

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 IN RE: PETITION FOR)
4 REINSTATEMENT)
5 OF)
6 TERRY L. WIKE,)
7 NEVADA BAR NO. 7211)
8)
9 _____)

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12 **STATE BAR OF NEVADA'S**
13 **ANSWERING BRIEF**
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1 **Issues on Appeal**

- 2 1. Whether this Court has jurisdiction to declare the purpose behind the costs
3 imposed by Supreme Court Rule (SCR) 120?
- 4 2. Whether this Court intended the costs imposed by SCR 120 to serve a
5 regulatory or compensatory purpose?
- 6 3. Whether the good-and-sufficient-reason exception in SCR 116(2) extends
7 to costs required by SCR 120(5)?

8 **Statement of the Case**

9 The State Bar accepts and adopts the facts and the Statement of the Case
10 found in Petitioner's Opening Brief.

11 **Argument**

12 **Summary**

13 The bankruptcy court lacks jurisdiction over the SCR 120 fees and costs if
14 they perform a regulatory function. This Court has broad regulatory authority
15 over the legal profession through the Nevada Constitution and the Tenth
16 Amendment to the U.S. Constitution. Federal bankruptcy courts have
17 jurisdiction over bankruptcy claims pursuant to Article I, Section 8, Clause 4. But
18 the Fifth and Tenth Amendments prohibit federal bankruptcy courts from
19 superseding a state's authority. Thus, this Court has exclusive jurisdiction over
20 its rules and specifically SCR 120.

1 Furthermore, only this Court can declare the purpose behind SCR 120. It
2 has never declared that imposition of SCR 120 fees and costs are compensatory,
3 which would give the bankruptcy court jurisdiction and discharge the fees and
4 costs. It should now declare that paying SCR 120 costs promotes rehabilitation
5 and protects the public, which are regulatory purposes.

6 Finally, the Court should clarify that its holding in *Shoen v. State Bar of*
7 *Nev.*, 464 P.3d 402 (Nev. 2020) only applies to “conditions precedent to
8 reinstatement *that were included in a disciplinary order*”¹ and not prior costs
9 required by SCR 120(5). Thus, a petitioner’s unpaid costs prohibit the State Bar
10 from processing his application for reinstatement.

11 **Issue #1 – Jurisdiction**

12 Bankruptcy courts have no jurisdiction over regulatory fines or fees.
13 Petitioner correctly states that bankruptcy courts have exclusive jurisdiction
14 over bankruptcy cases, but they cannot transgress the Fifth and Tenth
15 Amendments. Neither bankruptcy courts nor Congress can supersede a state’s
16 police power. Thus, discipline costs imposed under SCR 120 are within the
17 jurisdiction of this Court if they are regulatory, but within the jurisdiction of the
18 bankruptcy courts if they are compensatory.

21 ¹ 464 P.3d at 405 (emphasis added).

1 Petitioner correctly states that bankruptcy courts have exclusive
2 jurisdiction over the discharge of debts in bankruptcy cases pursuant to 28
3 U.S.C. §1334 and Article I, Section 8, Clause 4 of the U.S. Constitution.

4 However, Petitioner prematurely declared SCR 120 costs and fees as debts
5 without specific direction from the Court.

6 This Court represents the State of Nevada, which is a State of the Union
7 “on an equal footing with the Original States.”² It has jurisdiction to police and
8 regulate conduct within its borders unless otherwise delegated to the United
9 States by the Constitution.³

10 Petitioner asserts that SCR 120 directly conflicts with the Bankruptcy Act
11 and, thus, violates the Supremacy Clause of the Constitution. Federal courts
12 have a back-and-forth history on this issue.

13 First, in *Kesler v. Dep't of Pub. Safety, Fin. Responsibility Div., State of*
14 *Utah*, 369 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962), the U.S. Supreme
15 Court held that a State Board has the authority to require a licensee post-
16 discharge to pay discharged debts to retain a license. However, the Court
17 overruled *Kesler* with *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed.

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21 ² NEV. CONST. Prelim Resolution.

22 ³ U.S. CONST. 10th amend.

1 2d 233 (1971). And Congress later codified the *Perez* holding in § 525(a), which
2 Petitioner cites. Section 525(a) provides in pertinent part:

3 [A] governmental unit may not deny, revoke, suspend, or refuse to
4 renew a license . . . to . . . a person that is or has been a debtor under
5 this title . . . solely because such . . . debtor . . . has not paid a debt
6 that is dischargeable in the case under this title
7 11 U.S.C. § 525(a).

8 This Court and the discipline board, when regulating the legal profession,
9 are “governmental units” as that term is used in the statute.⁴ But “Section 525
10 does not prohibit a state from denying or revoking a license based upon a
11 determination that the public safety would be jeopardized by granting or
12 allowing continued possession of a license.”⁵

13 Under Section 523(a)(7), bankruptcy will not discharge an individual from
14 a debt “to the extent such debt is for a fine, penalty, or forfeiture payable to and
15 for the benefit of a governmental unit, and is not compensation for actual
16 pecuniary loss, other than a tax penalty.”

17 In *Brookman v. State Bar of Cal.*, 46 Cal. 3d 1004, 760 P.2d 1023, 251
18 Cal. Rptr. 495 (Cal. 1988), a bankruptcy court held that a state could condition a
19 lawyer’s license on his repayment to a client recovery fund without violating §
20 525.

21 ⁴ See 11 U.S.C. § 101(27); *In re Williams*, 158 B.R. 488, 490 (Bankr. D. Idaho 1993).

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

1 In *State Bar v. Taggart (In re Taggart)*, 249 F.3d 987 (9th Cir. 2001),
2 however, the Court of Appeals for the Ninth Circuit broke from precedent and
3 held that disciplinary costs required under prior California law were
4 dischargeable in bankruptcy because the award was not a “fine, penalty, or
5 forfeiture payable to and for the benefit of a governmental unit,” but rather
6 “compensation for actual pecuniary loss.”⁶

7 In response to *Taggart*, the California legislature amended the law in
8 2003. The legislature added a single clause that stated its intent was “to
9 promote rehabilitation and to protect the public.”⁷

10 In *State Bar v. Findley (In re Findley)*, 593 F.3d 1048, 1050-51 (9th Cir.
11 2010), the Court of Appeals for the Ninth Circuit reconsidered the issue after
12 the legislature’s declaration of intent.

13 The Ninth Circuit noted that the legislature’s declaration,
14 Comport[s] with the Supreme Court's recognition in *Middlesex*
15 *County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102
16 *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.”⁸

17 Thus, bankruptcy court has no jurisdiction over regulatory fines or fees.
18 As the Ninth Circuit recognized in *Findley*, disciplinary costs are generally

20 ⁶ 11 U.S.C. § 523(a)(7); see 249 F.3d at 989.

21 ⁷ Cal. Bus. & Prof. Code § 6086.10(e).

22 ⁸ *In re Findley*, 593 F.3d at 1053 (quoting *Middlesex* at 434 (quotation omitted)).

1 nondischargeable and certainly nondischargeable when the governmental unit
2 issues a clear declaration of intent.⁹

3 A state supreme court with jurisdiction over state regulatory action may
4 determine that such action is nondischargeable under bankruptcy code. It does
5 not need to wait for a bankruptcy court to recognize its police power. For
6 example, the Ohio Supreme Court rejected a nonlawyer's Chapter 7 bankruptcy
7 discharge against its sanctions designed to protect the public from the
8 unauthorized practice of law.¹⁰

9 Here, the Supreme Court of Nevada enacted SCR 99, *et seq.*, under its
10 inherent regulatory authority granted by the Nevada Constitution. The Court
11 enacted these rules to protect the public and the integrity of the profession.¹¹
12 Costs imposed under SCR 120 are part of this regulatory scheme.

13 Bankruptcy courts have no jurisdiction over fines, penalties, or forfeitures
14 designed to protect the public. Thus, only this Court has jurisdiction over the
15 means and methods, including imposition of fines, fees, or penalties, used to
16 regulate the legal profession. Only this Court can impose or discharge such
17 fines, fees, or penalties.

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19 ⁹ *Id.*

20 ¹⁰ *Ohio State Bar Ass'n v. Dalton*, 2010-Ohio-619, ¶ 7, 124 Ohio St. 3d 514, 515-16,
924 N.E.2d 821, 823.

21 ¹¹ *State Bar v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988).

1 **Issue #2 – Intent of SCR 120**

2 As stated above, jurisdiction over the discharge of SCR 120 costs boils
3 down to the Court’s intent behind SCR 120. This Court has often repeated that
4 “the purpose of a disciplinary proceeding is not to punish the attorney but to
5 inquire into the moral fitness of an officer of the court to continue in that
6 capacity and to afford protection to the public, the courts and the legal
7 profession.”¹²

8 Notably, before *Taggart* all reported cases had held that attorney
9 disciplinary costs were nondischargeable.¹³ These cases, “by and large,
10 analogized the costs of attorney disciplinary proceedings to the costs of criminal
11 litigation imposed on convicted defendants,”¹⁴ which held a criminal restitution
12 award nondischargeable under § 523(a)(7). Thus, the overwhelming majority of
13 courts find that disciplinary costs are nondischargeable regulatory actions.

14 Petitioner points to several provisions in SCR 120 that suggest a
15 compensatory intent, such as the phrase “allocable to the proceedings.”¹⁵

16 While the Ninth Circuit initially bucked the norm in *Taggart* by finding a
17 compensatory intent from such language, it ultimately accepted the legislature’s

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19 ¹² *Id.*

20 ¹³ *See* 249 F.3d at 993-94 & n.8 (listing cases).

21 ¹⁴ 249 F.3d at 994.

22 ¹⁵ SCR 120(3).

1 declaration of intent even though the statute “retain[ed] certain structural
2 elements identified in *Taggart* as indicative of a compensatory purpose.”¹⁶
3 Protecting the public—even if not punitive—is a regulatory purpose, which
4 exempts related fines, fees, or costs from bankruptcy discharge.

5 Thus, this Court should declare its intent in enacting SCR 120 as
6 regulatory. SCR 120 is a creature of the disciplinary process and exemplifies the
7 common intent “to inquire into the moral fitness of an officer of the court to
8 continue in that capacity and to afford protection to the public, the courts and
9 the legal profession.”¹⁷ Disciplinary costs, like the costs of prosecution imposed
10 on criminal defendants, are analogous to fines and should not be dischargeable
11 in bankruptcy.

12 **Issue #3 – Interaction between SCR 116(2)(a) and SCR 120(5)**

13 This Court should clarify that the “good-and-sufficient-reason exception”
14 in SCR 116(2)(a) does not negate the requirement that a petitioner must pay
15 previously assessed disciplinary costs before the State Bar can process his
16 application for reinstatement pursuant to SCR 120(5).

17 In *Shoen v. State Bar of Nev.*, 464 P.3d 402 (Nev. 2020), this Court
18 issued a writ of mandamus ordering the disciplinary board to hear Shoen’s
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20 ¹⁶ *In re Findley*, 593 F.3d at 1053.

21 ¹⁷ *Claiborne*, 104 Nev. at 213, 756 P.2d at 527-28.

petition for reinstatement even though she had not paid \$25,100 in restitution or the costs of the disciplinary proceeding.¹⁸

The Court held,

Accordingly, we conclude that an attorney who has not completed conditions precedent to reinstatement that were included in a disciplinary order may nonetheless petition for reinstatement but will have to “present[] good and sufficient reason why the attorney should nevertheless be reinstated.”¹⁹

However, the Court did not address SCR 120(5), which states:

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.*

Since *Shoen*, the disciplinary boards have followed the Court’s precedent in *Shoen* by accepting applications for reinstatement despite a petitioner’s failure to fulfill all “conditions precedent to reinstatement that were included in a disciplinary order,” including failure to pay costs previously assessed.

The State Bar did not move to dismiss the petition as was its practice before *Shoen*. However, in exercising jurisdiction, it is “generally appropriate” for an appellate court to reach the merits of an issue not raised below if it is a

¹⁸ 464 P.3d at 404.

¹⁹ *Id.* at 405.

1 “purely legal question[] upon which an appellate court exercises plenary
2 review.”²⁰

3 The State Bar asks the Court to clarify that its holding in *Shoen* was
4 limited to SCR 116(2), and SCR 120(5) remains an enforceable rule.²¹ The State
5 Bar need not process a suspended attorney’s application until he has paid “all
6 costs previously assessed.”

7 **Conclusion**

8 For the reasons stated above, the Court should adopt the Panel’s
9 recommendation and reinstate Petitioner on the condition that he repay costs
10 over a 24-month probationary period. This Court should also clarify that its
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18 ²⁰ *Comité de Apoyo a los Trabajadores Agrícolas v. Perez*, 774 F.3d 173, 182 (3d Cir.
19 2014); *see also Tam v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 80, 358 P.3d
20 234, 238-39 (2015).

21 ²¹ The State Bar recognizes that the Court cannot unring the bell because the State Bar
22 has processed the application and the panel has issued factual findings. However, the
State Bar respectfully asks the Court to clarify its position for future applications.

1 holding in *Shoen* was limited to SCR 116(2) and SCR 120(5) remains an
2 enforceable rule.

3 DATED this 27th day of August 2021.

4 Respectfully submitted,

5 **STATE BAR OF NEVADA**

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complied with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word from Office 365 in Georgia 14 point font size.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 2,820 words.

3. Finally, I hereby certify that I have read the foregoing Opening Brief of the State Bar of Nevada, and to the best of my knowledge, information and belief, this brief is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable NRAP, including the requirement of NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event

4. that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of August 2021.

STATE BAR OF NEVADA

By: 
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1 **CERTIFICATE OF SERVICE BY MAIL**

2 The undersigned hereby certifies that a true and correct copy of the
3 foregoing **STATE BAR OF NEVADA’S ANSWERING BRIEF** was placed in a
4 sealed envelope and sent by U.S. regular mail in Las Vegas, Nevada, postage fully
5 prepaid thereon for first class mail, addressed to:

6 Terry L. Wike
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9 Dated this 27th day of August 2021.

10 *Sonia Del Rio*

11 _____
12 Sonia Del Rio, an employee of the
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