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## A Survey on Admission to Practice Law in Montana

LEE METCALF\*

Annually a group of applicants for admission to practice law in Montana appears before the bar of the supreme court and takes the oath prescribed by Section 7 of Rule XXV (B) of the Rules of Court. The hopeful candidates are then conducted into the examination room and undergo a three-day ordeal to test their knowledge of the law. Sometime during the day following, approximately half of them<sup>1</sup> return to take their oath of

\*Associate Justice Montana Supreme Court.

### <sup>1</sup> RESULTS OF MONTANA BAR EXAMINATIONS

Year	No. Taking Exam	No. Passing	No. Failing	% Passing
1936	10	4	6	40
1937	19	10	9	53
†1938	17	13	4	77
1939	22	13	9	59
1940	20	6	14	30
1941	20	13	7	65
*1942	11	3	8	27
	11	3	8	27
*1943	3	1	2	33
	14	3	11	22
1944	10	00	10	00
1945	12	3	9	25
*1946	9	4	5	44
	9	5	4	55
1947	8	3	5	37
1948	20	12	8	60
1949	27	20	7	74
*1950	13	5	8	39
	21	3	18	14
1951	22	10	12	45
	—	—	—	—
Total	298	134	164	45

†1938 is the only year during the period in which the Justices of the Montana Supreme Court personally supervised the "strict examination." The minutes of the court reveal that on September 30, 1938, the

office, secure their certificates to practice law and go forth to attempt to earn a livelihood in their new profession.

The members of the court are familiar with the qualifications of the applicants because their petitions have been previously filed with the clerk of court and approved as to form by the attorney general. Each applicant's petition is then examined and passed upon by the members of the court.<sup>3</sup> In each class there are men who have graduated from famous law schools with excellent academic standing and others who have studied law privately or by correspondence. Yet it is impossible to predict which of the applicants will be back to receive a license to practice and which will be refused. After each examination the members of the court wonder if the men who will become the best lawyers have succeeded and if the examination has served its purpose in eliminating the incompetent or the unqualified. Sometimes such apparent injustices occur as to cast doubt upon the efficacy of the entire system.

The legislature has set rather simple requirements for admission to practice law. The applicant must be twenty-one years of age, of good moral character, a citizen or a person resident of the state who has declared his intention to become a citizen, and possessing the necessary qualifications of learning and ability.<sup>4</sup>

The moral character of the applicant for admission is proven by testimonials. The necessary learning and ability is proven by a certificate of "one or more reputable counselors-at-law" that the applicant "has been engaged in the study of law for two successive years prior to the making of such application." It is further demonstrated by requiring the applicant to "undergo a strict examination as to his qualifications by any one or more of the justices of the supreme court."<sup>5</sup>

The Montana Supreme Court has declared that the statute

court accepted the report of the board of bar examiners recommending nine applicants for admission and reporting that eight had failed. Subsequently on December 2, 1938, the following minute entry appears: "This Court, after having examined the examination papers from the regular examination given on the 26th to 29th day of September 1938 and after examining the applications for admission to practice, do hereby find that the following persons have successfully passed, and are otherwise qualified, and are entitled to be admitted to practice law in the State of Montana." (Then follow the names of five of the above eight who had been failed by the examining board.) Subsequently five petitions for re-grading of the examinations by the court have been denied.

\*Years in which two examinations were held.

<sup>3</sup>Section 4, Rule XXV (B), Rules of Court.

<sup>4</sup>R.C.M. 1947, § 93-2001.

<sup>5</sup>R.C.M. 1947, § 93-2002.

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grants it exclusive power to confer upon any persons the right to practice law.<sup>5</sup> Under this power the court has added additional requirements by court rule. An applicant for examination must have been for at least six months prior to the date of filing his application a bona fide resident of the state<sup>6</sup> and must present satisfactory evidence that he "possesses qualifications equivalent to those which are required of a 'regular' student who enters the Law Department of the State University of Montana as an applicant for a degree; that is to say, the evidence presented by him must satisfy the entrance requirements of the University of Montana and in addition must disclose that he has completed two years' work in a university or college of recognized standing, or the equivalent."<sup>7</sup>

This would seem to require graduation from a four-year high school and successful completion of two years' work beyond high school. But as the rule has been applied the applicant is able to show "the equivalent" by an examination, so that there are cases where men who never attended high school or the university have been permitted to take the examination.<sup>8</sup>

The court rules require that an applicant for admission by examination file with his application the affidavits of three responsible citizens, two of whom must be members of the bar, stating that the applicant is a person of good moral character.<sup>9</sup>

<sup>5</sup>State *ex rel.* Freebourn v. Merchants' Credit Service, 104 Mont. 76, 66 P. (2d) 337 (1937).

<sup>6</sup>Section 1, Rule XXV (A).

<sup>7</sup>Section 2, Rule XXV (B). This is the version of the rule set forth in 120 Mont. lli., but in 1932 in 90 Mont. xvii., Rule XXV (A), subd. 2, was amended so that the last paragraph reads, "If the applicant is not able to show that he has successfully completed two years' work in a university or college of recognized standing he must show that the work he has done and which he presents as an equivalent will prima facie entitle him to enter the junior class in the Literary Department of the State University upon examination."

The rule was printed in the next complete compilation of the rules in 101 Mont. as above amended. However, in 111 Mont. xxxvi. the rule reappeared as it was before the 1932 amendment. No order revoking the amendment is noted in the minutes of the court.

<sup>8</sup>Law is generally regarded as a "learned" profession, yet an examination of Title 66, R.C.M. 1947, reveals that chiropractors, nurses, dentists, optometrists, osteopaths, pharmacists, doctors, veterinarians and civil engineers have educational standards as high or higher.

<sup>9</sup>Section 2, Rule XXV (B). Some members of the bar have been so charitable in their character evaluations and so willing to swear to an applicant's good moral character on slight acquaintance that the court has been forced to require that the affidavit "set forth how long a time, when, and under what circumstances affiant has known the applicant." Despite the fact that this requirement has been printed in black face type in recent compilations of the rule, compliance with it is an exception.

In most cases then the petition on its face shows all the qualifications of the applicant except his "learning and ability." This must be tested by "strict examination." The members of the court are authorized to delegate the task of examining the applicants to an examining board.<sup>10</sup>

After the attorney general has tentatively approved the petitions, they are returned to the clerk of the court and the names of the applicants published.<sup>11</sup> If no one objects and the applicants have complied with the requirements of the statutes and rules of court as previously interpreted, the applicants are turned over to the board of bar examiners who take complete charge of the examination.

The members of the board of bar examiners are appointed for an indefinite term, and "the court may release, dismiss, or remove any member of said board, and appoint other members in his or their stead at any time."<sup>12</sup> The present members of the board are all eminent practicing lawyers with broad experience who have conscientiously discharged their duties under the statutes and the rules prescribed by the court.<sup>13</sup> The members serve without pay and are allowed only actual expenses and a per diem for attendance at the bar examination.<sup>14</sup> They give liberally of their time in preparing questions and are given no clerical assistance in grading examinations or handling the inquiries and correspondence relative to their duties.

The various qualifications of the applicants to take the Montana bar examination and their initial success are shown in the following table:

<sup>10</sup>R.C.M. 1947, § 93-2013.

<sup>11</sup>In only one instance has anyone filed objections with the clerk of court in response to the publication of names as provided by Rule XXV (B), section 3. In that case the court set a date for hearing the protest and the applicant withdrew his application.

<sup>12</sup>R.C.M. 1947, § 93-2013.

<sup>13</sup>Ralph J. Anderson, Helena, Chairman, former associate justice Montana Supreme Court, 1933-1939, admitted to practice 1912, appointed to the board 1943; H. Leonard DeKalb, Lewistown, admitted 1902, served as district judge, 10th district, 1917-1918, appointed to the board 1928; H. Cleveland Hall, Great Falls, admitted 1914, served as district judge, 17th district, 1919-1920, appointed to the board 1951; William Meyer, Butte, admitted 1903, appointed to the board 1946; Ralph J. Wiggernhorn, Billings, admitted 1908, appointed to the board 1941.

<sup>14</sup>R.C.M. 1947, § 93-2014.

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**Success of First-Time Applicants, According to Pre-Legal and Legal Training in the Montana Bar Examinations, 1936-1951**

	No. Taking Exam.	No. Passing	No. Failing
2 years pre-legal and 2 years law school....	9	7	2
Degree pre-legal and 2 years law school....	15	8	7
2 years pre-legal and law school degree....	20	17	3
3 years pre-legal and law school degree....	7	7	0
Degree pre-legal and law school degree....	48	36	12
2 years pre-legal and non-approved law school degree .....	13	1	12
3 years pre-legal and non-approved law school degree .....	2	1	1
Degree pre-legal and non-approved law school degree .....	4	1	3
2 years pre-legal and correspondence .....	9	4	5
3 years pre-legal and correspondence .....	2	2	0
Degree pre-legal and correspondence .....	14	8	6
2 years pre-legal and law office study.....	1	0	1
3 years pre-legal and law office study .....	1	1	0
Degree pre-legal and law office study.....	4	1	3
Equivalent pre-legal and correspondence..	26	5	21
Equivalent pre-legal and law office study	24	7	17
Equivalent pre-legal and unapproved law school degree .....	6	0	6
2 years pre-legal and 3 years law school (no degree) .....	2	1	1
Degree pre-legal and 3 years law school (no degree) .....	2	1	1
4 years pre-legal (no degree) and 2 years law school .....	1	0	1
Total.....	210	108	102

Some explanation is necessary on the above table. Unless otherwise mentioned the pre-legal training was in a university or college of recognized standing, and the law school is one approved by the council of legal education of the American Bar Association.<sup>15</sup>

Certain arbitrary classifications have been made. Correspondence means graduation from a correspondence law school.

<sup>15</sup>The section of legal education and admission to the bar of the American Bar Association in 1947 published a pamphlet containing the standards for legal education as originally adopted in 1921 with subsequent amendments. The approved law schools are taken from the list in the 1950 report of the American Bar Association, Vol. 75, p. 567.

In those cases where the applicant has submitted both correspondence study and study in a law office or under the supervision of a lawyer, the classification of correspondence has been used where the applicant had successfully passed the final examination and was awarded a degree from the correspondence school. Where the law office study was supplemented by correspondence study the applicant has been recorded under law office study.

In pre-legal education the greatest difficulty has arisen under the interpretation of the term "equivalent." All but five of the applicants who were given credit for education equivalent to "two years of work in a university or college of recognized standing" were high school graduates. None of those who was not a high school graduate was successful in passing the examination the first time; two succeeded in passing subsequent examinations.

The practical application of the rule permitting an applicant to show equivalent qualifications is individual for each petitioner. Most of the applicants who have not completed two years of work of college level are referred to the committee on admission and graduation of Montana State University and are given a comprehensive examination. If successful in this examination the applicant obtains a certificate from the chairman of that committee reciting that "the applicant by passing a comprehensive examination given him under my supervision in my office at the state university, established to my satisfaction that he possesses qualifications equivalent to those which are possessed by the regular students who enter the law department of the university as juniors." This certificate is accepted by the court as meeting the requirements of the rule.

However, the court has permitted applicants to show equivalent qualifications by experience as newspapermen, attendance and graduation from business colleges, education in military service schools and Armed Forces Institute, and even by affidavits of other lawyers or school principals that they are acquainted with the applicant and have "discussed literature, mathematics and history with him and believe that he has by self study educated himself to the level of a student who enters the third year of the University."

If a student has successfully completed two years in a recognized college or university there is no analysis of the kind of courses he took. Such courses as basketball coaching, sight

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singing, chorus, ceramics, harmony and weaving have been counted.<sup>18</sup>

Of the number who failed the first examination and took a subsequent examination the following results were obtained:

	No. Taking Exam.	No. Passing	No. Failing
2 years pre-legal and 2 years law school....	2	1	1
Degree pre-legal and 2 years law school....	3	2	1
2 years pre-legal and degree law school....	1	1	0
Degree pre-legal and degree law school....	8	3	5
2 years pre-legal and unapproved law school degree .....	5	2	3
2 years pre-legal and correspondence .....	3	0	3
2 years pre-legal and law office study.....	1	1	0
Degree pre-legal and law office study.....	4	0	4
2 years pre-legal and 3 years law school (no degree) .....	2	1	1
Equivalent pre-legal and correspondence	16	5	11
Equivalent pre-legal and law office study	8	1	7
Equivalent pre-legal and unapproved law school degree .....	1	1	0
Total.....	54	18	36

Those who failed two examinations and chose to take a third examination had the following success:

	No. Taking Exam.	No. Passing	No. Failing
Degree pre-legal and degree law school....	2	0	2
2 years pre-legal and correspondence .....	2	2	0
2 years pre-legal and unapproved law school degree .....	2	0	2
Equivalent pre-legal and correspondence..	9	2	7
Equivalent pre-legal and law office study	6	1	5
Total.....	21	5	16

Those who took the examination four times showed the following results:

<sup>18</sup>This is true despite the requirement of the Montana State University Law School that "non-theory courses are not acceptable \* \* \* with the exception that required courses in physical education and military drill are acceptable up to 10% of the total credit offered for admission."



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	No.		
	Taking	No.	No.
	Exam.	Passing	Failing
2 years pre-legal and unapproved law school degree .....	3	1	2
Equivalent and correspondence .....	5	1	4
Equivalent and law office study .....	2	0	2
	<hr/>	<hr/>	<hr/>
Total.....	10	2	8

Three applicants have taken the examination five times. The candidate who had equivalent pre-legal training and study in a law office for his legal training was successful on his fifth attempt. Two candidates who offered equivalent pre-legal training and correspondence law study failed on their fifth attempt.

The same lenience has been shown in giving credit for diligent pursuit of the study of law. In one instance a student made unsatisfactory grades in his first year of law school and was required to repeat the entire course. At the end of the second year he was dropped from school. Yet the court accepted this as compliance with the requirement that he had "diligently pursued the study of law for at least two successive years."

In the foregoing tables self-study has been included in law office study. The rule requires the certificates of two attorneys that the applicant has been "engaged in the study of law for two successive years." The attorneys state that the applicant has been studying under their supervision, reading texts and cases assigned, and taking periodic reviews and examinations. There is no further check on the amount of time actually spent by the applicant on the study of law, on the subjects studied, or the type of supervision. Most of the applicants who are successful after this type of legal study are those who have been exposed to law in action as employees in the office of the clerk of court or as a court reporter for a number of years and have had the supervision of able and conscientious lawyers or judges. Usually this type of study is supplemented by some correspondence work or in two instances by attendance for summer quarters as special students in an approved law school.

An inspection of the petitions of applicants who offered two or more years of pre-legal training and a degree from an approved law school reveals that those who passed the examination the first time took most of the courses enumerated in Sec-

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tion 5 of Rule XXV (B).<sup>17</sup> Those who failed the first examination but successfully passed the subsequent ones substituted courses such as Labor Law, Taxation, Insurance, Legislative Draftsmanship, Research in Cooperatives, Public Control of Corporations, etc.

The list of required subjects first appeared in the compilation of rules published in 53 Montana xlv. (1917), and except for the deletion of "Common Law Pleading and Practice" and the insertion of the words "including Oil and Gas" after Mining Laws, the requirements have remained unchanged over the past thirty-five years.

Certain fields of law of relatively little importance in 1917 have become important and significant today. The complexities of present day taxation laws and the growth of administrative and labor law are examples. If a law school is to cover completely the traditional subjects listed in the rule there will be no opportunity to teach subjects of equal or greater importance. If a student believes that he would like to specialize in labor law or cooperatives or taxation and neglect domestic relations or irrigation law he should be permitted to do so. If he has the proper foundation he can prepare for an irrigation law case without taking a course in water rights as completely as under the present system where he is required to present an application before an administrative board without having had a course in administrative law.

During the period 1936-1951, 477<sup>18</sup> graduates of the Montana State University law school have been admitted on motion as permitted by statute.<sup>19</sup>

The main arguments pro and con on the "diploma privi-

<sup>17</sup>"Candidates will present themselves prepared for examination in the following subjects: Constitutional Law, including the Constitutions of the United States and the State of Montana; Equity; Trusts and Suretyship; the Law of Real and Personal Property; Evidence; Decedents' Estates; Mortgages; Contracts; Partnership; Corporations; Torts; Crimes; Agency; Sales; Negotiable Instruments; Domestic Relations; Master and Servant; Code Pleading and Practice; Conflict of Laws; Mining Laws, including Oil and Gas; Water Rights; the Federal Statutes relating to the Judiciary and to Bankruptcy; Professional Ethics, particularly with reference to the Canons of Ethics recommended by the American Bar Association; and the Principles of Law as exemplified by the decisions of the Supreme Court of Montana and by statutory enactments of the Legislature of Montana."

<sup>18</sup> 1936.....22	1940.....21	1944..... 6	1948.....79
1937.....19	1941.....24	1945..... 3	1949.....43
1938.....37	1942.....14	1946.....10	1950.....75
1939.....20	1943.....10	1947.....24	1951.....70

<sup>19</sup>R.C.M. 1947, § 93-2002, " \* \* \* provided, however, that a diploma from

lege" have been often published and there is no point in reviewing them here.<sup>20</sup>

There are, however, some special reasons for retaining the "diploma privilege" for the graduates of Montana State University law school.

The standards, both for pre-legal and actual law study are higher for graduates of Montana law school than for applicants to take the bar examination. This is especially true with respect to the lenient interpretation given by the court to "equivalent" pre-legal study. But the three-year law study required for graduation sets a much higher standard than two years of study loosely supervised in a law office or self-study at night. The place to begin to tighten up admission requirements would appear to be in establishing stricter standards for permission to take the bar examination.

Then, too, Montana has a relatively small law school and it is the only one in the state. The Chief Justice is well acquainted with the instructors, familiar with the type of instruction given at the school, and able to determine accurately that standards are being maintained. The Montana graduates who appear before the court measure up in training and ability as lawyers with the graduates of out-of-state schools who are practicing in the state. In larger states this close acquaintance with the law school and observation of its graduates would not exist. The Chief Justice would be prevented from watching and comparing the local graduates with those of other approved schools, and the system might break down.

The success of former Montana students in the bar examination also indicates that the University is maintaining its standards. During the period 1936-1951 seven students who had completed two years of study at Montana State University law school took the bar examination. Two of the seven had less than a passing average in law school. The remaining five were students of relatively high rank. All five of the students who were main-

the department of law of the university of Montana at Missoula, or evidence of having completed the course in law of three years of said department, shall entitle the holder to a license to practice law in all the courts of this state, subject to the right of the chief justice of the supreme court of the state to order an examination as in ordinary cases of applicants without such diploma or evidence."

<sup>20</sup>See, *THE PROGRESS OF LEGAL EDUCATION* (1922), CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING; REED, *TRAINING FOR THE PROFESSION OF LAW* (1921); *Panel—What Method Should Be Used to Determine the Applicant's Educational Fitness for Admission to the Bar?* 23 *ROCKY MT. L. REV.* 90 (1950).

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taining a passing average were successful the first time in the bar examination. One of the other students was successful the first time, and the other passed on the second attempt. During the same period two applicants were successful in passing the bar examination who had attended the Montana law school for three years but had not graduated. Taken along with other evidence these results indicate that a man who is able to graduate from the Montana law school is able to pass the bar examination.

Probably the most serious criticism of the policy of admitting Montana graduates without examination is that the members of the court are passing off onto the faculty of the law school the duty of eliminating the unqualified. Certainly the teaching profession does not want this responsibility nor does the Montana law school need any favoritism to attract students. But under our present system with a small amount of money to devote to bar examinations and with a board of bar examiners whose members are already required to contribute a great deal of time and energy to their task, it is not the suitable time for the court to more than double the burden of the bar examiners and relieve the law school faculty of the responsibility that they have heretofore borne.

However, Montana's standards for admission are lagging behind those of other states. The American Bar Association in 1921 recommended that the minimum standard for admission should be two years of college training and three years of full time law school study. We have not yet achieved that standard. As a member of the court I am reluctant to stifle competition by depriving a young man of ability of the opportunity to practice law if he can surmount the obstacles that confront him before he attempts the bar examination. At the same time I am afraid that our loose interpretation of the rule allowing applicants to offer equivalent study or experience for academic pre-legal training holds out false hopes for most of the applicants who do not have adequate preparation. The standing Committee on Legal Education and Admission to the Bar of the Montana Bar Association could render the Supreme Court, the board of bar examiners, and the profession in general a real service by making a study of our whole system and recommending changes to conform to standards elsewhere. The court from time to time has altered the rules when some abuse or flagrant injustice has come to its attention. But it would appear that what is needed is not a piece-meal amendment but a re-evaluation of the whole process.

Some other problems that the committee might consider have been raised above. Consideration should be given to reducing

the number of subjects upon which an applicant is examined by at least a third.<sup>21</sup> Perhaps a part of the examination could be devoted to questions on optional subjects, thus permitting students more latitude in choosing fields in which they wish to specialize and allowing the law schools to teach subjects that answer the present day needs of the profession.

It has been suggested that the Montana system of giving 100 questions in three days gives an undue advantage to students who have taken cram courses or have studied law quizzers. Perhaps fewer questions demanding more consideration and analysis would be preferable.

The members of the Montana board of bar examiners have always corrected the examination papers during the course of the examination. Often they are required to work far into the night in order to present their report to the court on the day following the examination. In these days of larger classes it may be that they should have some assistance in this work.

These and other like matters are of vital interest to the bench and bar. The initiative for higher standards nationally has come from the American Bar Association. Similarly, the initiative for needed changes in the court rules and examination procedures should come in this state from the Montana Bar Association. The association would find the members of the court and the board of bar examiners anxious to cooperate for the betterment of our profession.

<sup>21</sup>See the article by J. E. Brenner, *Improving Bar Examinations, Some Suggestions*, 36 A.B.A.J. 279.