

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

2
3 IN RE: PETITION FOR)
 REINSTATEMENT,)
4 TERRY L. WIKE, ESQ.)
 Nevada Bar No.: 7211)
5)
6 Petitioner.)

Supreme Court No. 83296
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14 **PETITIONER’S REPLY BRIEF TO THE STATE BAR OF NEVADA’S**
15 **ANSWERING BRIEF RE: PETITION FOR REINSTATEMENT**
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INTRODUCTION

In its Answering Brief, the State Bar sets forth the issues on appeal as:

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

In contrast, Petitioner identified the issues on appeal as:

1. Whether the Supreme Court has jurisdiction to determine if the debt has been discharged in Petitioner's bankruptcy; and
2. Whether the Panel erred in conditioning Petitioner's full reinstatement upon the payment of a dischargeable debt.²

Notably, now that the bankruptcy court has issued its Order of Discharge, without objection by the State Bar, the Court's decision on the issues presented by the State Bar, will lead to two conclusions: (1) jurisdiction to determine whether Petitioner's debt for the prior disciplinary fees and costs were discharged in bankruptcy is the exclusive jurisdiction of the bankruptcy courts under 28 U.S.C. §1334; and (2) conditioning reinstatement upon the payment of a discharged debt is a discriminatory act in violation of 28 U.S.C. §525(a). Such conclusions are not simply supported by the cases cited by the Petitioner in his Opening Brief, but are also supported by the cases cited by the State Bar of Nevada in its Answering Brief.

¹See State Bar of Nevada's Answering Brief, 1:2-7.

²See Petitioner's Opening Brief In Support of Petition for Reinstatement, 2:14-17.

1 **I. LAW & ARGUMENT**

2 In its Answering Brief, the first issue raised by the State Bar of Nevada appears
3 to confuse two issues: i.e., the regulatory authority of the Supreme Court with the
4 exclusive jurisdiction of the bankruptcy courts. While it is true that the Supreme
5 Court may determine the intent of a state statute, the bankruptcy courts have
6 exclusive jurisdiction in determining which debts are discharged under the
7 bankruptcy code. Each and every case cited by the State Bar in its Answering Brief,
8 conclusively supports the exclusive jurisdiction of the bankruptcy courts over this
9 matter. As a matter of law, bankruptcy courts may not even defer the issue to a state
10 court, but *must* take jurisdiction over any *potential* or *possible* claim involving 11
12 U.S.C. §525(a).³

13 In its second issue, the State Bar contends that the jurisdiction over the
14 discharge of the SCR 120 costs boils down to the Court's intent behind SCR 120.
15 But this is simply not true. Not one case, cited by the State Bar, or known to the
16 Petitioner, has a state supreme court exercised jurisdiction over a bankruptcy issue by
17 holding that costs of a disciplinary hearing against an attorney are non-dischargeable
18 under the bankruptcy code. In fact, **all** the cases cited by the State Bar were decided
19 by federal courts. The only case that comes close, is *Dalton infra*, where the Ohio
20 Supreme Court did not hold, but only opined that the sanctions *would not* be
21 discharged in bankruptcy proceedings. Hence even if the Court finds the intent of
22 SCR 120 is punitive in nature, the Court lacks jurisdiction to overturn the bankruptcy
23 court's Order of Discharge issued to the Petitioner on July 20, 2021.
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27 ³*In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993)
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1 Lastly, the State Bar requests the Court clarify its holding in *Shoen infra*. The
2 State Bar requests an advisory opinion from the Court to hold that the State Bar may
3 still deny a reinstatement hearing until all costs are paid, even when the petitioner
4 presents good-and-sufficient reasons for not being able to pay fees and costs. In
5 effect, the State Bar requests the Court overrule *Shoen* and amend SCR 116(2)(a). In
6 its brief, the State Bar acknowledges that such advisory opinion would not affect
7 Petitioner’s case, as his Petition for Reinstatement has already been processed.
8

9 However, now that the bankruptcy court has issued its Order of Discharge, the
10 only issue that remains in Petitioner’s case, is whether it is a discriminatory violation
11 of 11 U.S.C. §525(a), to deny Petitioner reinstatement after the debt owed to the State
12 Bar has been discharged in bankruptcy. Clearly, the answer is *yes*.
13

14 **Issue #1 - Jurisdiction**

15 In support of the State Bar’s first issue, they argue that bankruptcy courts have
16 no jurisdiction over regulatory fines or fees, as limited under the Fifth and Tenth
17 Amendments and the state’s police power.⁴ The State Bar reasons that the state’s
18 have “jurisdiction to police and regulate conduct within its borders unless otherwise
19 delegated to the United States by the Constitution.”⁵ However, the State Bar’s
20 argument that the state’s police power gives it jurisdiction to decide the bankruptcy
21 issues in this case is a red herring, as jurisdiction over the discharge of debts in
22 bankruptcy proceedings *have been* expressly delegated by Congress to the bankruptcy
23 courts under the U.S. Constitution.
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26 ⁴See State Bar of Nevada’s Answering Brief 2:12-16.

27 ⁵*Id.* at 3:7-9.
28

1 Notably, the State Bar concedes that the discharge of debts is within the
2 exclusive jurisdiction of the bankruptcy courts as delegated pursuant to 28 U.S.C.
3 §1334 and Article I, Section 8, Clause 4 of the U.S. Constitution.⁶ Moreover, the
4 cases cited by the State Bar, identify that the bankruptcy courts *must* exercise their
5 exclusive jurisdiction over any *possible* or *potential* violations 11 U.S.C. §525(a).⁷

6 Initially, the State Bar cites to *Kesler v. Dep't of Pub. Safety, Fin.*
7 *Responsibility Div., State of Utah*, 369 U.S. 153, 82 S. Ct. 807, 7 L.Ed. 2d 641
8 (1962), for its position that states may require a licensee, post-discharge, to pay
9 discharged debts to retain a license. Two points are worth noting about *Kesler*. First,
10 *Kesler* was initially filed in the United States District Court for Utah, whereafter the
11 Court clarified its exclusive jurisdiction over the matter pursuant to 28 U.S.C.A.
12 §2281.⁸ Second, *Kesler* was overruled by the Court in *Perez v. Campbell*, 402 U.S.
13 637, 91 S. Ct. 1704, 29 L.Ed. 2d 233 (1971). *Perez* held that state legislation that
14 frustrates the full effectiveness of federal law is invalidated by the Supremacy
15 Clause.⁹ Shortly thereafter, Congress codified 11 U.S.C. §525 to clarify the holding
16 in *Perez*.
17

18 The State Bar then turns to *In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993), in
19 support of its argument that Section 525 does not prohibit a state from denying or
20 revoking a license based upon a determination that the public safety would be
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23 ⁶*Id.* at 3:1-3.

24 ⁷*In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993)

25 ⁸*Kesler v. Dep't of Pub. Safety, Fin. Responsibility Div., State of Utah*, 369 U.S.
26 153, 82 S. Ct. 807, 7 L.Ed. 2d 641 (1962).

27 ⁹*Perez*, 402 U.S. 644-656.

1 jeopardized by granting or allowing continued possession of a license.¹⁰ But here too,
2 *Bradley* undermines the State Bar’s position that this Court has jurisdiction.

3 First, the *Bradley* court clarified that the jurisdictional grant in §525 is broad.¹¹
4 The court stated “[W]e are not aware of any bankruptcy court, with the exception of
5 the one in this case, which has dismissed a *possible* §525 violation on the basis of
6 lack of subject matter jurisdiction.” The court went on to say “if there is a *potential*
7 violation of §525, then the court *must* take jurisdiction.”¹² Accordingly, the court
8 remanded the matter to the bankruptcy court to take subject matter jurisdiction as to
9 whether there was a violation of 11 U.S.C. §525.
10

11 Second, *Bradley* involved a non-dischargeable claim for “restitution” based
12 upon defrauding a client of \$18,000.00. Many courts, including the U.S. Supreme
13 Court and those cited by the State Bar, find that “restitution” is the equivalent of a
14 non-dischargeable fine or penalty under Section 523(a)(7).¹³

15 In *Brookman v. State Bar of Cal.*, 46 Cal. 3d 1004, 760 P.2d 1023, 251 Cal.
16 Rptr. 495 (Cal. 1988), the state bar used it’s client recovery fund to pay \$48,900 to
17 Brookman’s former client. The bankruptcy court, in exercising its exclusive
18 jurisdiction, found that “restitution” to the client recovery fund did not violate §525.
19 The court followed the reasoning of the U.S. Supreme Court in *Kelly, infra*, holding
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23 ¹⁰See State Bar of Nevada’s Answering Brief, 4:6-10.

24 ¹¹*In re Bradley*, 989 F.2d 802, 804.

25 ¹²*Id.* at 804.

26 ¹³*Kelly v. Robinson*, 479 U.S. 36, 50, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986) (holding
27 that “§ 523(a)(7) preserves from discharge any condition a state criminal court imposes
28 as part of a criminal sentence”).

1 that “restitution” is analogous to a “fine” or “penalty.”¹⁴ The court held that
2 “restitution” fundamentally serves the goal of rehabilitation, it is not merely
3 compensation to the government for “actual pecuniary loss,” and thus it is
4 nondischargeable under §523(a)(7).

5 Next, the State Bar argues that in response to *State Bar v. Taggart (In re*
6 *Taggart)*, 249 F.3d 987 (9th Cir. 2001), the California legislature simply “added a
7 single clause” to its 2003 Cal. Bus. & Prof. Code §6086.10(e), that its intent was “to
8 promote rehabilitation and to protect the public.”¹⁵ However, this argument is
9 incomplete. It is incomplete, because the actual legislation shows that the legislation
10 was amended to expressly state that the fees and costs are *penalties*, along with the
11 newly stated intent:
12

13 In addition to other monetary sanctions as may be ordered
14 by the Supreme Court pursuant to Section 6086.13, costs
15 imposed pursuant to this section are *penalties*, payable to
16 and for the benefit of the State Bar of California, a public
17 corporation created pursuant to Article VI of the California
18 Constitution, to promote rehabilitation and to protect the
19 public. This subdivision is declaratory of existing law.

20 Cal. Bus. & Prof. Code § 6086.10(e). Mindfully, the *Taggart* court held that prior to
21 amendment of the Code, the compensation to the state bar was for “actual pecuniary
22 loss.”¹⁶ Hence it was not simply the intent expressed by the legislature, it was the
23

24 ¹⁴*See Brookman infra, citing Kelly v. Robinson*, 479 U.S. 36, 93 L.Ed.2d 216, 107
25 S.Ct. 353 (1986)(involving a larceny conviction of Robinson).

26 ¹⁵*Id.* at 5:7-9.

27 ¹⁶*In re Taggart*, 249 F.3d at 994.

1 “plain language” of the amended provision which made such costs non-dischargeable
2 under §523(a)(7).¹⁷

3 As cited by the State Bar, the subsequent holding in *State Bar v. Findley (In re*
4 *Findley)*, 593 F.3d 1048, 1053 (9th Cir. 2010), clarified that until the legislature
5 amended §6086.10(e) in 2003, fees and costs for disciplinary hearings were
6 dischargeable. The court reasoned that in amending §6086.10(e), the legislature
7 followed the “Supreme Court’s proclamation in *Kelly* that state ‘penal and
8 rehabilitative interests . . . are sufficient to place [a debt] within the meaning of §
9 523(a)(7),’ at least with respect to restitution orders. *See Kelly*, 479 U.S. at 53.”¹⁸
10 Thus, only after the amendment of §6086.10(e) in 2003, were fees and costs of
11 disciplinary hearings in California held to be non-dischargeable.
12

13 Lastly, the State Bar argues that *Ohio State Bar Ass’n v. Dalton*, 2010-Ohio-
14 619, ¶7, 124 Ohio St. 3d 514, 515-16, stands for the proposition that a state supreme
15 court may determine that an action is non-dischargeable under the bankruptcy code.¹⁹
16 However, the *Dalton* court made no such holding. Dalton engaged in the
17 unauthorized practice of involving law of real estate transactions. The state bar
18 imposed monetary sanctions as a civil penalty. The *Dalton* Court based its decision
19 upon three points of reasoning. First, it reasoned that its police powers allowed it to
20 continue proceedings against Dalton. Second, it reasoned that the monetary sanctions
21 were the equivalent of fines and penalties and “Dalton’s bankruptcy *would not*
22 discharge the board’s recommended civil penalty,” under §523(a)(7). Third, it
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25 ¹⁷*In re Findley*, 593 F.3d at 1053.

26 ¹⁸*Id.* at 1053, footnote 3.

27 ¹⁹*See* State Bar of Nevada’s Answering Brief, 6:3-8.
28

1 reasoned that the monetary sanctions were not compensation for actual pecuniary loss
2 §523(a)(7). Thus, the Ohio Supreme Court did not hold that the sanctions were non-
3 dischargeable, but merely expressed that her bankruptcy *would not* discharge the
4 sanctions.

5 In the instant case, the claims against Petitioner do not involve restitution,
6 fines, penalties or sanctions, but simply a claim by the State Bar of Nevada for
7 compensation for actual pecuniary loss.²⁰ The claim by the State Bar herein was
8 incurred before Petitioner filed for bankruptcy on April 19, 2021. The State Bar of
9 Nevada did not oppose the discharge even after it received Petitioner's brief on the
10 issues on April 21, 2021. Approximately 120 days later, Petitioner received his Order
11 of Discharge on July 20, 2021. Now, it appears that the State Bar of Nevada seeks
12 the intervention of this Court to circumvent the exclusive jurisdiction of the
13 bankruptcy court in deciding whether the debt has been discharged.

14 In sum, there are only two problems with the cases cited by the State Bar of
15 Nevada, the law and the facts. First, the law, bankruptcy courts have exclusive
16 jurisdiction over any *possible* or *potential* violation of 11 U.S.C. §525, and they *must*
17 take jurisdiction.²¹ Second, the facts in these cases demonstrate that each of claims
18 were non-dischargeable as they were found to be fines, penalties, forfeitures and
19 restitution. Lastly, even if this Court agrees with the State Bar, that the fees and costs
20 under SCR 120 are regulatory, it does not relinquish the bankruptcy courts of its
21 exclusive jurisdiction over the issue whether Petitioner's debt has been discharged.
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25 ²⁰See *Albert-Sheridan v. State Bar of California*, 19-60023 (9th Cir. 2020)(holding
26 that discovery sanctions payable to a private part are dischargeable under §727(b)).

27 ²¹*In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993).
28

1 **Issue # 2 - Intent of SCR 120**

2 Here, the State Bar argues that “jurisdiction over the discharge of SCR 120
3 costs boils down to the Court’s intent behind SCR 120.”²² However, as discussed
4 *supra*, the State Bar fails to identify even one case where a state supreme court took
5 jurisdiction and held that costs of a disciplinary are non-dischargeable. Even the court
6 in *Dalton* did not hold that the debt was non-dischargeable, but merely opined that the
7 debt *would not* be discharged in bankruptcy.²³ Clearly, the State Bar read the holding
8 in *Dalton* incorrectly.
9

10 The State Bar also cites to footnote 8 in *State Bar of California v. Taggart (In re*
11 *Taggart)*, 249 F3d. 987, 994 (9th Cir. 2001), wherein the court identified several cases
12 wherein courts found that the costs of the disciplinary matters were a civil penalty.²⁴
13 Notably, each of these cases involve *bankruptcy courts* determining whether the debts
14 under the code were discharged in bankruptcy. The *Taggart* court also looked to the
15 legislative intent of Cal. Bus. & Prof. Code §6086.10, and concluded, that there was
16 no evidence that the statute was punitive in nature, but that it was compensation to the
17 state bar for actual pecuniary loss.²⁵
18

19 Despite the clear language of SCR 120 and the precedence of the Court,²⁶ the
20 State Bar urges this Court to hold that the intent of SCR 120 is punitive in nature.
21

22 ²²See State Bar of Nevada’s Answering Brief, 7:2-3.

23 ²³*Dalton*, 2010-Ohio-619, ¶7, 124 Ohio St. 3d 514, 515-16.

24 ²⁴See State Bar of Nevada’s Answering Brief, 7:8-9.

25 ²⁵*In re Taggart*, 249 F3d. at 994.

26 ²⁶See *State Bar of Nevada v. Claiborne*, 104 Nev. 115, 756 P.2d 464 (1988)(“[t]he
27 purpose of attorney discipline is to protect the public, the courts, and the legal
28 profession, not to punish the attorney”).

1 Even if the Court is so persuaded, such a decision would not offer the State Bar any
2 relief in the instant case. That is, this Court would still lack jurisdiction to hold that
3 Petitioner's debt was not discharged in his bankruptcy. In addition, the State Bar
4 received notice of Petitioner's bankruptcy and failed to object to the discharge, before
5 Petitioner received his discharge on July 20, 2021. Accordingly, the legislative intent
6 behind SCR 120, even if found to be punitive, does not offer the State Bar any relief.
7

8 9 **Issue # 3 - Interaction between SCR 116(2)(a) and SCR 120(5)**

10 In this issue, the State Bar requests that the Court "clarify that the 'good-and-
11 sufficient-reason exception' in SCR 116(2)(a) does not negate the requirement that a
12 petitioner must pay previously assessed disciplinary costs before the State Bar can
13 process his application for reinstatement pursuant to SCR 120(5)."²⁷ Essentially, the
14 State Bar is asking the Court to issue an advisory opinion, overruling *Shoen*, to hold
15 that [T]he State Bar need not process a suspended attorney's application until he has
16 paid 'all costs previously assessed.'²⁸

17 *Shoen* involved an order to pay "restitution" in the amount of \$25,100. The
18 *Shoen* Court held that if the petitioner presented good-and-sufficient-reason for not
19 paying the disciplinary fees and costs, she may be reinstated prior to paying the fees
20 and costs. As cited *supra*, the U.S. Supreme Court in *Kelly*, held that "restitution" is a
21 analogous to a "fine" or "penalty." That is, even if *Shoen* had sought to discharge the
22 debt in bankruptcy, it likely *would not* be discharged under 11 U.S.C. 523(a)(7),
23 assuming, that the State Bar filed an objection with the bankruptcy court. Hence
24

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26 ²⁷See State Bar of Nevada's Answering Brief, 8:13-16.

27 ²⁸*Id.* at 10:4-6.

1 *Shoen* no longer applies to the instant case, since the bankruptcy court has already
2 issued the Order of Discharge.

3 Here, the State Bar confuses two issues: (1) whether a disciplined attorney may
4 be reinstated before paying disciplinary fees and costs; with (2) whether a disciplined
5 attorney may be denied reinstatement when he did not pay disciplinary costs, but
6 actually discharged the such costs by exercising his rights under the bankruptcy code.
7 In the latter issue, the denial of reinstatement would be a discriminatory act in direct
8 violation of 11 U.S.C. §523(a)(7).
9

10 Petitioner filed for bankruptcy on April 19, 2021, Case No. 21-11982-mkn to
11 relieve him of debts in excess of \$1,000,000. Petitioner and the bankruptcy court gave
12 notice of Petitioner's bankruptcy to the State Bar. Petitioner filed his petition for
13 reinstatement on April 21, 2021, citing *Shoen* and presenting good-and-sufficient
14 reasons to the Panel as to why the debt was not paid prior to seeking reinstatement.²⁹
15 In his Petition for Reinstatement, Petitioner set forth the argument that he believed the
16 debt was dischargeable as compensation for actual pecuniary loss.³⁰ After which, the
17 State Bar chose not to file an objection to the discharge with the bankruptcy court. On
18 July 20,2021, four months later, the bankruptcy court issued the Order of Discharge.
19

20 Hence the instant case, now presents an entirely different issue than the Court
21 faced in *Shoen*. The issue now, is whether it is a *discriminatory* act under 11 U.S.C.
22 §525(a) to deny Petitioner reinstatement for not paying the disciplinary costs, when he
23

24 ²⁹See State Bar of Nevada's Answering Brief, 1:9-10, ("adopting the facts and
25 statement of Statement of the Case in Petitioner's Opening Brief," wherein both the
26 Panel and the State Bar agreed that Petitioner presented good-and-sufficient reasons for
not paying the fees and costs prior to seeking reinstatement).

27 ³⁰See Petition for Reinstatement, pp. 10-13.
28

1 exercised his rights under the bankruptcy code to discharge those costs. Thus,
2 Petitioner believes that the Panel erred in conditioning Petitioner's full reinstatement
3 upon the payment of the discharged debt.
4

5 6 **CONCLUSION**

7 For the reasons stated above, Petitioner's debt to the State Bar has been
8 discharged in his bankruptcy. Therefore, Petitioner respectfully requests reinstatement
9 in accord with the Panel's recommendation in the transcript, wherein the Panel
10 recommended that if the debt is discharged, Petitioner should serve out his remaining
11 time on probation with credit for time served, along with, the conditions of that
12 probationary period as set forth in Docket No. 79305.
13

14 DATED this 3rd day of September, 2021.

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