

the clients acting as a public insurance program. Third, the court found that the precise calculation of the debt showed that the debt was for an actual loss (the lawyer was obligated to reimburse the fund for all the money paid, and there was not a flexible, discretionary remedy tailored to his particular situation). As a result, the court found that the debt was for actual loss because the statute showed more concern for recoupment and did not have enough of a penal purpose.

What Attorney Disciplinary Cost Cases Tell Us About § 523(a)(7)

The dischargeability of debt under § 523(a)(7) turns on whether the debt can be deemed to serve a penal purpose rather than compensate for actual pecuniary loss.¹¹ Due to the lack of appellate decisions specifically regarding CPF debt, one must look for additional guidance by reviewing cases addressing the dischargeability of disciplinary costs assessed against attorneys for ethical and professional violations. Although debt arising from disciplinary costs is distinguishable from CPF debt,¹² the two debts are sufficiently similar to provide insight into how courts have viewed § 523(a)(7). The two types of debt are similar in that (1) both debts arise from an attorney's poor professional conduct, (2) both result from state statutes, and (3) both debts' dischargeability turns on whether the debt is deemed to have primarily a penal or reimbursement purpose. Furthermore, these disciplinary cost cases are informative in understanding how courts have viewed and analyzed the penal purpose of a debt.

After surveying the cases regarding disciplinary costs,¹³ a multitude of factors determine the debt's penal purpose. If the assessment of the debt is discretionary, or if a debt is conditional or readmission to the state bar is based on the repayment of the debt, then the debt is penal and, thus, nondischargeable. However, courts primarily determine the existence of a penal purpose on whether the debt is meant to protect the public and whether the debt serves some punitive, rehabilitative or deterrence function.

The Way Forward, and Finding Hope in *Findley*

Perhaps most informative for these purposes is *In re Findley*,¹⁴ in which the Ninth Circuit reversed its prior deci-

sion in *In re Taggart*¹⁵ (which held that disciplinary costs were dischargeable) in response to the California legislature's revision of Cal. Bus. & Prof. Code § 6086.10. The revision inserted a statement of intent stating that disciplinary costs are penalties to promote rehabilitation and protect the public.¹⁶ The *Findley* court found that the revision was enough to undermine the Ninth Circuit's prior decision because the revision clarified the legislature's intent, demonstrated that the California legislature strongly disagreed with the prior decision, and rid the requisite statute of the distinction the prior case precedent identified.¹⁷

The *Findley* case demonstrates that under § 523(a)(7), an insertion of a statement of intent into the requisite statute by the California legislature is enough to transform a debt from dischargeable to nondischargeable. To transform Cal-CSF debt into nondischargeable debt, the California legislature should insert a statement of intent expressing that an attorney's debt to the CSF is a penalty to promote the rehabilitation of attorneys and protect the public. Additional language regarding the debt being punitive and for deterrence would strengthen the likelihood of Cal-CSF debt being deemed nondischargeable.

Recommended Changes to the Cal-CSF Statute

Ultimately, revision of the Cal-CSF statute is the only remedy for such debt to be nondischargeable under § 523(a)(7). The Ninth Circuit's holding in *Kassas* that Cal-CSF debt did not primarily serve a penal purpose and was for actual pecuniary loss was highly specific to the Cal-CSF statute. By undermining the specific reasoning with a statutory revision, Cal-CSF debt can be transformed into a nondischargeable debt. The California legislature has done this before with attorney disciplinary cost debt. These suggested revisions are crafted to address the court's reasoning in *Kassas*. Here are a few suggested revisions:

1. (Necessary) Insert a new statement of intent into the Cal-CSF statute (as the California legislature did in response to *Taggart*) and eliminate the statement that the fund's purpose is to compensate for pecuniary loss. The statement should indicate that an attorney's debt to the Cal-CSF is a penalty to promote the rehabilitation of the attorney and to protect the public. The statement should also indicate that the debt is punitive and for deterrence purposes.

11 To be exempted from discharge under § 523(a)(7), the debt must: (1) be a fine, penalty or forfeiture; (2) be owed to or for the benefit of a governmental unit; (3) not be compensation for an actual pecuniary loss; and (4) not be one of the identified tax exceptions. Thus, for a debt to be nondischargeable, it must be penal in nature (the debt may arise from a criminal or civil proceeding). In fact, the emphasis of a penal purpose arises from *Kelly v. Robinson*, 479 U.S. 39, in which the Supreme Court found that criminal restitution was not dischargeable because the Bankruptcy Code was not intended to interfere with state police powers. The Court reasoned that the Code did not interfere with states' need to be able to punish and deter bad conduct and rehabilitate individuals to protect the public. *Kelly v. Robinson* acts as the underlying foundation to most of the § 523(a)(7) case law and is thus the reason why these cases turn on a debt's penal purpose.

12 Debt arising from disciplinary costs results from a governmental unit (the state bar) directly assessing the costs against the attorney debtor after prosecuting the attorney for ethical violations, whereas the debt to a CSF arises after the fund pays money to a wronged client and subrogates the rights against the attorney from the client (this is explicitly done in California, but not in all states), then seeks an award or payment from the attorney debtor. In sum, the debt from the disciplinary costs is directly from the governmental unit, whereas the CSF debt is indirectly from the state bar, as it originates from the wronged client.

13 *Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct*, 542 F.3d 913 (1st Cir. 2008); *United States HUD v. Cost Control Mktg. & Sales Mgmt.*, 64 F.3d 920, 928 (4th Cir. 1995); *State Bar v. James (In re James)*, Nos. 16-40752, 16-4076, 2017 Bankr. LEXIS 3521 (Bankr. E.D. Tex. 2017); *Hughes v. Sanders*, 469 F.3d 475, 478 (6th Cir. 2006); *Osicka v. Off. of Law. Regul.*, 25 F.4th 501 (7th Cir. 2022); *Disciplinary Bd. v. Feingold (In re Feingold)*, 730 F.3d 1268 (11th Cir. 2013).

14 *State Bar v. Findley (In re Findley)*, 593 F.3d 1048 (9th Cir. 2010).

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

16 The California legislature inserted subsection (e), which states in part that "costs imposed pursuant to this section are penalties ... to promote rehabilitation and to protect the public." *Findley* at 1052.

17 *Id.* at 1052-53. The prior statute had two different sections that allowed for the imposition of fees on disciplined attorneys — one for fines (§ 6086.13) and one for costs (§ 6086.10). Due to the differences in the plain language of the Code sections and the different legislative histories, the court concluded that the disciplinary cost debt was significantly distinct and different from fines in § 6086.13, and thus, the disciplinary cost debt was not a fine or penalty under § 523(a)(7). *State Bar v. Taggart (In re Taggart)*, 249 F.3d 987, 991-92 (9th Cir. 2001). The *Taggart* court further noted the similarity between disciplinary costs and awards to prevailing parties in civil suits. *Id.* at 992. However, the statutory distinctions made by the *Taggart* court were undermined. The statutory revision, as discussed in *Findley*, clearly changed the legislative history and expressly provided that the debt had a penal purpose. Moreover, the revision inserted language that equated disciplinary costs with monetary sanctions under § 6086.13, which further proved the legislature's penal intent. Lastly, the *Findley* court dismissed the similarities between disciplinary costs and awards to prevailing parties in civil suits. The court reasoned that looking at the similarities was only necessary to discern legislative intent, which had been made clear by the statutory revision. *Findley* at 1053-54.

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