

## **2. Elimination of the Four Montana Essay Questions.**

There are two aspects to the comments regarding elimination of the MTEE component. The first is that including four Montana essay questions on the bar exam forces applicants to study and learn Montana law. The second is the idea that one should know Montana law to be adjudged competent to practice law in Montana. We address each issue in turn.

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<sup>7</sup> It is worth noting that one of the concerns raised in a faculty meeting held at the law school attended by Randy Cox and Greg Murphy was that raising the passing score might reduce the law school's bar exam pass rate, thus affecting its national rankings. Though surprised by the comment, the Board suggests that "national ranking" is not an issue within Board purview.

**A. Is It the Proper Function of the Bar Exam to Force Students to Learn Montana Law?**

One troubling aspect of the comments on this topic is the implied acknowledgment that Montana law is not being taught to law students and that preparation for the bar exam therefore appropriately rounds out their legal education. If that is a legitimate purpose of the bar exam, so be it. The Board can perform that function. However, the Board believes its function is more appropriately devoted to the task of determining whether any given examinee can demonstrate knowledge of general legal principles and an ability to identify legal issues, separate the relevant from the irrelevant, and reason to a sound legal conclusion. That, we suggest, better demonstrates minimum competence than knowledge of specific aspects of Montana law, obscure or not.

This issue presents a legitimate debate upon which well-informed people legitimately hold differing opinions. The comments submitted demonstrate the scope of the debate. Certain of the comments, however, are clearly off-base. For example, two faculty members commented that making examinees review Montana law helps prepare lawyers to practice in Montana, “especially lawyers in small or solo firms.” Do they mean to suggest that small firm or solo lawyers are inept in Montana law without the preparation for the bar exam? Or that if one is in a large firm, there is no need to know Montana law?



More substantive are the comments of Klaus Sitte. Mr. Sitte suggests, appropriately, that “while no bar examination can ensure competence in practicing law, a bar examination that emphasizes Montana law will at least test their knowledge and understanding of that law. A well-written exam may even test the ability of the applicant to apply the facts to the law.”

These comments are incisive, but do not necessarily support Mr. Sitte’s conclusion. The Board agrees that “no bar examination can ensure competence in practicing law.” Indeed, the purpose is not to “ensure competence” in practice but, rather, to make a determination as best as possible whether a particular applicant has demonstrated minimal competence to begin the practice of law. That is, does the applicant have the basic tools necessary? If the tools are demonstrated – knowledge of general legal principles and a demonstrated ability to reason their way to a sound legal conclusion – the bar examination takes on faith that the individual can then learn the law as necessary to practice. As Mr. Sitte so aptly puts it, “After all, what competent lawyer would practice or advise a client without consulting the law, a text, or even a colleague?”

The second portion of Mr. Sitte’s comments also provokes debate. He suggests that “a bar examination that emphasizes Montana law will at least test their knowledge and understanding of that law.” Perhaps. Given that the Board’s

view is that it is neither fair nor necessary - nor even reasonable - to test minutiae of Montana law on a high-stakes bar exam, it is fair to say that the four Montana essay questions focus on the basics. The questions are designed (sometimes more successfully than others) to be answered competently without specific reference to Montana law but by application of general legal principles. The student who ably weaves in an answer based on a specific Montana case or statute may earn a higher score, depending on the rest of the answer. But the Board attempts to test general principles in order to gauge an applicant's ability to apply those general principles to a given set of facts and reason to an adequate and informed legal conclusion.

**B. To Be Competent to Practice Law in Montana, Must One Demonstrate Knowledge of Montana Law?**

That brings us back to the fundamental question – and to the next issue – which is whether knowledge of Montana law is a good thing for lawyers seeking a license to practice in Montana. Of course it is. But the next question is whether four essay questions are a better means of exposing applicants to important aspects of Montana law than is the proposed on-line educational component discussed in the following section. Let there be no mistake – the Board believes it important that applicants to practice in Montana have a fundamental familiarity with

Montana law.<sup>8</sup> However, the Board believes that the educational component described in the section below will better deliver useful information regarding a broader range of Montana law than does forcing applicants to study 14 specific areas of law that may be tested on four one-hour essay questions.

The Board does not oppose (but does not prefer) retaining the MTEE as a separate component of the bar exam, with certain qualifications. It is possible to keep that portion of the exam so long as the UBE is adopted. The Montana component could be scaled and applied to the UBE score. Montana applicants could still transfer their UBE score to other UBE jurisdictions, retaining that benefit. Likewise, UBE scores earned in another UBE jurisdiction could be transferred to Montana within the time limit of two or three years, whatever the Court chooses to establish. Such applicants would have to take the MTEE separately and have that score blended in to their “final” score, with that score applied to Montana’s passing standard. It can be done. The Board just does not think it should be. That is likely the pivotal decision to be made by the Court.<sup>9</sup>

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<sup>8</sup> Some of the states adopting the UBE have done away with a separate state law component. One of the more thoughtful analyses was attached to the Board’s Petition as Exhibit B, which includes an article written by North Dakota Chief Justice Gerald VandeWalle. North Dakota has not state law component to its exam.

<sup>9</sup> There has been some suggestion that a desire to reduce the amount of work on the part of the Board somehow affects the Board’s proposal. With all due respect, such comments are dramatically underinformed. Nevertheless, it is a fact that the on-line component outlines and tests will be a major undertaking for the Board and will impose a much larger burden, at least initially, than leaving us to continue drafting and grading four essays on the MTEE. The proposal being made increases, not decreases, the burden on the Board.

### **3. Replacing the MTEE with On-Line Review Materials and an On-Line Test.**

The Board proposes to follow, though not copy, the Missouri model for presentation of materials related to Montana law and testing of comprehension and understanding of the materials. Since the time of submitting the Petition, much has been done to address some of the criticisms raised.

The Board will, in an effort led by Randy Cox and Greg Murphy, first survey the bench, bar and law faculty to determine the areas of law and practice that those surveyed suggest are important to know and understand and that contain demonstrably unique areas of Montana law. The range of topics will be broader than the topics presently listed for the MTEE.

Once the topics are identified, the Board will take responsibility for preparing outlines identifying and discussing those topics. As noted, topics could address important insurance and claims-handling issues, family law and child support issues, and even such things as structure of the court system and important local practices. There may be a modest initial cost to preparation of some of the materials, but less cost than the savings of eliminating the MTEE. (*See cost discussion in Section 5 below.*)

The Board has consulted in substantial detail with State Law Librarian Judy Meadows and her staff.<sup>10</sup> It has been agreed that the outlines prepared by the Board can be posted without cost on the Court's website. Each examinee will be given a link to the materials and to the test itself. Any necessary updates to the materials will be provided by the Board to the State Law Library staff with old materials removed and new ones substituted. There is no cost to the Board for use of the Court's website and no cost, other than limited staff and administrative time, to the State.

The other aspect of the on-line education and testing component (referred to as the Montana Educational Component Test or MECT) is the test itself. The Board proposes that Montana break away from the Missouri model in this aspect. Judy Meadows has found, and we have studied, a low-cost computer program called ProProfs that will serve our purposes. It is an on-line testing program in use at Harvard, Yale and other academic institutions as well as at various tech companies such as Cisco. The program will allow us, at very modest cost (approximately \$30 a month), to administer an on-line testing program as follows:

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<sup>10</sup> Judy and her staff have been great to work with. We have held thoughtful discussions and one very productive work session. The section of this response relating to the commitments made by the State Law Library and by the Board of Bar Examiners has been reviewed by Ms. Meadows and approved by her. The tasks seem manageable to all of us.

- A bank of questions drawn from the on-line materials will be created by the Board and randomly drawn by the software for each on-line applicant.
- Upon completion of the test, 30 out of 35 correct, the applicant will know immediately upon clicking the “submit” button whether they passed or did not pass.
- If the applicant passes, the computer will generate a Certificate of Completion or similar item to be printed and submitted to the Administrator for the Board of Bar Examiners. Successful completion is a necessary step in the process of admission.
- If the applicant does not score 30 answers correctly, he or she can take the test again at any time – but they will have to answer 35 randomly-generated questions which, of course, will not be the same questions in the same order.<sup>11</sup>
- An applicant can take the test as many times as is necessary, but must submit the computer-generated Certificate of Completion in order to complete the application for admission to the bar.

The Board believes that this procedure adequately answers the criticisms about the ease of passing the Missouri test. Consider the applicant who fails the on-line test upon taking it the first time. Is he or she likely to study less to take it the second time? We believe it adequately responds to the cheating concerns. Finally, it is a very cost-effective way of providing information about a broad range of Montana law topics and gaining some assurance that the applicants have

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<sup>11</sup> One of the comments rather disturbingly pointed out all of the ways one could cheat on the Missouri exam and fraudulently falsify having satisfied the testing requirement for admission to the bar - all as part of being admitted to practice law! Use of ProProf as outlined above eliminates those problems.

actually read and understood the materials, particularly those that must review and take the test multiple times.

Thus, the Court's choice is whether to accept the UBE as an adequate testing tool for determining minimum competence and to accept the review and on-line testing protocol described above as a means of assuring familiarity with Montana law. Mike Anderson, a long-time Board member, put it this way: "Is it the Bar Examiner's job to teach applicants to learn Montana law by making them fear they will flunk if they do not pass the Montana Essay Exam or is it to insure that every new applicant is exposed to certain unique Montana legal concepts, and then hope that they will do what competent practitioners do when advising a client - make sure they know that which they may not know?"

In this case, the Board believes that the on-line review and test will do a better job of exposing applicants to those aspects of Montana law that are different in such a way as to matter and to make those materials available to all examinees – and even to the bar and the public. If the Court does not agree, we respectfully ask the Court to allow adoption of the UBE but direct the Board to continue administering the four MTEE questions as discussed above.

The final point is in response to criticism that eliminating the MTEE reduces reliance upon legal writing as an assessment tool in determining minimum competence. It is important to note, however, that certain of the comments

submitted clearly misunderstand the structure of the UBE. For example, one comment quotes Bobbi Anner-Hughes stressing the importance of testing writing ability with her claim that “the UBE would ignore that skill, in favor of a multiple guess type test.” That statement is wrong. Insofar as the MBE is denigrated as a “multiple guess” test, the opinion is uninformed as to the demonstrated psychometric reliability and validity of the MBE. As to the suggestion that the UBE will “ignore” writing, that too is incorrect. The UBE has three components, and two of them require written analysis – the six MEE questions and the two MPT questions.

#### **4. UBE Score Portability as the Camel’s Nose Under the Tent.**

Certain comments, including the MTLA, raise the notion that allowing UBE portability will let “corporate,” “big-city,” “out-of-state” law firms practice law in the State of Montana by getting one of their lawyers admitted here using a UBE score, thus using the new lawyer as some sort of beach head from which to unleash dozens of other “corporate, big-city, out-of-state” lawyers on an unsuspecting public. The Board assumes that the MTLA cannot possibly be arguing for a manipulation of bar examination rules and rules of admission as a means of protectionism for existing Montana lawyers. Thus, one is left to look for some sort of proof that there will be a negative impact on Montana citizens if a “corporate, big-city, out-of-state law firm” allows one of its associates to transfer a



UBE score to Montana and gain admission here.

Even if this was a plausible possibility, then what? And so what? Under the current *pro hac vice* rules, the corporate big-city out-of-state law firm would still have to put this new associate<sup>12</sup> as lead counsel on their cases. That seems unlikely. Even if that were the case, is this an issue of concern about protection of the public – or protection of Montana lawyers?

With all due respect, the comments submitted are not about testing for minimum competence on the bar exam. Rather, they are about reciprocity and competition in a legal market. Adoption of the UBE is not reciprocity. While reciprocity is an issue that may someday deserve open debate and a considered decision, this petition does not raise that issue. The Board respectfully asks the Court to consider this Petition on its merits.

## **5. Cost and Responsibility.**

The State Bar of Montana supports the Petition but expresses concerns regarding cost. Whatever the State Bar's role in supporting the work of Court-appointed commissions is, we understand the concerns though we do do not

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<sup>12</sup> UBE scores are good for only three years as proposed by the Board. The Court could order the scores good for two years only. Thus, any lawyer who transferred a UBE score could only do it for two years, meaning we are talking about lawyers of zero to two years of practice. And, the score can only come from another UBE jurisdiction – so far, Alabama, North Dakota, Idaho, Washington and Missouri.

necessarily agree with the stated position that Court-appointed commissions such as the Board of Bar Examiners or Commission on Practice must make sure that their work is revenue neutral.

As to the Board's Petition, it is clear that costs will not increase if the UBE is adopted. Assuming the MTEE is no longer administered the bar exam will be shortened from two and one-half days to two, with resulting savings in hotel, staff, drafting and grading. There will be other savings as well. There are likely to be some initial costs, though in amounts less than the anticipated savings. At this point, we propose neither raising nor lowering the fees charged to examinees because we need to see what the Court ultimately decides to do with the Petition and how costs shake out. Depending upon the result, we will examine the fee structure and propose adjustment as necessary.

## **CONCLUSION**

The proposal made by the Board has been thought about and studied for about three years. We support the Petition unanimously. However, some of the issues raised are legitimate and require the Court to weigh conflicting views. In the final analysis, the Board believes that what it proposes will accomplish the important task of protecting the public through adoption of a valid and well-accepted bar examination and that it will also serve the important task of assuring

a level of knowledge and understanding of unique aspects of Montana law.

Finally, we believe the public is well served by the proposal to increase the passing score a modest amount, from 130 to 135 (260 to 270 on the UBE scale)

DATED this 15<sup>th</sup> day of August, 2011.

MONTANA BOARD OF BAR EXAMINERS

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CERTIFICATE OF SERVICE

This is to certify that the foregoing *Response of Board of Bar Examiners to Comments Regarding Petition to Adopt Uniform Bar Examination* was served by U.S. Mail upon the following this 15<sup>th</sup> day of August, 2011:

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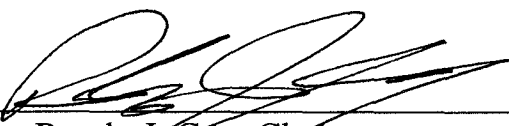
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