Resignation From the Bar Under Charges

Shortly after Stanley Balch was admitted to the practice of law, the Oklahoma Bar Association discovered that Balch’s answers to two essay questions on the bar examination were identical to those of another examinee. When this discovery was made known to Balch, he submitted his resignation from the bar, giving as his reason “other personal and professional activities and involvements.” After counsel for the Bar Association had twice warned Balch of the consequences of resignation, Balch ratified his resignation, and it was accepted.

In 1972, Balch applied for reinstatement. At the hearing on his reinstatement, he testified that he was not guilty of any misconduct in taking the bar examination and that he had submitted an affidavit to that effect in 1965. After reviewing the evidence, the Supreme Court of Oklahoma concluded that there was “very convincing circumstantial evidence” that Balch had copied from the paper of the other examinee.

Balch argued that his sworn testimony established a prima facie case that he was not guilty of the misconduct charged and that the Bar Association’s purely circumstantial evidence was, as a matter of law, not sufficient to overcome his case. The court observed that Balch’s argument failed to distinguish the reinstatement proceeding from a disciplinary proceeding, in which the burden is upon the Bar Association to establish the charges by a preponderance of the evidence. The court held in Application of Balch that the burden of proof in a proceeding for the reinstatement of an attorney who has resigned pending investigation of alleged misconduct is upon the applicant for reinstatement. Furthermore, where the applicant cannot prove that he was not guilty and is unwilling to recognize the reason(s) for his resignation, he has failed to establish affirmatively that he has been rehabilitated and thus cannot be reinstated.

Balch’s petition for reinstatement was denied.

Permitting resignation pending investigation of alleged misconduct has certain practical advantages. As the ABA Special Committee on Evaluation of Disciplinary Enforcement pointed out, if resignation is not permitted, unethical attorneys might remain in practice for months or even years while the disciplinary action is prose-

cuted. Resignation results in their immediate removal from the profession and also conserves the resources of the disciplinary agency for use in other matters.\textsuperscript{2} To some extent, then, resignation serves the interests of both the public and the disciplinary agency.

But there is a more far-reaching question: Is resignation consistent with the purposes of professional discipline? Courts generally agree that the purpose of discipline is not the "punishment" of the attorney but the protection of the public, the courts, and the profession.\textsuperscript{3} Of course, the disciplined attorney is necessarily punished, \emph{i.e.,} made to undergo loss, pain, or suffering because of his wrongdoing,\textsuperscript{4} and some degree of punishment is required to effectuate discipline. Apparently, what the courts are saying is that the purpose of discipline is not retribution. If this premise is accepted, no more punishment than is required to protect the courts, the public, and the profession should be inflicted in disciplining an attorney. But how much punishment is necessary to assure such protection? Is removal from practice sufficient, or must the attorney be branded with "the stigma of disbarment"?\textsuperscript{5}

By resigning soon enough, an attorney may be able to avoid the publicity of disbarment. Is a disciplinary procedure which enables the delinquent attorney to avoid publicity adequate to deter others\textsuperscript{6} and to maintain public confidence in the integrity of the profession? Does the interest of the public and of the profession in publicizing the disciplining of an attorney outweigh the attorney's right to privacy? On the other hand, if publicity is essential to effective discipline, cannot procedures be devised whereby an attorney's resignation under charges will be publicized?

Disbarment protects the public, the courts, and the legal profession primarily by removing unfit attorneys from the profession. But resignation, while removing the attorney from the profession,

\begin{enumerate}
\item \textit{E.g.,} Application of Harper, 84 So. 2d 700, 703 (Fla. 1956), annotated in 54 A.L.R. 2d 1272 (1957); In re Streeter, 115 N.W.2d 729, 733 (Minn. 1962); In re Symson, 322 S.W.2d 808, 810 (Mo. 1959), noted in 26 Mo. L. Rev. 90 (1961).
\item \textit{Cf.} In re Evers, 41 Wash. 2d 942, 247 P.2d 890, 891 (1952) (dissenting opinion).
\item In re Lewis, 404 S.W.2d 469, 470 (Ky. 1966).
\item See Drinker, Legal Ethics 48 (1953).
\end{enumerate}
may also facilitate an undesirable return to practice, since an attorney who has resigned under charges may seek reinstatement at a later time when the bar's indignation has subsided and when the evidence against him is no longer available.\(^7\) Like Balch, such an attorney may aver that he resigned for personal reasons and deny being guilty of any misconduct.\(^8\) Unless adequate procedures were followed at the time of the attorney's resignation, the bar may be unable to prevent his reinstatement. Can a procedure, such as resignation, which circumvents a final ruling on the attorney's alleged misconduct adequately guard against the reinstatement of unqualified and unethical attorneys? Perhaps an attorney who has resigned under charges should not be permitted to apply for reinstatement.\(^9\) But is it equitable to make the consequences of resignation harsher than those of disbarment?\(^10\)

The treatment of resignation under charges varies considerably from state to state.\(^11\) Although the reported cases do not provide sufficient data for a definitive statement of each state's approach to resignation and associated problems, enough information is available to make possible a survey of the various ways in which the problem has been handled.

Some courts simply refuse to permit resignation under charges.\(^12\) For example, in proceedings for the disbarment of an attorney for misconduct in handling probate matters entrusted to his care and for solicitation of estate planning business, the Minnesota Supreme Court rejected the attorney's resignation and proceeded with disbarment even though the attorney presented evi-

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7. *In re Joel*, 160 So. 2d 110, 112 (Fla. 1964); *In re Symson*, 322 S.W. 2d 808, 810-12 (Mo. 1959); *In re Cashman*, 261 App. Div. 227, 25 N.Y.S. 2d 59, 60 (1941); ABA Special Comm. 101-102.

8. *In re Cashman*, supra note 7.

9. *In re Harvey*, 235 So. 2d 481 (Fla. 1970); Florida Bar v. Varnedoe, 181 So. 2d 523 (Fla. 1966); *In re Talbott*, 172 So. 2d 579 (Fla. 1965); *In re Joel*, 160 So. 2d 110 (Fla. 1964); *In re Grant*, 139 So. 2d 405 (Fla. 1962); People ex rel. Chicago Bar Ass'n v. Reed, 341 Ill. 573, 173 N.E. 772 (1930); State Bar of New Mexico v. Muldavin, 71 N.M. 230, 377 P.2d 526 (1963).


11. ABA Special Comm. 101.

12. E.g., *In re Lucas*, 230 Ind. 254, 102 N.E.2d 909 (1952); *In re Lewis*, 404 S.W.2d 469 (Ky. 1966); *In re Streeter*, 262 Minn. 538, 115 N.W.2d 729 (1962); *In re Harrington's Case*, 100 N.H. 243, 123 A.2d 396 (1956); *In re Haddad*, 106 Vt. 322, 173 A. 103 (1934); *In re Evers*, 41 Wash. 2d 942, 247 P.2d 890 (1952). Cf. *In re King*, 165 Or. 103, 105 P.2d 870 (1940); *Ex parte* Thompson, 32 Or. 499, 52 P. 570, (1898).
idence of emotional and mental disturbance as grounds for resignation and also admitted the charges against him. The court argued that permitting resignation would not operate as a deterrent to professional misconduct and stated that where disbarment is justified it must be imposed.\textsuperscript{13} Although the court stated that the purpose of disciplining the attorney is not to punish him, its insistence upon imposing the penalty which was justified indicated a reluctance to eliminate the retributive element entirely. A similar attitude is apparent in \textit{In re Lewis} in which the Kentucky Court of Appeals refused to allow an attorney charged with failing to make a proper accounting of funds entrusted to him as a public official to resign thereby "escaping the stigma of disbarment."\textsuperscript{14}

Other courts accept some resignations under charges while rejecting others, but even among these courts there is no uniformity. Louisiana, for example, regards acceptance of resignation as an exercise of leniency, appropriate only where there are mitigating circumstances.\textsuperscript{15} At the other extreme is Florida, where an attorney under charges may resign after a "competent investigation" has shown that the public interest will not be adversely affected and that the administration of justice and the public's confidence in the legal profession will not be hindered by the resignation.\textsuperscript{16} The result in Florida is that almost every resignation is accepted. The thirteen reported cases include only two in which resignation was refused. In one, the bar had objected, for an unstated reason, to the resignation.\textsuperscript{17} In the other, the court regarded the attorney's misconduct as so flagrant that accepting the resignation would "... in fact adversely affect the purity of the courts."\textsuperscript{18} The court did not say how

\textsuperscript{13} \textit{In re Streater}, supra note 12, at 732-33.

\textsuperscript{14} 404 S.W.2d 469 (Ky. 1966).


\textsuperscript{16} \textit{Fla. Rules of Court}, Rule 11.08 (Integration Rule) (1974); \textit{In re Harvey}, 235 So. 2d 481 (Fla. 1970); Application of Harper, 84 So. 2d 700 (Fla. 1956).

\textsuperscript{17} Hodges v. State \textit{ex rel. Florida Bar}, 121 So. 2d 793 (Fla. 1960).

\textsuperscript{18} State v. Englander, 118 So. 2d 625, 626 (Fla. 1960).

The Florida court's refusal to permit the resignation of an attorney charged with flagrant or very serious misconduct is not unique. In New Jersey, for instance, where acceptance of resignation under charges is discretionary, \textit{In re Giordano}, 49 N.J. 210, 229 A.2d 524, 532 (1967), the court in one case, \textit{In re Johnson}, 49 N.J.
or why permitting the resignation would have that effect. Since the Florida Supreme Court is authorized to set conditions upon its acceptance of resignations under charges, the reinstatement problem would seem to be solved in most cases by the court’s practice of accepting the resignation without leave to apply for reinstatement; however, the court held, in a proceeding to determine the eligibility of an attorney who had been “permanently disbarred” to apply for reinstatement, that neither an attorney who has been “permanently disbarred” nor one who has been permitted to resign upon condition that he will never seek reinstatement is thereby forever precluded from seeking reinstatement at some future date.

Still other courts freely permit resignation under charges in all or most cases. Colorado and Washington accept resignations under charges and require discontinuance of investigations immediately upon resignation.

In New York, the Appellate Division of the Supreme Court, which oversees professional discipline, must approve the resignation of an attorney under investigation before it can be accepted. The court, however, consistently approves such resignations without comment. Although acceptance terminates the proceedings with-

110, 228 A.2d 343 (1967), rejected the resignation of an attorney who had previously been suspended for one year for conversion of trust funds and who after his reinstatement again converted trust funds. The court stated that, even though the resignation was tendered with prejudice and was “equivalent to disbarment,” the resignation was inappropriate under the circumstances. The attorney was disbarred. In another case, In re Warner, 43 N.J. 254, 203 A.2d 259 (1964), the court held the resignation of an attorney who had been convicted of grand theft, a felony, to be unacceptable and disbarred him. See cases cited in second paragraph of note 25 infra; In re Jacobsen, 202 Cal. 272, 260 P. 294 (1927); Ex parte Thompson, 32 Or. 499, 52 P. 570, 571 (1898).

20. See Florida cases cited note 8 supra.
23. ABA Special Comm. 101.
25. E.g., New York cases cited note 22 supra.
However, where the attorney had been convicted of a felony, the court held
out an actual ruling on the charges of misconduct,\textsuperscript{26} the court regards resignation under charges as tantamount to admission of the charges.\textsuperscript{27} While an attorney who has resigned under charges may subsequently be reinstated, whether the New York court utilizes this constructive admission in reinstatement proceedings is not clear.\textsuperscript{28}

In other states, however, there is evidence of the utilization of similar presumptions in reinstatement and other disciplinary proceedings.\textsuperscript{29} In \textit{Nolan v. Brawley}, an attorney who had resigned from the Wisconsin bar pending disbarment proceedings was disbarred by the Indiana Supreme Court, which regarded his resignation as tantamount to disbarment for professional misconduct.\textsuperscript{30} In \textit{In re Symson}, a reinstatement proceeding, the Missouri Supreme Court asserted by means of a rhetorical question that an innocent lawyer would not have resigned under charges of subornation of perjury, as Symson had.\textsuperscript{31} Regarding Symson as guilty of the charges and finding no evidence of rehabilitation, the court refused to reinstate him. Although not explicitly stated, the presumption of guilt is implicit in the holding of \textit{Balch} that one who has resigned under charges may not be reinstated without a showing that he was not guilty of the charges or that he has been rehabilitated.\textsuperscript{32}

In some states, resignation under charges is permitted if the lawyer satisfies certain conditions. In California, for instance, since resignation alone does not connote misconduct,\textsuperscript{33} a resignation pending disciplinary proceedings may be rejected unless it is tendered that since conviction resulted in immediate and automatic disbarment a subsequent resignation could not be accepted. \textit{In re Liddy}, 41 App. Div. 2d 422, 343 N.Y.S.2d 710 (1973); \textit{see In re Maxwell}, 32 App. Div. 2d 305, 301 N.Y.S.2d 889 (1969).


\textsuperscript{29} \textit{E.g., In re Pena}, 511 S.W.2d 931 (Tex. 1974).

\textsuperscript{30} 244 N.E.2d 918 (Ind. 1969).

\textsuperscript{31} 322 S.W.2d 808 (Mo. 1959), \textit{noted in} 26 Mo. L. Rev. 90 (1961).

\textsuperscript{32} \textit{Application of Balch}, 506 P.2d 1384, 1386 (Okla. 1973).

\textsuperscript{33} \textit{Gresham v. Superior Court}, 44 Cal. App. 2d 668, 112 P.2d 965, 967 (1941).
“with prejudice.” All that is involved in a resignation with prejudice is not clear. However, it apparently involves including a reference in the resignation letter to the pendency of disciplinary proceedings, as in the case of Richard M. Nixon, whose first attempt to resign from the California bar was rejected because his letter of resignation did not contain a reference to the proceedings then pending against him. When an attorney who has resigned with prejudice applies for reinstatement, he may be reinstated upon the same conditions as one who has been disbarred for misconduct.

More stringent conditions have been established by the bar in New York City. An attorney may resign under charges only if he has filed with the court having disciplinary jurisdiction an affidavit stating that his resignation is voluntary, that he has not been coerced or intimidated, that he is fully aware of the implications of his resignation, that he knows that he is the subject of an investigation into allegations of stated misconduct, that he admits those allegations, and that he is resigning because he knows that he cannot successfully defend himself against those allegations. The ABA Special Committee on Evaluation of Disciplinary Enforcement has substantially reproduced the practice of New York City in its proposal. This procedure adequately provides for the possi-

37. It should be noted, however, that in a recent case in which such an admission was not made, the court treated the attorney’s acknowledgment that he was convinced that he could not successfully defend himself against the charges as an admission of the charges. In re Grimes, 47 App. Div. 2d 914, 367 N.Y.S.2d 37 (1975); see In re Tomicki, 47 App. Div. 2d 752, 365 N.Y.S.2d 32 (1975).
38. ABA Special Comm. 103.
39. ABA Special Comm. 104-105. Following is the full text of the rule proposed:

A rule providing procedures for accepting attorney resignations should include the following provisions:

1. An attorney who is the subject of an investigation into allegations of misconduct on his part may submit his resignation by submitting to the disciplinary agency conducting the investigation an affidavit stating that he desires to resign and that:
   (a) His resignation is freely and voluntarily rendered; he is not being subjected to coercion or duress, and he is fully aware of the implications of submitting his resignation.
   (b) He is aware that there is pending an investigation into allegations that he has been guilty of misconduct the nature of which he shall specifically set forth.
bility that the attorney may later seek reinstatement, while permit-
ting immediate resignation and termination of the costly discipli-
nary action. The Special Committee also proposed procedures for
making an attorney's resignation under charges public, which ac-
commodate his interest in keeping the details of his transgression
private.40

Established procedures for handling resignation should exist in
each jurisdiction. Because of the practical advantages of permitting
resignation and the availability of adequate procedures for handling
it, refusal to permit resignation hardly seems justifiable. Neither
retribution, deterrence, nor protection of society necessitates rejec-
tion of an offer to resign.

The best overall system for handling resignations appears to be
that proposed by the ABA Special Committee on Evaluation of
Disciplinary Enforcement. It provides the safeguards necessary to
prevent the unjustified reinstatement which might result from ac-
cepting a resignation and terminating an incomplete investigation.
It provides adequate publicity and sufficiently differentiates be-
tween the attorney who resigns under charges and the attorney who
resigns for other reasons. Nevertheless, the proposal seems to re-
quire an unnecessary condition, viz., admission of the charges. Re-
garding resignation as tantamount to an admission of the charges
may be a legal fiction,41 but it serves the same purpose as requiring
an admission and increases the likelihood that the attorney will
resign, by avoiding an additional and an unnecessary affront to his
pride.

(c) He acknowledges that the material facts upon which the com-
plaint is based are true.
(d) He submits his resignation because he knows that if charges
were predicated on the misconduct under investigation he could
not defend himself successfully against them.

2. On receipt of the required affidavit, the disciplinary agency
shall file it with the court having disciplinary jurisdiction and the court
shall enter an order disbarring the attorney on consent. The order shall
be a matter of public record and reported to the National Discipline
Data Bank.

3. The contents of an affidavit of an attorney filed in support of
his resignation from the bar shall not be disclosed publicly or made
available for use in any other proceeding, except on order of the court
having disciplinary jurisdiction. Id.

40. Id.
41. In re Pena, 511 S.W.2d 931, 933 (Tex. 1974) (dissenting opinion).
Resignation From the Bar Under Charges

Reinstatement of the attorney who has resigned under charges should be granted upon the same conditions as reinstatement of an attorney who has been disbarred. When he applies for reinstatement, he should be required, as in Balch, to prove either that he was not guilty of the misconduct alleged or that he has been rehabilitated. If he cannot prove his innocence, then admission of guilt should probably be required as part of an affirmative demonstration of his rehabilitation.

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42. Jonesi v. State Bar, 29 Cal. 2d 181, 173 P.2d 793-94 (1946); In re Sympson, 322 S.W.2d 808, 812 (Mo. 1959); In re McGrath, 255 App. Div. 923, 7 N.Y.S.2d 978, 979 (1938); In re Petition for Reinstatement of Razar, 40 Ohio St. 2d 25, 317 N.E.2d 915 (1974); In re Reinstatement of Kearns, 28 Ohio St. 2d 121, 276 N.E.2d 650 (1971); Application of Balch, 506 P.2d 1384 (Okla. 1973); Petition of Shanin, 24 Wash. 2d 598, 166 P.2d 843 (1946); Application of Lonergan, 23 Wash. 2d 767, 162 P.2d 289 (1945).

Following is a list of the factors typically considered in reinstatement proceedings:

1. Strict compliance with the disciplinary order.
2. Evidence of unimpeachable character.
3. Clear evidence of a good reputation for professional ability.
4. Evidence of lack of malice and ill feeling toward those involved in bringing the disciplinary proceedings.
5. Personal assurances of sense of repentance and desire to conduct practice in exemplary fashion in the future.
6. Restitution of funds.

In re Florida Bar, 301 So. 2d 488 (Fla. 1974).