

MINUTES
MONTANA SUPREME COURT PUBLIC MEETING

Tuesday, May 31, 2016, 1:00 p.m.
Joseph P. Mazurek Justice Building
215 North Sanders, Helena
Attorney's Lounge, 4th floor

FILED

JUN 21 2016

Ed Smith

CLERK OF THE SUPREME COURT
STATE OF MONTANA

Justice Shea called the meeting to order at 1:00 pm. In attendance were Justices Baker, Rice, McKinnon, and Wheat. Chief Justice McGrath and Justice Cotter were excused. The following people were also present: Kathie Lynch and Chris Manos, on behalf of the Montana State Bar; Beth McLaughlin, Montana Supreme Court Administrator; Assistant Attorney General Stuart Segrest; Chris Wethern, Staff Attorney for the Montana Supreme Court; Professor of Law Anthony Johnstone; Dan Stusek; Sonja Pospisil; Stephanie Fuller; and Aislinn Shaul-Jensen and Mark Handelman, Law Clerks for the Montana Supreme Court.

Item 1: Minutes for the previous public meeting.

- All present Justices approved the Minutes from the previous public meeting.

Item 2: AF 11-0244 RULES FOR ADMISSION TO THE BAR OF MONTANA

- Justice Rice moved to adopt recommendations of the ad hoc committee for admissions to the Montana State Bar; Justice Wheat seconded the motion. Justice Shea then called for comment, in addition to the written comments the Court has already reviewed.
- Justice Baker voiced her appreciation for the written comments' thoroughness and thoughtfulness, and wanted to discuss the question of retroactivity. The current transfer rules allow for an out of state test taker to transfer his or her UBE score within three years of acquiring a passing score. However, Montana test takers would not fall under the transfer rules because they would be applying directly to Montana for admission. Therefore, if the Court does adopt a lower score, but does not make the rule change retroactive, Montana test-takers will be disadvantaged relative to out-of-state test takers. Furthermore, Justice Baker touched on the State Bar Board of Trustees' concern about having to amend the Rules for Admission to clarify the distinction.
 - Justice Rice answered stating the Court can clarify in its Order (if it adopts the ad hoc Committee's recommendations) to allow retroactivity for both in and out of state test takers, and that this one-time, unique situation does not necessitate

amending the Rule for Admission that only allows transferring a UBE score from another jurisdiction.

- Justice Baker requested clarification regarding a grace period for implementing any retroactive effect the rule change may cause for prior test-takers.
 - Ms. Lynch stated that a UBE score is good for three years, for Montana. Therefore, the July 2013 test-takers would not be able to take advantage of a rule change after July 2016. She stated the Court could implement a three month grace period, extending the full length of time to three years and three months.
 - Justice McKinnon asked for clarification on any potential grace period's purpose and identification of what problem the grace period is aimed to solve.
 - Justice Rice stated a grace period is aimed to: (1) alleviate administrative hurdles with implementing any rule change; and (2) allow enough notice to anyone the rule change affects to adequately act upon the change.
 - Ms. Lynch stated that the rule change would affect 29 former test-takers, 17 of whom have already retaken and passed, leaving 12 who still need to be admitted. Five of those 12 are UM graduates. Furthermore, Ms. Lynch did not have any data on the potential out-of-state test-taker pool that may apply for Montana admission once the rule change takes effect. Some out-of-staters would still need to go through Montana's entire application process.
 - Ms. Lynch also clarified that if the passing rate is lowered to 266, and the change is retroactive back though the July 2013 bar, then those who applied to the Montana Bar with a 266 or higher need not reapply.
 - Justice Baker also addressed potentially extending the grace period over two Montana Seminar periods. She stated that the current rules may negate any concern for extending the grace period over two Seminars, but that it should be made clear in the Court's Order.
- Justice Rice began discussion regarding the Board of Bar Examiners' Letter, which asked the Court not to implement any changes in the passing score until the February 2017 examination, so that the bar and public will have advanced notice of the change.
- Professor Johnstone voiced a clarification in the New York UBE process. New York also had a committee that arrived at 266 for a UBE passing score because that was the

equivalent to the passing score on the state's previous bar exam. Therefore, if Montana does look to New York for persuasive guidance in determining the new passing score, the same measure would reinstate Montana's original 260 passing score, not 266, because Montana's previous passing score was lower than New York's.

- Justice Baker responded by stating that her support for the ad hoc committee's recommendation is not based on New York's score, but that it's one of many factors the ad hoc committee considered. Any system is imperfect, but the committee appointed by the Court brought diverse interests and views to the discussion before arriving at 266 as the most agreeable compromise.
- Justice Baker then stated that a person's bar exam score does not predict competence or whether a lawyer will end up in front of the disciplinary counsel; and even those attorneys are not necessarily incompetent, but often are over their heads for a variety of reasons and lack skills a bar exam cannot adequately measure.
- Justice Baker expressed her support of and moved for the creation of a standing committee that would continue to examine bar admission requirements and help predict competency. The Montana law seminar is a good step to help introduce attorneys to Montana's legal idiosyncrasies, but ongoing evaluation is important. She also would like to see inquiry into some type of residency requirement, whether that be a year-long apprenticeship or something entirely different. She clarified that she was not proposing a year-long apprenticeship at this point.
- Justice McKinnon did not disagree with the potential need for a standing committee, but did express the need to refrain from revisiting the passing score issue, because changing it again and again would be the worse course of action the Court could take (to which Justice Baker agreed).
- Justice McKinnon then expressed her support for the ad hoc committee's recommendations.
- Justice Shea also expressed his support for adopting the ad hoc committee's recommendation. He went on to state there is a compelling case to go to 260, but there are other factors that make 266 the best option. Justice Shea also echoed Justice McKinnon's opinion that the passing score will not be something the Court will consistently tweak. Justice Shea also stated that the creation of a standing committee has some merit, and that the Court will likely visit admissions issues as necessary.
- Justice Wheat then expressed his thoughts on the rule changes, as well as the Bar Exam's greater impact and context. He stated that both Justice Rice and him were part of the

“diploma privilege” and therefore did not take the bar. The statement laid the foundation for Justice Wheat’s opinion that the bar exam is no measure of current or future competence. Justice Wheat spoke of future lawyers who went through the arduous steps of being admitted to law school, then surviving law school’s rigorous standards, while amassing great sums of debt, only to have an irrelevant test prevent them from what they have been working towards for years. Justice Wheat stated he would rather scrap the whole exam, but conceded Montana is stuck with it.

- Justice Wheat also wanted more information on a potential standing committee before supporting the motion, and wondered whether it would be better suited for UM’s Law School oversight than the Court’s.
 - Justice Baker explained her reasoning for keeping the standing committee with the Court, because: (1) the Court sets the admission standards; and (2) not all admittees are from UM Law.
- Justice Baker continued the standing committee discussion, stating that one would not have to meet every month, but bringing different interests and perspectives to the table regarding admissions for Montana could bring continued positive change.
 - Justice Rice recalled talking about a standing committee with the ad hoc committee, and they discussed it potentially being a good tool for innovation. They talked about other states’ unique approaches to admission, like New Hampshire’s rigorous two-year honors program that serves as an alternative to taking the bar exam.
- Dan Stusek then expressed his perspective as one of the five UM Graduates who would qualify for admission if the committee’s passage rate and reciprocity recommendations are adopted. Mr. Stusek stated that the 4 points out of the potential 400 on a bar exam have delayed qualified attorneys from practicing, as opposed to keeping unqualified attorneys from practicing. This is because many current attorneys fell into the 260-270 score range, when the passing score was still at 260 before Montana became part of the UBE.
- The Justices then discussed any potential need for a grace period, and if so, for how long. Because character and fitness determinations can go on past an applicant’s application, the grace period does not need to be longer than three months. Everyone agreed on a three month grace period, extending the date to November 1, 2016. Justice Wheat reiterated his focus on the UM students, and his desire to make sure they won’t fall through any cracks. Justice Shea stated that Chief Justice McGrath is in favor of

adopting the committee's recommendations, and Justice Baker noted Justice Cotter's written support for adopting the committee's recommendations.

- Justice Rice moved to amend his motion to include the November 1, 2016 transition period. Justice Baker seconded Justice Rice's amended motion and the Court adopted the ad hoc committee's recommendations by unanimous vote.

Item 3: AF 06-0090 APPOINTMENT TO COMMISSION ON PRACTICE

- Pursuant to Section I of the Rules Establishing the Commission on Practice of the Supreme Court of the State of Montana, dated August 24, 1983, an Order was issued April 20, 2016, requesting that Judge Knisely conduct an election among the resident members of the State Bar in Commission Area G, consisting of the Thirteenth and Twenty-second Judicial Districts (Yellowstone, Big Horn, Carbon and Stillwater Counties), and to certify to the Montana Supreme Court the election's results.
- Judge Knisely had certified the results of the election to the court, Kelly Gallinger received the highest number of votes.
- Justice Baker noted that the Chief Justice had proposed an order recommending Kelly Gallinger based on the election.
- Justice Shea moved to appoint, Justice Rice seconded, and all present Justices voted in favor of appointing Kelly Gallinger.
- The Justices then signed an order appointing Kelly Gallinger to the Commission on Practice.

Item 4: REVISIONS TO JUDICIAL BRANCH ADMINISTRATIVE POLICY NUMBERS 1220, 1230, 1260, 1290, 1300 and 1310, as recommended by the District Court Council

and

REVISIONS TO DRUG TREATMENT COURT FUNDING FOR FY 2017, POLICY NUMBER 880, as recommended by the District Court Council

- Ms. McLaughlin spoke to the revisions and some of their implications. For example, to conform to new statutory changes, relevant financial duties are transferred from the Department of Corrections to the Judicial Branch. She explained that all of the changes were geared towards complying with the statutory changes.

- Justice Baker moved to adopt all proposed amendments; Justice Shea seconded, and all present Justices voted in favor of the revisions.
- Justice Shea adjourned the meeting at 1:45 p.m.

Duly Submitted
Mark Handelman
Law Clerk