BAP No.: NV-23-1179

UNITED STATES BANKRUPTCY APPELLANT PANEL

FOR THE NINTH CIRCUIT

In re: TERRY LEE WIKE,

Debtor,

TERRY LEE WIKE, dba WIKE LAW GROUP

Appellant,

v.

STATE BAR OF NEVADA

Appellee.

APPELANT, TERRY LEE WIKE'S, REPLY BRIEF

Appeal from the U.S. Bankruptcy Court, District of Nevada - Las Vegas
BK-21-11982-mkn, Appeal from the Hon. Mike K. Nakagawa, Chapter 7
Underlying Bankr. No.: BK-21-11982-mkn

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APPELLANT'S REPLY BRIEF

Appellant, TERRY LEE WIKE ("Wike" or "Appellant") hereby submits his Reply Brief to Appellee State Bar of Nevada's Answering Brief:

I. DISPUTED STATEMENT OF THE CASE

In Appellee's Answering Brief, the State Bar alleges in its "Statement of the Case" that in 2017 the State Bar investigator "discovered that he [Appellant] had misappropriated client and third-party funds."[1] This statement is false. In fact, there was no finding by either the hearing panel or the Nevada Supreme Court ("NSC") that Appellant had misappropriated client funds in the first disciplinary hearing.[2] The NSC actually held that there was insufficient evidence as to whether Wike [Appellant] acted knowingly or negligently.[3] The NSC did recognize that all clients and lienholders had been paid timely. *Id*. Based upon the actual testimony and evidence presented to the hearing panel, the hearing panel's recommended discipline was a public reprimand and probation.[4] Thus, the State Bar's statement and implication that there was a misappropriation in the first disciplinary hearing is simply false.

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[1] Appellee's Answering Brief, p.9.
[2] 1-ER-16-19.
[3] 1-ER-17.
[4] 1-ER-18.

The State Bar also alleges that one of Appellant's "former clients, a homeowner's association ("HOA"), … alleged he had repeatedly double-billed the client."[5] This statement is misleading. The actual facts show that the hearing panel never found that Appellant double-billed any client or **ever** owed any client or lienholder money.[6] In fact, in determining the degree of discipline, the NSC found that a mitigating factor was Appellant's cooperation by producing the "invoices of construction defect costs," which refuted the HOA's false allegation that it was double-billed.[7] Thus, while the double-billing was alleged, the State Bar's attempt to use this unproven allegation herein is misleading.

The State Bar also states: "[W]hile 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."[8] There are two false statements derived from this statement.

First, there was never a finding by the hearing panel or NSC, that there was a second overdraft from Appellant's bank regarding his IOLTA client trust

[5] Answering Brief, p.9.
[6] 1-ER-16-19.
[7] 1-ER-18.
[8] Answering Brief, p.9.

account.[9] This statement is misleading, as it would lead a person to believe that there was, in fact, an overdraft. In fact, the State Bar never presented such evidence to the NSC, because it did not happen. That is, Bank of America mistakenly withdrew funds from the wrong trust account, which automatically generated notice to State Bar. *Id*. Bank of America quickly corrected its mistake, by issuing correction letters, notifying the State Bar and Appellant that the reported overdraft was caused by bank error.[10] Thus, this statement is false, and at best, misleading.

Second, the State Bar's allegation that "Appellant continued to misappropriate client funds," is again false and misleading, because there was no initial finding of misappropriation in the first hearing.[11] That is, only in the second disciplinary hearing did the NSC find a misappropriation involving $2,706.47.[12] These events occurred between May 2018 – July 25, 2018.[13] During this same time period, Appellant had two trust accounts, wherein the other trust account contained earned fees in excess of $30,000.[14] Appellant testified that he simply withdrew the funds from the wrong account, which ironically, is the same error

[9] 1-ER-11-15.
[10] 5-ER-331-332.
[11] 1-ER-16-19.
[12] 1-ER-11; *See also* 5-ER-333-334.
[13] 5-ER-334.
[14] 5-ER-335-351

that Bank of America made. Nevertheless, the NSC held that Appellant benefitted from the withdrawals, concluding that a misappropriation occurred.

Notably again, the hearing panel which actually heard the testimony, reviewed and weighed the evidence, found that the appropriate discipline should have been a stayed six-month suspension with two-year probationary period.[15]

Importantly, Appellant seeks to correct the record, as to the facts presented by Appellee are false, inaccurate and misleading. It is vital to Appellant's livelihood and reputation that the facts submitted to the Court, and to someone reading this material, that they are presented with true and accurate facts, without scurrilous implications. Accordingly, Appellant will supplement the excerpts of the record to include evidence of the actual facts, in order to correct Appellee's version of the Statement of the Case.

II. ARGUMENT

In its Answering Brief, the State Bar of Nevada ("State Bar") acknowledges that the "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."[16] Yet, the State Bar never objected to the discharge of

[15] 1-ER-13.
[16] Appellee's Answering Brief, p.12.

the debt or sought other relief from the Bankruptcy Courts to fairly adjudicate its right before putting Appellant's Constitutional rights in jeopardy.

That is, the State Bar has taken the approach that it may simply ignore the Bankruptcy Court's exclusive jurisdiction, ignore the plain language of 11 U.S.C. § 525(a), and deny Appellant reinstatement to the practice of law because it alone has decided the debt was non-dischargeable under 11 U.S.C. § 523(a)(7). Thus, when the State Bar argues in its Brief that § 523(a)(7) is "subject to interpretation," it is an acknowledgment by the State Bar that it knew it should have sought relief from the Bankruptcy Courts before ignoring Appellant's Constitutional Rights.

A. The NSC has Rejected the State Bar Opinion that Appellant's Debt is a Fine, Penalty, or Forfeiture.

The State Bar initially argued to the NSC that Appellant's debt was exempted from discharge as a fine, penalty or forfeiture.[17] In turn, the NSC rejected this argument, holding that the debt was exempted from discharge as a process of rehabilitation and deterrence.[18] In its Brief, the State Bar combines these two arguments, to now argue that the debt is exempted from discharge as a fine, penalty, process of rehabilitation, and deterrence.[19] Obviously, whether

[17] 1-ER-6-10.
[18] 1-ER-7-9.
[19] Answering Brief, p.18.

Appellant's debt is fine or penalty, or was a process of rehabilitation and deterrence, was in fact "subject to interpretation," but that interpretation ended when the NSC disagreed with the State Bar's arguments.

When the NSC rejected the State Bar's argument that the debt served as a fine or penalty, the NSC clarified that the payment of the debt was exempted from discharge as it serves as a process of rehabilitation and deterrence under *Kelly v. Robinson*, 479 U.S. 36, 50,107 S. Ct. 353, 93 L.Ed.2d 216 (1986) and *Brookman v. State Bar*, 46 Cal. 3d. 1004 (1988) *Id*. [1-ER-6-10]. Hence because the NSC has already rejected the State Bar's argument that the debt is a fine or penalty under Nevada Law, whether the debt is a fine or penalty need not be belabored herein, leaving the remaining issue of whether the rationale of *Kelly* and *Brookman* apply to prevent the discharge of Appellant's debt.[20]

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B. Federal Bankruptcy Courts Have Little, if Any, Trouble Applying

[20] Under the plain text of NSC Rule 120 (SCR 120), the debt does not serve as a penalty or fine.[20] The NSC held as much in this case, and in *State Bar of Nevada v. Claiborne*, 756 P.2d 464, 527 (Nev.1988)(disciplinary costs are not intended to be a penalty upon the errant attorney). [2-ER-102]. More recently, the NSC, *In re Discipline of Arabia*, 495 p.3d 1103, 1109 (Nev. 2021) affirmed its holding that the payment of disciplinary costs are not intended to be a penalty. *See* Answering Brief, p.20, n31.

the Plain Text of § 523(a)(7), to Overcome Opinions About What Debts are Dischargeable.

As the State Bar correctly points out the three-part test under § 523(a)(7), is that 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.'**"[21] In the instant case, element (1) cannot be satisfied as the NSC has held that the debt is not a fine, penalty or forfeiture. Likewise, element (3) of § 523(a)(7) cannot be satisfied as the debt **is compensation for actual pecuniary loss**, which is solely based upon the costs of the State Bar's disciplinary proceedings. Accordingly, the State Bar's argument that the debt serves as a sanction under *Kelly*, fairs no better.

The holding in *Kelly* is inapplicable. *Kelly* involved restitution owed by a criminal defendant, wherein the Supreme Court held that the debt was exempted from discharge. The Ninth Circuit has repeatedly rejected attempts to transform compensatory disciplinary proceeding debts under *Kelly* into a process of rehabilitation or deterrence, in order to avoid the discharge of the debt, even when the *meaning* of § 523(a)(7) is argued to include *sanctions*, or *rehabilitation.*

[21] Answering Brief, p.13.

Albert-Sheridan, 960 F.3d 1188, 1194 (2016). In *Kassas v. State Bar of California*, 49 F.4th 1158 (9th Cir. 2022), the court rejected the argument that "reimbursement" to the state bar's Client Security Fund ("CSF") was nondischargeable because it serves as rehabilitation and to protect to the public. Thus, arguments that the debt is exempted from discharge because it may serve as rehabilitation and the protection of the public do not change the plain text of § 523(a)(7).

In applying the plain text of § 523(a)(7), the *Kassas* court, clarified that it need not dive into the abyss of whether the fine serves as rehabilitation, or is for the protection of the public, but rather, it need only to determine under element (3) if the debt is "compensation for actual pecuniary loss." If it is, the debt is dischargeable. 49 F.4th at 1164.

The State Bar argues that rehabilitation and public safety are also excuses that serve to exempt debts from discharge under *Brookman v. State Bar of Cal.*, 46 Cal. 3d 1004, 760 P.2d 1023 (Cal. 1988). In *Brookman* the California Supreme Court opined, but did not hold, that the reimbursement to the CSF would be permissible under federal bankruptcy law based upon its rehabilitative purpose. *Id.* at 1027. However, on this issue, *Brookman* has now been put to rest.

The *Kassas* court held that debts owed to the CSF are dischargeable as *compensation for actual pecuniary loss*, even if the repayment would serve as some form of rehabilitation. 49 F.4th at 1166.

Next, the State Bar turns to an analysis of *In re Taggart*, 249 F.3d 987 (9th Cir. 2001) and *In re Findley*, 593 F.3d 1048 (9th Cir. 2010), wherein the latter case, the debt was expressly defined as a "penalty" under California Law. In dismissing the reasoning applied by both of the courts, the State Bar argues that *Findley* should be controlling authority in [in Nevada] all jurisdictions because of the Bar's authority to "regulate the legal profession."[22] Notably, the courts deciding *Taggart*, *Findley* and more recently, *Kassas*, never embarked on the journey the State Bar argues for, but rather the courts simply recognize that *Findley* and *Kassas* were decided after California amended its disciplinary statute in response to *Taggart*, whereafter such debts resulting from disciplinary proceedings were expressly defined as "penalties" under California Law.[23] Such is not the law in Nevada, which has already decided by the NSC.

[22] *Id*. at p. 15-18.

[23] There remains some question as to whether *Findley* was wrongfully decided as the debt violates element (3) of the test under § 523(a)(7), as the debt was clearly compensation for actual pecuniary loss. *Kassas*, 49 F.4th at 1158, ("We [a panel] are also bound by that decision . . . If Kassas wishes to pursue this issue, he must do so through a petition for rehearing en banc.).

In the next two sections of the State Bar's Answering Brief, it embarks on a journey arguing against the NSC's decision, and that the debt remains to be a fine, penalty or forfeiture. In effect, the State Bar urges this Court to accept any "interpretation" that the State Bar argues for, to prevent the discharge such debts. Fortunately, § 525(a) and § 523(a)(7) have been drafted in such a way to prevent governmental entities from wielding such power, by providing debtors a fresh start.

Lastly, Appellant would be remiss not to briefly discuss the string cite of cases presented by the State Bar wherein it claims that the courts deny the discharge of such debts based upon public safety.[24]

The State Bar cites to *In re Smith*, 317 B.R. 302, 313 (Bankr. D. Md. 2004) but *Smith* received *negative treatment* by *Love v. Tennessee Board of Professional Responsibility*, 442 B.R. 868, 882-83, (Bankr. M.D. Tenn. 2011) (Despite arguments by the state bar that the payment of the costs serves as part of rehabilitation under *Kelly*, the court held that costs assessed in the attorney disciplinary proceedings were dischargeable as **compensation for actual pecuniary loss**. And the state bar may not hold Debtor's law license hostage to payment of the discharged costs.)

The State Bar cites to *In re Doerr*, 185 B.R. 533, 537 (Bankr. W.D. Mich. 1995) but *Doerr* received negative treatment and was not followed by *In re Stasson*, 472 B.R.

748, 754 (Bankr. E.D. Mich. 2012) (Despite the arguments by the state bar that the payment of disciplinary costs are fines and non-dischargeable under *Kelly* and for public safety reasons, the court held that disciplinary costs are dischargeable under the plain text of § 523(a)(7) as **compensation for actual pecuniary loss**, and that the exceptions to discharge are to be strictly construed against the creditor.).[25]

The State Bar cites to *In re Cillo*, 159 B.R. 340, 343 (Bankr. M.D. Fla. 1993) which received negative treatment and was not followed by *In re Love*, 442 B.R. 868, *supra*.

The State Bar cites to *In re Williams*, 158 B.R. 488, 491 (Bankr. D. Idaho 1993), which held that the disciplinary costs were a fine under Idaho Bar Commission Rule 506(j), which allows **discretion** in the amount of the fine based upon the level of misconduct. Thus, the *Williams* court *did not say* that the costs were non-dischargeable because they serve a public safety purpose.

The State Bar cites to *In re Lewis*, 151 B.R. 200, 203 (Bankr. C.D. Ill. 1992), which held that disciplinary costs were fines, but under ILCS S. Ct. Rule 773, the amount of the costs is **discretionary**. The State Bar cites to *In re Betts*, 149 B.R.

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[24] Answering Brief, p. 25, n.49.

[25] In *In re Netzer*, 545 B.R. 254, 260 (Bankr. W.D. Wis. 2016), the court contrasted its holding with *Stasson*, as Wisconsin's disciplinary *statute* expressly provided that the payment of costs was imposed as discipline, and that the imposition of the costs were discretionary as a measure of the misconduct, making the costs not purely compensation for actual pecuniary loss, but serve as a fine or penalty.

891, 896 (Bankr. N.D. Ill. 1993), wherein the court stated it would follow the logic of *In re Lewis*, supra.

The State Bar cites to *In re Haberman*, 137 B.R. 292, 295-96 (Bankr. E.D. Wis. 1992), held the disciplinary costs served as a fine or penalty, whereafter *In re Netzer*, *supra*., recognized that the state disciplinary statute imposing costs as a form of discipline was **discretionary** and as such was a measure of the misconduct.

Notably, each of the cases cited above by the State Bar come from *Taggart*, wherein the court stated "We acknowledge that the few reported cases that consider whether the costs of attorney disciplinary proceedings are excepted from discharge under § 523(a)(7) have held that such costs are nondischargeable." 249 F.3d 987, 993. The analysis of these cases demonstrates that only when the state statute provides for **discretion** in the amount of the costs to be imposed, have the courts found that the disciplinary costs serve as a fine or penalty as a measure of the attorney's misconduct. Otherwise, most, if not all, the cases have received negative treatment in the application of *Kelly* and the arguments of rehabilitation and public safety.

C. The Holding in *Kassas* Clearly Expresses the Ninth Circuit's Opinion that if the Debt is Compensation for Actual Pecuniary

Loss, it is Dischargeable.

The State Bar concludes that the *Kassas* court held that the disciplinary costs were non-dischargeable under *In re Findley*.[26] The State Bar fails to mention that the *In re Findley* holding was premised upon California's disciplinary statute, and the *Kassas* court was bound by that decision, until, and if, it was overturned en banc. 49 F.4th at 1166. While the *Kassas* court was bound by *Findley* regarding the discharge of disciplinary costs in California, it was not bound by *Findley* in deciding whether reimbursement to the Client Security Fund was dischargeable. The *Kassas* court stated **"[W]e do not need to reach the question whether the California Supreme Court's order that Kassas repay the CSF is a fine or penalty, because we conclude that the restitution payments at issue here are 'compensation for actual pecuniary loss.'"** *Id*. at 1164. *Citing*, "*In re Albert-Sheridan*, 960 F.3d [1188], 1193 [2020] n.3 ("Because the discovery sanctions do not meet the governmental unit **or non-compensatory elements, we need not address whether they are also fines, penalties, or forfeitures under the Code."**)." *Id*. Thus, in the instant case, because the costs of the disciplinary proceedings are compensation for actual pecuniary loss, it makes no difference

[26] Answering Brief, p.28.

even if they were fines or penalties, because under the third element of § 523(a)(7), compensation for actual pecuniary loss is dischargeable.

III. CONCLUSION

The State Bar of Nevada has taken the approach that it may ignore the exclusive jurisdiction of the Bankruptcy Courts and decide whose debts will be dischargeable. The State Bar has also taken the approach that may change the nature of the debt to avoid its discharge. The State Bar even believes § 523(a)(7) is subject to interpretation, yet it did not seek the Bankruptcy Court's intervention to ensure its interpretation was correct and that the Appellant's rights were respected. Section 525(a) was explicitly enacted to curb governmental entities from wielding arbitrary power over debtors, by affording professionals the opportunity to be licensed with a fresh start.

In its decisions, the Ninth Circuit consistently holds that compensation for actual pecuniary loss is dischargeable. Taggart remains the exception, but its decision is premised on California' disciplinary statute. Nevada has no similar statute, so the State Bar has relied upon the application of *Kelly*, which has also been rejected by the Ninth Circuit. Accordingly, the Court should find that Appellant's debt has been discharged, and in doing so, find that the State Bar is

subject to sanctions for Appellant's costs and reasonable attorney fees in presenting these issues to the Court.

DATED this 1st day of March, 2024.

Respectfully submitted,

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CERTIFICATE OF INTERESTED PARTIES (BAP Rule 8015(a)-1(a))
BAP No.: NV-23-1179, Terry Lee Wike

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

Dan Hooge, Counsel for the State Bar of Nevada.

Signed: */s/Terry L. Wike* Dated: March 1, 2024

CERTIFICATE OF RELATED CASES (BAP Rule 8015(a)-1-(b))
BAP No.: NV-23-1179, Terry Lee Wike

The undersigned certifies that there are no known related cases.

Signed: */s/Terry L. Wike* Dated: March 1, 2024

CERTIFICATE OF COMPLIANCE (FRBP 8015(a)(7))

The foregoing document complies with the type-volume limitation of FRBP 8015(a)-1(b) and FRAP 32(a)(7)(B) because this document is proportionally spaced, has typeface of 14 points, using Times New Roman font and contains 2783 words as counted by Microsoft Word, excluding the portions exempted by FRAP 32(a)(7)(B), if applicable.

Signed: */s/Terry L. Wike* Dated: March 1, 2024

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 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 either are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

Dated March 1, 2024.

Submitted by:

/s/ Terry L. Wike