IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE: APPLICATION OF ETHAN APPLETON SHANER, 2551 MCGEE DRIVE, NORMAN, OKLAHOMA 73072 FOR ADMISSION TO THE PRACTICE OF LAW ON MOTION PURSUANT TO RULE TWO OF *THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLAHOMA*	)	SCBD No. 5810

WINCHESTER, J., with whom Taylor, C.J., Edmondson, J., and Kauger, J., join, dissenting:

I respectfully dissent. The applicant, Ethan Shaner, requests admission to the Oklahoma Bar Association pursuant to Rule 2 of the Rules Governing Admission to the Practice of Law, 5 O.S.2011, ch. 1, app. 5. On November 15, 2011, the Oklahoma Bar Association (OBA) filed an application with a report and recommendation to admit Mr. Shaner to the Oklahoma Bar without examination.

Pursuant to Rule 2, a lawyer from another state that grants Oklahoma judges and lawyers the right of admission on motion, without the requirement of an examination, may be likewise admitted to the OBA if the lawyer:

> 1. has good moral character, due respect for the law, and fitness to practice law;
> 2. is at least 18 years of age;
> 3. graduated from an American Bar Association approved law school; and
> 4. is engaged in the actual and continuous practice of law for at least five of the seven years immediately preceding application for admission.

Mr. Shaner was admitted as a member of the Delaware Bar Association on March 2, 2005. He was also admitted to the District of Columbia Bar

Association on August 8, 2011. Shaner, a lawyer of more than six years, graduated from William & Mary Law School; has a favorable character report by the National Conference of Bar Examiners; and has achieved the score on the Multistate Professional Responsibility Examination required for admittance to the OBA. He has moved to Norman, Oklahoma, and accepted employment with the Attorney General of the State of Oklahoma.

These qualifications appear to the OBA and to me to satisfy the requirements for admission to the Bar of Oklahoma by motion. Yet the majority has determined that because Delaware does not qualify as a "reciprocity state" under our rules, the applicant should not be permitted to be licensed under Rule 2, and must be required to take the bar exam in Oklahoma. If the State of Delaware allowed reciprocity admittance of Oklahoma lawyers to its Bar, Shaner could now join the OBA without taking the Oklahoma Bar exam.

The District of Columbia, on the other hand, allows Delaware licensed lawyers to be admitted to the DC Bar upon certain conditions having been met. Shaner met these conditions and was admitted to the DC Bar on August 8, 2011.[1] Because DC grants Oklahoma judges and lawyers the right of admission

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[1]D.C. Ct. App. Rule 46 (2007) provides in pertinent part:

> ... (c) Admission Without Examination of Members of the Bar of Other Jurisdictions.
> (1) Application. An application of an applicant seeking admission to this Bar from another state or territory shall be typewritten and submitted on a form approved by the Committee and filed with the Director. The contents of the application shall be confidential except upon order of the court.
> (2) Fees. The applicant shall be accompanied by (1) certified check, cashier's check, or money order in the amount of $400 made payable to the Clerk, D.C. Court of Appeals, together with

on motion, without the requirement of an examination, Shaner, as a member of the DC Bar may be admitted to the OBA pursuant to Rule 2 of the Rules Governing Admission to the Practice of Law in this state.

The Board of Bar Examiners has interpreted this rule to allow the admission of such lawyers for many years. This Court has followed the recommendation and approved the application of lawyers from other states to do exactly what Shaner has done in this cause. Rather than require the applicant lawyer to take the Oklahoma Bar examination, we have admitted lawyers who were able to use their admission from a non-reciprocal state to gain admission into a reciprocal state, thus qualifying for reciprocity in Oklahoma. Our rule does not prohibit this type of admission nor does it require that the actual and continuous practice of law for at least five of the seven years immediately preceding application for admission be solely from a reciprocal state.[2]

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(2) a certified check, cashier's check, or money order made payable to the National Conference of Bar Examiners, the amount of which shall be specified on the application form.
(3) Admissions Requirements. Any person may, upon proof of good moral character as it relates to the practice of law, be admitted to the Bar of this court without examination, provided that such person:
(i) Has been a member in good standing of a Bar of a court of general jurisdiction in any state or territory of the United States for a period of five years immediately preceding the filing of the application; or
(ii)(A) Has been awarded a J.D. or LL.B. degree by a law school which, at the time of the awarding of the degree, was approved by the American Bar Association;
(B) Has been admitted to the practice of law in any state or territory of the United States upon the successful completion of a written bar examination and has received a scaled score of 133 or more on the Multistate Bar Examination which the state or territory deems to have been taken as a part of such examination; and
(C) Has taken and passed, in accordance with paragraph (b)(5), the Multistate Professional Responsibility Examination (MPRE). . . .

[2] For a comparison review of all states' reciprocity requirements and policies, see www.barreciprocity.com.

Today, for the first time, the Court decides to change its interpretation of the rule. However, even more than the sudden interpretation change, I strongly disagree with the Court's change by randomly picking out an applicant who, when his application was filed based on the Bar Association's and this Court's prior practice and interpretation of its own rules, was justified in a belief that he would be qualified to be admitted to the Oklahoma Bar.

Generally, construction of an ambiguous or uncertain statute or rule by an administrative agency charged with its administration, although not controlling, is entitled to the highest respect from the courts, especially when construction is definitely settled and uniformly applied for a number of years.[3] In this cause the Court intends to ignore, abrogate or diminish this rule of construction, at least as it would apply by comparison to itself.

The interest in a professional license is substantial. So much so that when it is necessary to procure a license in order to carry on a chosen profession or business, the power to revoke a license is viewed as the ability to destroy in a measure the means of livelihood and revocation becomes penal in nature.[4] This lawyer, or others like him, may have relied upon our previous application and interpretation of our rules to leave employment in another state and move to Oklahoma in reliance on a job.

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[3] *Hendrick v. Walters*, 1993 OK 162, ¶17, 865 P.2d 1232, 1241-42; *Oral Roberts Univ. v. Oklahoma Tax Com'n*, 1985 OK 97, ¶9, 714 P.2d 1013, 1014-15; *Berry v. Public Empl. Retirement System*, 1989 OK 14,¶8, 768 P.2d 898, 900.

[4] *Johnson v. Board of Governors of Registered Dentists*, 1996 OK 41, ¶13, 913 P.2d 1339, 1344; *State ex rel. Oklahoma State Board of Embalmers and Funeral Directors v. Guardian Funeral Home*, 1967 OK 141, ¶0, 429 P.2d 732, 733.

This Court is not prohibited nor compelled to give judicial decisions retrospective operation. Judicial policy determines whether, and to what extent, a new rule will operate retroactively.[5] Because lawyers may be making life-changing decisions on where to live and work and because applying this interpretive change to this applicant who obviously has accepted contractual employment results in an *ex post facto* effect,[6] I would not apply the change to this applicant or any applicant already in the "application pipeline," but only to those which are not now pending.

Although I do not agree with the change, if it must be done, I would set a date on which it is to occur. The language of Rule 2 could be expressly changed to reflect the Court's new interpretation of the Rule and that change could be made to apply prospectively on a certain date. *At the very least*, this lawyer should be admitted and the Court could warn future applicants of its change in interpretation. Either alternative would preserve due process as required by our

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[5] *Resolution Trust Corp. v. Grant*, 1995 OK 68, ¶22, 901 P.2d 807; *Harry R. Carlile Trust v. Cotton Petroleum*, 1986 OK 16, ¶16, 732 P.2d 438, 445 *cert. denied*, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 and 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 764; *Thompson v. Presbyterian Hosp., Inc.*, 1982 OK 87, ¶32, 652 P.2d 260, 268.

[6] The Oklahoma Const. art. 2, § 15 provides:

"No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties."

In construing this constitutional provision, this Court has extended its protection beyond actions which are merely criminal in character but also laws which are penal in any form, which provides the imposition of some punitive consequence for its violation. *Anderson v. Ritterbusch*, 1908 OK 250, ¶0, 98 P. 1002, 1003. Denying this application because of a sudden interpretative change to a rule may not rise to the level of punitive, but it has a punitive effect because it unexpectedly denies the applicant the freedom of choice of where to work and live without prior warning that a bar examination would be required to make such a choice.

Constitution and avoid the impairment of the obligation of contracts under Okla. Const. art 2 §15.[7]

[7]The Okla. Const. art. 2, §7 provides:

"No person shall be deprived of life, liberty, or property without due process of law. "

In *Johnson v. Board of Governors of Registered Dentists*, 1996 OK 41, ¶14, 913 P.2d at 1344, the Court stated:

"Due process 'entitles a person to an impartial and disinterested tribunal in both civil and criminal' adjudicative proceedings. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 578-79, 93 S.Ct. 1689, 1697-98, 36 L.Ed.2d 488 (1973). The lack of due process resulting from a biased tribunal cannot be corrected on appeal. *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61, 93 S.Ct. 80, 83-84, 34 L.Ed.2d 267 (1972)."

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ORDER

The Court having reviewed the application for admission to practice law in the State of Oklahoma pursuant to Rule Two of the Rules Governing Admission to the Practice of Law in the State of Oklahoma (RGAP), 5 O.S. 2009, Ch. 1, App. 5, of Ethan Appleton Shaner, finds as follows:

That the applicant, Ethan Appleton Shaner, has been a member of the Delaware Bar since March 2, 2005, and supports his Rule Two application with affidavits showing continuous practice of law in the State of Delaware for a period in excess of five years;

That the applicant has been a member of the District of Columbia Bar since August 8, 2011, but has provided no documentation that he practiced in the District of Columbia.

The Court further finds that the Delaware Bar constitutes a "closed state" for reciprocity admission of out-of-state attorneys.

The Court further finds that the District of Columbia Bar is a state which has reciprocity privileges with the State of Oklahoma.

Accordingly, the Court holds that the applicant has failed to present evidence of minimal continuous practice for the requisite five of the last seven years in a reciprocating state to be admitted to the practice of law in the State of Oklahoma under the provisions of Rule Two, RGAP, 5 O.S. Supp. 2009, Ch. 1, App. 5. [emphasis added].

If the applicant wishes to become a full member of the Oklahoma Bar, he should register for the next available bar examination.

IT IS THEREFORE ORDERED that the application of Ethan Appleton Shaner to be admitted to the practice of law in the state of Oklahoma under Rule Two is hereby denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 15th DAY OF DECEMBER, 2011.

ACTING CHIEF JUSTICE

COLBERT, V.C.J., WATT, REIF, COMBS, GURICH, JJ. – concur
TAYLOR, C.J., KAUGER, WINCHESTER, EDMONDSON, JJ. – dissent