

BAP No.: NV-23-1179

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re: TERRY L. WIKE
Debtor

TERRY L. WIKE
Appellant
v.
STATE BAR OF NEVADA
Appellee

On Appeal from the U.S. Bankruptcy Court,
District of Nevada - Las Vegas
No. BK-21-11982-mkn
Hon. Mike K. Nakagawa

APPELLEE STATE BAR OF NEVADA'S ANSWERING BRIEF

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Table of Contents

Table of Authorities.....	3
Introduction	7
Statement of the case	8
Summary of the Argument.....	11
Argument	12
I. History of 11 U.S.C. § 523(a)(7).	12
II. Fine, Penalty, or Forfeiture	18
III. Not Compensation for Actual Pecuniary Loss.....	22
IV. Appellant also misconstrues precursors to <i>Kassas</i> from the Ninth Circuit Court of Appeals.	30
Conclusion.....	31
Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6.....	32
Form 8. Certificate of Compliance for Briefs	34
Addendum.....	35

TABLE OF AUTHORITIES

Cases

Albert-Sheridan v. State Bar of Cal. (In re Albert-Sheridan), 960 F.3d 1188
 (9th Cir. 2020)..... 28, 29, 30

Atty. Griev. Comm'n v. Smith (In re Smith), 317 B.R. 302 (Bankr. D. Md.
 2004) 26

Brookman v. State Bar of Cal., 46 Cal. 3d 1004, 760 P.2d 1023, 251 Cal.
 Rptr. 495 (Cal. 1988) 14

Detwiler v. Eighth Judicial Dist. Court of Nev., 486 P.3d 710, 718 (Nev.
 2021) 20

Doherty's Case, 142 N.H. 446, 703 A.2d 261, 264 (1997) 25

In re Betts, 149 B.R. 891, 896 (Bankr. N.D. Ill. 1993) 24

In re Bradley, 989 F.2d 802, 804 (5th Cir. 1993)..... 14

In re Cillo, 159 B.R. 340, 343 (Bankr. M.D. Fla. 1993) 24

In re Discipline of Arabia, Bar No. 9749, 495 P.3d 1103, 1109 (Nev. 2021) 19

In re Discipline of Droz, 123 Nev. 163, 167, 160 P.3d 881, 884 (2007) 16

In re Doerr, 185 B.R. 533, 537 (Bankr. W.D. Mich. 1995) 24

In re Haberman, 137 B.R. 292, 295-96 (Bankr. E.D. Wis. 1992)..... 24

In re Hollis, 810 F.2d 106, 108-09 (6th Cir. 1987)..... 24

In re Lewis, 151 B.R. 200, 203 (Bankr. C.D. Ill. 1992) 24

In re Morgan, 143 N.H. 475, 727 A.2d 985 (1999)..... 25

In re Smith, 317 B.R. 302, 313 (Bankr. D. Md. 2004) 24

In re Thompson, 16 F.3d 576, 580-81 (4th Cir. 1994)..... 24

In re Wike, 504 P.3d 1132 (Nev. 2022) 20

In re Williams, 158 B.R. 488, 490 (Bankr. D. Idaho 1993)..... 14, 26

In re Williams, 158 B.R. 488, 491 (Bankr. D. Idaho 1993) 24

In re Zarzynski, 771 F.2d 304, 305-06 (7th Cir. 1985) 24

Kassas v. State Bar of Cal., 49 F.4th 1158, 1160 (9th Cir. 2022) passim

Kelly v. Robinson, 479 U.S. 36, 43, 50 (1986) 13, 22, 23, 25

Kersey's Case, 150 N.H. 585, 842 A.2d 121 (2004)..... 25

Kesler v. Dep't of Pub. Safety, Fin. Responsibility Div., State of Utah, 369
 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962) 13

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423,
 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) 15

Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971) ... 14

Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct, 542 F.3d 913
 (1st Cir. 2008)..... 13

State Bar v. Claiborne, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) ...17,
 19, 22

State Bar v. Findley (In re Findley), 593 F.3d 1048, 1050-51 (9th Cir. 2010)
 15, 21, 30

State Bar v. Taggart (In re Taggart), 249 F.3d 987 (9th Cir. 2001) 14, 15

U.S. HUD v. Cost Control Mktg. & Sales Mgmt., 64 F.3d 920, 927 (4th Cir.
 1995) 13

United States HUD v. Cost Control Mktg. & Sales Mgmt. 25

Whitehouse v. Laroche, 277 F.3d 568, 573 (1st Cir. 2002)13, 25

Statutes

11 U.S.C. § 101(27) 14

11 U.S.C. § 523(a)(7)15

11 USC § 523(a)(7) 8, 10, 11, 17

28 U.S.C. §1334 12

Cal. Bus. & Prof. Code § 6086.10(e)15

NRS 2.120..... 16, 17

NRS 7.275.....17

Rules

SCR 104, 10517

SCR 120 passim

SCR 39 16

SCR 93.....17

SCR 99, *et seq.*.....17

SCR 99-12117

Constitutional Provisions

NEV. CONST. Prelim Resolution.15

U.S. CONST. 10th amend. 16

INTRODUCTION

In 2017, the State Bar of Nevada received an overdraft notice from the Appellant's bank, indicating insufficient funds in the Appellant's IOLTA client trust account for a charge to a software subscription service. Upon investigation, the State Bar discovered that the Appellant had misappropriated funds belonging to clients and third parties. Subsequently, a homeowner's association filed another complaint, alleging repetitive double-billing by the Appellant.

Combining these matters, the State Bar conducted a disciplinary hearing. Meanwhile, a second overdraft notice concerning the Appellant's trust account underscored ongoing misappropriation of client funds, leading to a subsequent disciplinary hearing. The Supreme Court of Nevada suspended the Appellant on February 27, 2020 for two years but stayed all but 3 months of the suspension. It placed Appellant on probation with conditions for the stayed portion. The court found that the Appellant had persistently used trust account funds for personal and business expenses and covered up the shortfall with personal funds.

Further disciplinary action followed on October 8, 2020, resulting in an additional six-month-and-one-day suspension. The court reiterated the Appellant's unauthorized transfers of client funds, creating a deficit in the

client trust account. These suspensions necessitated a petition for reinstatement, which the Appellant became eligible for in April 2021. A disciplinary panel heard the petition. It recommended reinstatement subject to payment of costs totaling \$21,138.15 under SCR 120.

Appellant challenged the condition before the Nevada Supreme Court. He argued that the bankruptcy court discharged the costs. However, the Nevada Supreme Court upheld the condition, emphasizing the goals of attorney discipline: rehabilitation, deterrence of misconduct, and public protection. The Appellant then sought sanctions against the State Bar in bankruptcy court, alleging wrongful conditioning of reinstatement. The bankruptcy court sided with the Supreme Court of Nevada, exempting the condition from discharge under 11 USC § 523(a)(7), deeming it essential for public protection and attorney rehabilitation.

In this appeal, the Appellant contests the bankruptcy court's ruling, disputing the imposition of sanctions by the State Bar of Nevada.

STATEMENT OF THE CASE

In 2017, the State Bar of Nevada received an overdraft notice after Appellant's bank refused a charge to a software subscription service called Abacus for insufficient funds in Appellant's IOLTA client trust account. A

State Bar investigator reviewed Appellant's bank records and discovered that he had misappropriated client and third-party funds.¹

Shortly thereafter, the State Bar received another complaint from one of Appellant's former clients, a homeowner's association, which alleged he had repeatedly double-billed the client. The State Bar combined the two matters into a single disciplinary hearing.

While the parties prepared for the disciplinary hearing, the State Bar received a second overdraft notice from the Appellant's bank regarding his IOLTA client trust account. Appellant continued to misappropriate client funds. That matter proceeded to a second disciplinary hearing.²

The Supreme Court of Nevada suspended Appellant on February 27, 2020 for 2 years but stayed all but the first 3 months instead placing Appellant on probation with conditions. It found that Appellant "repeatedly paid personal and business expenses out of his trust account and deposited personal funds into the account to cover his misuse of trust account funds."³

The Supreme Court of Nevada again suspended Appellant on October 8, 2020 in the second case for six months and one day. It found again that

¹ Vol. 1-ER-0016-19.

² Vol. 1-ER-0012-15.

³ Vol. 1-ER-0016-19.

Appellant had “made numerous small transfers of client funds from his trust account to his personal and operating accounts, creating a shortfall in his trust account.”⁴

These two suspensions required Appellant to petition for reinstatement. Appellant was eligible to apply for reinstatement on April 9, 2021. He applied for reinstatement on April 21, 2021. A disciplinary panel heard Appellant’s petition for reinstatement and recommended that the Nevada Supreme Court reinstate him on condition that he pay the SCR 120 costs of \$21,138.15 owed to the State Bar.⁵

Appellant argued that the bankruptcy court discharged the costs and that the Nevada Supreme Court could not condition his reinstatement on payment.

The Nevada Supreme Court rejected Appellant’s argument. The court held that “The primary purposes of attorney discipline are to promote an attorney’s rehabilitation, deter misconduct, and protect the public.”⁶ It held, that the condition of reinstatement “does not run afoul of 11 USC § 525 because its purpose is not to penalize Wike for having obtained a discharge

⁴ Vol. 1-ER-0012-15.

⁵ Vol. 1-ER-0006-10.

⁶ Vol. 1-ER-0008.

of debt.”⁷ It held that the purpose of attorney discipline was to protect the public and rehabilitate the errant attorney.⁸

Appellant then moved the bankruptcy court to sanction the State Bar of Nevada for conditioning his reinstatement on payment of the fees and costs incurred from his two disciplinary suspensions.⁹ The bankruptcy court agreed with the Supreme Court of Nevada that 11 USC § 523(a)(7) exempted the reinstatement condition from discharge in bankruptcy as its purpose was to protect the public through deterrence and rehabilitate the errant attorney.¹⁰

Appellant appeals the bankruptcy court’s denial of his motion to sanction the State Bar of Nevada.

SUMMARY OF THE ARGUMENT

Appellant violated the Rules of Professional Conduct. The Supreme Court of Nevada suspended him. It also imposed costs of the disciplinary proceedings on Appellant. When his suspension ended, Appellant petitioned for and received reinstatement from the Supreme Court of Nevada with the condition that he repay those costs.

⁷ Vol. 1-ER-0008.

⁸ Vol. 1-ER-0008.

⁹ Vol. 2-ER-0094-0108.

¹⁰ Vol. 1-ER-0001-05.

Congress exempted any “fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and [which] is not compensation for actual pecuniary loss” from discharge in bankruptcy under 11 USC § 523(a)(7). The Ninth Circuit Court of Appeals has a long history of precedent in which it has held that disciplinary costs are exempt from discharge under 11 USC § 523(a)(7).

Appellant attempts to distinguish this precedent by ignoring the express intent that the Supreme Court of Nevada attached to its disciplinary costs in SCR 120.

With clear intent from the Supreme Court of Nevada that SCR 120 costs protect the public and rehabilitate the attorney, this Bankruptcy Appellate Panel should affirm the bankruptcy court’s finding and order that the disciplinary costs are nondischargeable.

ARGUMENT

I. History of 11 U.S.C. § 523(a)(7).

Bankruptcy courts have exclusive jurisdiction over the discharge of debts in bankruptcy cases pursuant to 28 U.S.C. §1334 and Article I, Section 8, Clause 4 of the U.S. Constitution. Under the Bankruptcy Code, a Chapter 7 debtor is generally discharged from all debts except those that are designated as non-dischargeable such as those under § 523(a)(7).

Section 523(a)(7) makes non-dischargeable any “fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and [which] is not compensation for actual pecuniary loss.”¹¹

Federal courts have interpreted this statutory provision to create a three-part test: the State Bar must show that a cost assessment in a Nevada attorney disciplinary proceeding is (1) “a fine, penalty, or forfeiture,” (2) “payable to and for the benefit of a governmental unit,” and (3) “not compensation for actual pecuniary loss.”¹²

Because the language of § 523(a)(7) is “subject to interpretation,” the “text is only the starting point” of the analysis.¹³ “In expounding a statute, [bankruptcy courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”¹⁴ Bankruptcy is “not intended to be a haven for wrongdoers.”¹⁵

¹¹ 11 U.S.C. § 523(a)(7).

¹² *Whitehouse v. Laroche*, 277 F.3d 568, 573 (1st Cir. 2002); *Richmond v. N.H. Supreme Court Comm. on Profl Conduct*, 542 F.3d 913 (1st Cir. 2008).

¹³ *Richmond*, 542 F.3d 913, 917 (quoting *Kelly v. Robinson*, 479 U.S. 36, 43, 50 (1986)).

¹⁴ *Richmond*, 542 F.3d at 917.

¹⁵ *U.S. HUD v. Cost Control Mktg. & Sales Mgmt.*, 64 F.3d 920, 927 (4th Cir. 1995).

Appellant asserts that federal courts may not defer to a state court's interpretation of § 523(a)(7) or its jurisdiction. Federal courts have a back-and-forth history on this issue.

First, in *Kesler v. Dep't of Pub. Safety, Fin. Responsibility Div., State of Utah*, 369 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962), the U.S. Supreme Court held that a State Board has the authority to require a licensee post-discharge to pay discharged debts to retain a license.

However, the Court overruled *Kesler* with *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971). And Congress later codified the *Perez* holding in § 525(a). Section 525(a) provides in pertinent part:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . to . . . a person that is or has been a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . 11 U.S.C. § 525(a).

The Nevada Supreme Court and the State Bar of Nevada, when regulating the legal profession, are “governmental units” as that term is used in the statute.¹⁶ But “Section 525 does not prohibit a state from denying or

¹⁶ See 11 U.S.C. § 101(27); *In re Williams*, 158 B.R. 488, 490 (Bankr. D. Idaho 1993).

revoking a license based upon a determination that the public safety would be jeopardized by granting or allowing continued possession of a license.”¹⁷

In *Brookman v. State Bar of Cal.*, 46 Cal. 3d 1004, 760 P.2d 1023, 251 Cal. Rptr. 495 (Cal. 1988), a bankruptcy court held that a state could condition a lawyer’s license on his repayment to a client recovery fund without violating § 525.

In *State Bar v. Taggart (In re Taggart)*, 249 F.3d 987 (9th Cir. 2001), however, the Court of Appeals for the Ninth Circuit broke from precedent and held that disciplinary costs required under prior California law were dischargeable in bankruptcy because the award was not a “fine, penalty, or forfeiture payable to and for the benefit of a governmental unit,” but rather “compensation for actual pecuniary loss.”¹⁸

In response to *Taggart*, the California legislature amended the law in 2003. The legislature added a single clause that stated its intent was “to promote rehabilitation and to protect the public.”¹⁹

¹⁷ *In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993).

¹⁸ 11 U.S.C. § 523(a)(7); see 249 F.3d at 989.

¹⁹ Cal. Bus. & Prof. Code § 6086.10(e).

In *State Bar v. Findley (In re Findley)*, 593 F.3d 1048, 1050-51 (9th Cir. 2010), the Court of Appeals for the Ninth Circuit reconsidered the issue after the legislature’s declaration of intent.

The Ninth Circuit noted that the legislature’s declaration,

Comport[s] with the Supreme Court’s recognition in *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982), that ‘[t]he ultimate objective of [attorney disciplinary] is the protection of the public, the purification of the bar and the prevention of a re-occurrence.’²⁰

The Nevada Supreme Court represents the State of Nevada, which is a State of the Union “on an equal footing with the Original States.”²¹ It has jurisdiction to police and regulate conduct within its borders unless otherwise delegated to the United States by the Constitution.²²

Attorneys in Nevada are “officers of the court,” and are “essential aids in the administration of justice” in the state.²³ Governing the legal profession in Nevada is a judicial function. The Nevada Supreme Court has the inherent and exclusive authority to admit to practice and to discipline attorneys in

²⁰ *In re Findley*, 593 F.3d at 1053 (quoting *Middlesex* at 434 (quotation omitted)).

²¹ NEV. CONST. Prelim. Resolution.

²² U.S. CONST. 10th amend.

²³ SCR 39; *In re Discipline of Droz*, 123 Nev. 163, 167, 160 P.3d 881, 884 (2007).

Nevada.²⁴ The power to discipline and control the actions of officers of the court is absolutely necessary for the Nevada Supreme Court to function effectively and to carry out its mandate to preserve the judicial system. It also has the inherent and statutory power to do so.²⁵

Pursuant to its authority to regulate the legal profession, the Nevada Supreme Court promulgated the Nevada Rules of Professional Conduct. These Rules establish the boundaries of lawyer conduct. The Rules cover everything from diligence and candor toward the tribunal to confidentiality and conflicts of interest. *See, e.g.*, NRPC 1.3, 1.6, 1.8, 3.3. With the privilege of practicing law in Nevada comes the concomitant responsibility of abiding by the standards of professional responsibility embodied in the Rules.

The Nevada Supreme Court enforces the Rules of Professional Conduct. The Nevada Legislature created the State Bar of Nevada as a public corporation under the exclusive jurisdiction and control of the Court to assist it with the task of enforcing the Rules and administering discipline.²⁶ Bar Counsel investigates complaints against lawyers and makes disciplinary recommendations to a disciplinary board, which in turn makes

²⁴ SCR 39.

²⁵ NRS 2.120.

²⁶ NRS 7.275; NRS 2.120; SCR 99-121.

recommendations to the Nevada Supreme Court.²⁷ An annual assessment of attorneys imposed by an order of the Nevada Supreme Court funds the State Bar and Bar Counsel.²⁸

Here, the Nevada Supreme Court enacted SCR 99, *et seq.*, under its inherent regulatory authority granted by the Nevada Constitution. The Court enacted these rules to protect the public and the integrity of the profession.²⁹ Costs imposed under SCR 120 are part of this regulatory scheme.

Thus, 11 USC § 523(a)(7) exempts SCR 120 costs from discharge in bankruptcy because they constitute fines, penalties, or forfeitures payable to a governmental agency, and are punitive, deterrent, and rehabilitative in nature.

II. Fine, Penalty, or Forfeiture

An attorney who fails to abide by the standards of professional conduct is subject to discipline, including public reprimand, suspension, and disbarment.³⁰ Rule 120 states:

1. An attorney subjected to discipline or seeking reinstatement under these rules shall be assessed the costs, in full or in part, of the proceeding, including, but not limited to, reporter's fees, investigation fees, witness expenses, service costs, publication

²⁷ SCR 104, 105.

²⁸ SCR 93.

²⁹ *State Bar v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988).

³⁰ SCR 120 (amended in 2023 to add costs of \$750 for an admonition).

costs, and any other fees or costs deemed reasonable by the panel and allocable to the proceeding.

2. If, for any reason, bar counsel is disqualified or has a conflict of interest, the board of governors shall appoint an attorney, ad hoc, to act in the place of bar counsel.

3. In addition to any costs assessed as provided for herein, an attorney subjected to discipline shall be assessed administrative costs allocable to the proceeding, but in any case, shall not be less than the following amounts:

Reprimand: \$1,500

Suspension: \$2,500

Disbarment: \$3,000

4. A final assessment for costs and fees shall have the force and effect of a civil judgment against the disciplined attorney and shall be subject to all legally available post-judgment enforcement remedies and procedure.

5. In addition, in any matter where any attorney is required to apply for reinstatement, administrative costs shall be assessed in any amount not less than \$2,500, and the attorney shall also be required to pay all costs previously assessed but not yet paid prior to the processing of the application for reinstatement.

The purpose of an attorney discipline proceeding is to protect the public, the courts, and the legal profession, not to make the grievant whole or punish the attorney.³¹ Attorney discipline protects the legal profession by

³¹ *In re Discipline of Arabia*, Bar No. 9749, 495 P.3d 1103, 1109 (Nev. 2021) (citing *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988)).

maintaining public confidence in the State Bar.³² Sanctions serve an important public function not only to protect the public, maintain public confidence in the bar, and preserve the integrity of the legal profession, but also “to prevent [unprofessional] conduct in the future.”³³

Although the sanctions can be harsh, the Nevada Supreme Court has consistently stated that attorney disciplinary proceedings are not civil or criminal proceedings.³⁴ Sanctions, like contempt hearings, while they have civil and criminal elements, “are, strictly speaking, neither. They may best be characterized as sui generis and may partake of the characteristics of both.”³⁵

The Nevada Supreme Court considered the issue of whether it could condition Wike’s reinstatement on the payment of disciplinary fees and costs. It held that it could “regardless of whether the cost assessment in the discipline order was discharged in bankruptcy.”³⁶

The Nevada Supreme Court held that the

primary purposes of attorney discipline are to promote an attorney’s rehabilitation, deter misconduct, and protect the

³² *Claiborne*, 104 Nev. at 224, 756 P.2d at 535.

³³ *Kersey’s Case*, 150 N.H. 585, 586, 842 A.2d 121, 123 (2004).

³⁴ *In re Discipline of Arabia*, Bar No. 9749, 495 P.3d 1103, 1109 (Nev. 2021) (although disciplinary proceedings follow civil rules of procedure, they are not civil actions).

³⁵ *Detwiler v. Eighth Judicial Dist. Court of Nev.*, 486 P.3d 710, 718 (Nev. 2021).

³⁶ *In re Wike*, 504 P.3d 1132 (Nev. 2022).

public. As such, the recommended condition of reinstatement does not run afoul of 11 USC § 525 because its purpose is not to penalize Wike for having obtained a discharge of his debt. ... the purpose of attorney discipline is not to penalize Wike merely for having obtained a discharge of his debt in bankruptcy. Instead, it is to protect the public from specified professional misconduct ... and at the same time to rehabilitate the errant attorney.³⁷

As stated above, jurisdiction over the discharge of SCR 120 costs boils down to the Nevada Supreme Court's intent behind SCR 120. It has often repeated that "the purpose of a disciplinary proceeding is not to punish the attorney but to inquire into the moral fitness of an officer of the court to continue in that capacity and to afford protection to the public, the courts and the legal profession."³⁸ It explicitly held that SCR 120 fees and costs protect the public from attorney misconduct and rehabilitate the errant attorney.

Thus, SCR 120 fees and costs are "fines" or "penalties" within the meaning of § 523(a)(7).

Wike claims that the Ninth Circuit Court of Appeals consistently holds that it is a discriminatory act under § 525(a) to condition an attorney's reinstatement upon the payment of fees and costs. This is not correct.

³⁷ Id.

³⁸ Id.

While the Ninth Circuit initially bucked the norm in *Taggart* by finding a compensatory intent from such language, it ultimately accepted the legislature’s declaration of intent even though the statute “retain[ed] certain structural elements identified in *Taggart* as indicative of a compensatory purpose.”³⁹ Protecting the public—even if not punitive—is a regulatory purpose, which exempts related fines, fees, or costs from bankruptcy discharge.

The Nevada Supreme Court, like the California legislature, has declared its intent in enacting SCR 120 as regulatory. SCR 120 is a creature of the disciplinary process and exemplifies the common intent “to inquire into the moral fitness of an officer of the court to continue in that capacity and to afford protection to the public, the courts and the legal profession.”⁴⁰ Disciplinary costs, like the costs of prosecution imposed on criminal defendants, are analogous to fines and should not be dischargeable in bankruptcy.

III. Not Compensation for Actual Pecuniary Loss

Appellant next argues that the bankruptcy court misunderstood the Ninth Circuit Court of Appeal’s holding in *Kassas v. State Bar of Cal.*, 49

³⁹ *In re Findley*, 593 F.3d at 1053.

⁴⁰ *Claiborne*, 104 Nev. at 213, 756 P.2d at 527-28.

F.4th 1158, 1160 (9th Cir. 2022). Appellant claims that the Court in *Kassas* discharged disciplinary costs because they were compensation for actual pecuniary loss § 523(a)(7). This is incorrect.

First, we must start the US Supreme Court's holding in *Kelly v. Robinson*, 479 U.S. 36 (1986).

The Nevada Supreme Court ordered Wike “to pay \$21,138.15 in fees and costs for the previous disciplinary proceedings.”⁴¹ Reimbursement sounds like compensation for actual loss when viewed in isolation. In *Kelly*, however, the Supreme Court cautioned bankruptcy courts to read § 523(a)(7) in light of the broader objects of the statute or rule.⁴² While a cost award might “resemble” compensation for an actual loss, “the context in which it is imposed [might] undermine [] that conclusion.”⁴³ Thus, bankruptcy courts should look to the context in which the penalty is imposed to determine whether its purpose is truly compensatory.

In *Kelly*, a debtor attempted to have discharged a restitution order entered as a condition of probation in a state criminal proceeding. The Court

⁴¹ *Id.*

⁴² *Kelly*, 479 U.S. at 50.

⁴³ *Id.* at 52.

held, however, that such debts were non-dischargeable under § 523(a)(7) because they were not “compensation for actual pecuniary loss.”⁴⁴ The *Kelly* Court noted that the criminal justice system is “not operated primarily for the benefit of victims, but for the benefit of society as a whole.”⁴⁵ While the Court acknowledged that restitution orders necessarily involved compensation for pecuniary loss, this was not dispositive. Instead, the Court emphasized that the primary purpose of restitution orders was to further the “rehabilitative and deterrent goals” of the criminal justice system.⁴⁶ If federal bankruptcy courts discharged these obligations, they would throw the mix of sanctions chosen by the State to further these important goals out of balance.⁴⁷ Congress did not intend to subvert a state’s police power in enacting § 523(a)(7).

Following *Kelly*, a number of courts of appeals have held that cost assessments levied in criminal proceedings are non-dischargeable under § 523(a)(7).⁴⁸ Nearly every bankruptcy court that addressed cost assessed in

⁴⁴ *Id.* at 40.

⁴⁵ *Id.* at 52.

⁴⁶ *Id.* at 49.

⁴⁷ *Id.*

⁴⁸ See *In re Thompson*, 16 F.3d 576, 580-81 (4th Cir. 1994); *In re Hollis*, 810 F.2d 106, 108-09 (6th Cir. 1987); *In re Zarzynski*, 771 F.2d 304, 305-06 (7th Cir. 1985).

attorney disciplinary proceedings has found them to be non-dischargeable.⁴⁹ These cases note that attorney disciplinary proceedings are not criminal, but have found that the goals of these sanctions—deterrence, rehabilitation and protection of the public interest—are sufficiently analogous to *Kelly* to support an extension of its rule.

Bankruptcy courts have already held that a civil penalty may qualify as non-dischargeable if “the particular penalty . . . serve[s] some ‘punitive’ or ‘rehabilitative’ governmental aim, rather than a purely compensatory purpose.”⁵⁰

It is clear that the costs assessed in Nevada disciplinary proceedings are not purely compensatory. As bankruptcy courts have explained, cost assessments serve both to deter attorney misconduct and to help rehabilitate

⁴⁹ See *In re Smith*, 317 B.R. 302, 313 (Bankr. D. Md. 2004); *In re Doerr*, 185 B.R. 533, 537 (Bankr. W.D. Mich. 1995); *In re Cillo*, 159 B.R. 340, 343 (Bankr. M.D. Fla. 1993); *In re Williams*, 158 B.R. 488, 491 (Bankr. D. Idaho 1993); *In re Lewis*, 151 B.R. 200, 203 (Bankr. C.D. Ill. 1992); *In re Betts*, 149 B.R. 891, 896 (Bankr. N.D. Ill. 1993); *In re Haberman*, 137 B.R. 292, 295-96 (Bankr. E.D. Wis. 1992).

⁵⁰ *Whitehouse v. Laroche*, 277 F.3d 568, 573 (1st Cir. 2002) (citing *Kelly*, 479 U.S. at 52); accord *United States HUD v. Cost Control Mktg. & Sales Mgmt.*, 64 F.3d 920, 928 (4th Cir. 1995) (holding that a disgorgement remedy awarded in a suit brought by the U.S. Department of Housing and Urban Development under the Interstate Land Sales Full Disclosure Act was non-dischargeable).

wayward attorneys.⁵¹ Rehabilitation and deterrence are the same public functions that were at issue in *Kelly*.

It is irrelevant that the fees and costs referenced actual costs incurred by the State Bar of Nevada. In fact, there was no question that, in *Kelly*, the state calculated restitution from the victim's loss.⁵² This did not determine the outcome, because the purpose of the penalty was at issue. Courts have consistently held that the "mere fact that a penal sanction is calculated by reference to actual costs does not, in and of itself, transform the penalty into compensation for pecuniary loss."⁵³ Here, the Nevada Supreme Court is not concerned with recouping litigation costs for the State Bar of Nevada as much as deterring unprofessional conduct.

The substantial purpose of attorney disciplinary proceedings in Nevada is to deter attorney misconduct, protect the public and to rehabilitate the attorney. "It would be a poor policy indeed to suggest that an attorney

⁵¹ See, e.g., *Kersey's Case*, 150 N.H. 585, 842 A.2d 121 (2004); *In re Morgan*, 143 N.H. 475, 727 A.2d 985 (1999); *Doherty's Case*, 142 N.H. 446, 703 A.2d 261, 264 (1997).

⁵² See *Kelly*, 479 U.S. at 52 ("restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused").

⁵³ *Atty. Griev. Comm'n v. Smith (In re Smith)*, 317 B.R. 302 (Bankr. D. Md. 2004).

could elude punishment for professional improprieties by resorting to the Bankruptcy Code.”⁵⁴

In that context, we next consider *Kassas*.

Kassas violated multiple State Bar Rules of Professional Conduct and provisions of California’s Business and Professions Code.⁵⁵ In January 2014, the California Supreme Court disbarred him, ordering him to pay restitution of \$201,706 to 56 individuals, with an additional 10% annual interest.⁵⁶ The court also ordered Kassas to pay disciplinary proceeding costs to the State Bar of \$61,122.27.⁵⁷

The California Client Security Fund (CSF) compensated 51 individuals identified in the Supreme Court’s order.⁵⁸ It paid 305 other clients not listed in the order. In total, the CSF paid \$1,367,978.12 to Kassas’s victims.⁵⁹ By April 2021, including accrued interest and processing costs, Kassas’s debt to the CSF totaled \$2,090,096.32.⁶⁰

⁵⁴ *In re Williams*, 158 B.R. at 491.

⁵⁵ *Kassas*, 49 F.4th at 1161.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Kassas*, 49 F.4th at 1162.

The bankruptcy court in *Kassas* discharged the \$201,706 restitution, plus interest, that the California Supreme Court had ordered Kassas to pay to 56 former clients.⁶¹ The bankruptcy court found this restitution was not a debt “payable to and for the benefit of a government unit” under § 523(a)(7), a ruling the State Bar did not contest.⁶²

Secondly, the bankruptcy court held that \$61,112 in disciplinary costs remained non-dischargeable, aligning with the precedent set in *In re Findley*.⁶³

Finally, the bankruptcy court ruled that Kassas’s debts exceeding \$2 million, owed to the CSF for restitution to persons not named in the Supreme Court’s order, were nondischargeable under 11 U.S.C. § 523(a)(7). It reasoned that these payments to the CSF served more as a penalty for rehabilitating attorneys than as compensation for actual pecuniary loss.⁶⁴

However, the bankruptcy court recognized that the Ninth Circuit had not explicitly ruled on the nondischargeability of debts owed to the CSF citing *In re Albert-Sheridan*, 960 F.3d 1188, 1194 n.5 (9th Cir. 2020).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1162-63.

⁶⁴ *Id.*

Contrary to Appellant's claim, the Ninth Circuit affirm the bankruptcy court's holding regarding the nondischargeability of the disciplinary costs.

The Court held that while bankruptcy discharged the restitution payments and reimbursements paid from the CSF, 11 U.S.C. § 523(a)(7) exempted the disciplinary costs from discharge.

It stated,

Kassas also appeals the bankruptcy court's judgment holding the costs associated with his disciplinary proceedings nondischargeable. Kassas acknowledges that the bankruptcy court was bound by our decision in *In re Findley*. We are also bound by that decision. A panel can only depart from our own precedent "if a subsequent Supreme Court opinion 'undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Nichols*, 10 F.4th 956, 961 (9th Cir. 2021) (alteration in original) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). No such intervening precedent or change to the statute exists here. Thus, we have no occasion to reconsider *In re Findley*. See *In re Albert-Sheridan*, 960 F.3d at 1192 (refusing to reconsider *In re Findley* in holding that debt to the State Bar for the costs of attorney discipline proceedings is nondischargeable). As a result, in accordance with the clear directive of *In re Findley*, we affirm the bankruptcy court's finding that Kassas's disciplinary costs of \$61,122.27 were not discharged in his bankruptcy. See 593 F.3d at 1054. If Kassas wishes to pursue this issue, he must do so through a petition for rehearing en banc. *Kassas v. State Bar of Cal.*, 49 F.4th 1158, 1166 (9th Cir. 2022)

There is no subsequent appellate history to the *Kassas* case. So, the Ninth Circuit Court of Appeals did not reconsider or overturn *In re Findley en banc* as Appellant alleges.

Thus, the Supreme Court of Nevada assessed Appellant disciplinary costs to protect the public and rehabilitate Appellant as an attorney—not to compensate the State Bar for pecuniary loss. They are exempt from discharge under § 523(a)(7).

IV. Appellant also misconstrues precursors to *Kassas* from the Ninth Circuit Court of Appeals.

Appellant also claims that Ninth Circuit Court of Appeals holdings in *Taggart* and *Albert-Sheridan v. State Bar of Cal. (In re Albert-Sheridan)*, 960 F.3d 1188 (9th Cir. 2020) support discharge. This is incorrect.

The Court stated in unequivocal terms,

As stated above, the costs of the State Bar’s disciplinary proceedings are non-dischargeable under § 523(a)(7) and *Findley*. Accordingly, the State Bar is within its right to condition reinstatement on the payment of that debt.⁶⁵

Appellant attempts to distinguish this clear precedent by arguing “until Nevada changes the text of its disciplinary statute, *In re Taggart* is compelling authority based upon the facts in this case.”⁶⁶

This is a nonsensical argument as the Court noted in *In re Findley* that it attempted to “discern California’s legislative intent” in *Taggart* but the

⁶⁵ *Albert-Sheridan v. State Bar of Cal. (In re Albert-Sheridan)*, 960 F.3d 1188, 1196 (9th Cir. 2020).

⁶⁶ Appellant’s Op. Br. at 25.

“California legislature’s express statement” of “penal and rehabilitative” intent “undermined” the result in *Taggart*.⁶⁷

Appellant asks this Appellate Panel to reject the Supreme Court of Nevada’s “express statement” of intent and instead “discern” its intent from the Supreme Court rule alone. This goes against clear Ninth Circuit Court of Appeals precedent in *Findley*, *Taggart*, *Albert-Sheridan*, and *Kassas*.

CONCLUSION

Thus, the Bankruptcy Appellate Panel should affirm the bankruptcy court’s findings and order. Disciplinary costs are non-dischargeable under § 523(a)(7).

DATED this day 22nd of February, 2024.

Respectfully submitted,

STATE BAR OF NEVADA

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⁶⁷ *State Bar v. Findley (In re Findley)*, 593 F.3d at 1053-54.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**FORM 17. STATEMENT OF RELATED CASES PURSUANT TO
CIRCUIT RULE 28-2.6**

9th Cir. Case Number BAP No.: NV-23-1179

The undersigned attorney or self-represented party states the following:

I am unaware of any related cases currently pending in this court.

I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: /s/ Daniel M. Hooge **Date** 02/22/2024

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS**

9th Cir. Case Number BAP No.: NV-23-1179

I am the attorney or self-represented party.

This brief contains 5,032 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief:

[X] complies with the word limit of Cir. R. 32-1.

Signature: /s/ Daniel M. Hooge **Date:** 02/22/2024

ADDENDUM

11 USCS § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title [[11 USCS § 727](#), [1141](#), [1192](#), [1228\(a\)](#), [1228\(b\)](#)], or [1328\(b\)](#)] does not discharge an individual debtor from any debt—

...

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

...

Nevada Supreme Court Rule 120. Costs; bar counsel conflict or disqualification.

1. An attorney subjected to discipline or seeking reinstatement under these rules shall be assessed the costs, in full or in part, of the proceeding, including, but not limited to, reporter's fees, investigation fees,

witness expenses, service costs, publication costs, and any other fees or costs deemed reasonable by the panel and allocable to the proceeding.

2. If, for any reason, bar counsel is disqualified or has a conflict of interest, the board of governors shall appoint an attorney, ad hoc, to act in the place of bar counsel.

3. In addition to any costs assessed as provided for herein, an attorney subjected to discipline shall be assessed administrative costs allocable to the proceeding, but in any case, shall not be less than the following amounts:

Reprimand: \$1,500

Suspension: \$2,500

Disbarment: \$3,000

4. A final assessment for costs and fees shall have the force and effect of a civil judgment against the disciplined attorney and shall be subject to all legally available post-judgment enforcement remedies and procedure.

5. In addition, in any matter where any attorney is required to apply for reinstatement, administrative costs shall be assessed in any amount not less than \$2,500, and the attorney shall also be required to pay all costs

previously assessed but not yet paid prior to the processing of the application for reinstatement.

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2024, I electronically filed the foregoing document with the Clerk of Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I further certify that all parties of record to this appeal are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service.

Dated: February 22, 2024.

Submitted by:

/s/ Tiffany Bradley