



MAKING AWARDS PRIOR TO (OR WITHOUT) DISCIPLINARY ACTION

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THE ABA SURVEY QUESTION IN QUESTION

2014 – 2016 Survey of Lawyers' Funds for
Client Protection



Prepared by the Standing Committee on
Client Protection of the American Bar Association
Center for Professional Responsibility



Is disciplinary action against
the lawyer required before
awards are made to the
lawyer's claimants?

State	Disciplinary Action needed prior to award?				Disciplinary Action needed prior to award?	
	Answer from 2011-2013 Survey	Answer from 2014-2016 Survey	Answer from website/RoP	Specific Rule Citation		
Alabama	No	Yes	Yes	Rule II(D)		
Alaska			Yes	Website		
Arizona	Yes	Yes	Yes	Rule 3(c)	NO	YES
Arkansas	No	Yes	Yes	Rule 4(e)	20	31
California	Yes	Yes	Yes	Article 2 Rule 3.432(A)(1)		
Colorado	No	No	No	No rule prohibiting	Here are the specific jurisdictions you asked for (all responded to the 2014- 2016 survey):	
Connecticut	Yes	Yes	Yes	Website FAQ	California	Yes
Delaware	No	No	No	No rule prohibiting	Iowa	No
DC	Yes	No			Massachusetts	Yes
Florida	Yes	Yes	Yes	Rule 7.24(b) The filing of a grievance complaint with The Florida Bar against the attorney claimed against may be required as a prerequisite to the consideration of a Clients' Security Fund claim. Rule 7.24(c) A claim will not be considered unless it has been filed within 2 years after the date the disciplinary action becomes final.	New Jersey	Yes
Georgia		Yes		Cannot find rules	New York	Yes
Hawaii	Yes		Yes	Website requirements	Ohio	Yes
Idaho	No	No	No	No Rule	Texas	Yes
Illinois	Yes	Yes	Yes	Rule 501(i)		
Indiana			No	Website - claimant must file with Disciplinary Board		
Iowa		No	No	No rule present		
Kansas	No	No	No	claimant must file with Disciplinary Board prior to or concurrently with Fund application		
Kentucky	Yes	No	No	Website - "Review Process" second bullet point		
Louisiana	No	No	No	Website: "you should register a complaint against the lawyer with the lawyer discipline system, if you have not already done so"		
Maine		No	No	Rule 10(a)(1) seems to suggest attorney's must be disciplined but rule 10(a)(3) basically says that the trustees have ultimate discretion		
Maryland	Yes		Yes	Rule C(1)		
Massachusetts	Yes	Yes	Yes	Website		
Michigan	Yes	Yes	Yes	Rule 9(a)		
Minnesota	No		No	No rule present		
Mississippi		No		Cannot find rules		
Missouri	Yes	Yes	Yes	Rule 2.2(d)		
Montana	No*		Yes	Website appears to have an updated rule		

State	Disciplinary Action needed prior to award?			
	Answer from 2011-2013 Survey	Answer from 2014-2016 Survey	Answer from website/RoP	Specific Rule Citation
Nebraska	Yes	No	No	Rule J(5)
Nevada	Yes	Yes	Yes	Rule 3(b)(i)
New Hampshire		Yes	Yes	Rule 55 section 4
New Jersey	Yes	Yes	Yes	Fund Brochure
New Mexico	No	Yes		Can't find rule
New York	Yes	Yes	Yes	FAQ's
North Carolina	No			Cannot find rules
North Dakota	Yes	No	No	No rule directly discussing discipline of attorney
Ohio	Yes	Yes	Yes	FAQ's
Oklahoma			Yes	Website
Oregon	No	Yes	Yes - only for claims under \$5,000	Only for claims under \$5,000
Pennsylvania	No	No	No	No rule stated
Rhode Island	Yes		Yes	No rule explicitly stating disciplinary action must happen Rule 4(e) In cases of extreme hardship or special and unusual circumstances, as where conditions have been shown to exist which preclude formal disciplinary action against the offending lawyer by the Supreme Court or the Disciplinary Committee, the Committee may, in its discretion, consider claims which would otherwise be excluded by the rules, or which do not meet all conditions for filing or allowance.
South Carolina			Yes	Website
South Dakota	No		Yes	"Who is eligible" via the website states part of the requirement as the attorney being disbarred
Tennessee			No	Rule 25 section 10.04
Texas	Yes	Yes	Yes	Pamphlet
Utah		Yes		Cant find rules
Vermont	Yes	Yes	Yes	Rule 8(c)(1)
Virginia	Yes	Yes	Yes	Website
Washington	No	Yes (Board can waive)	Yes	Upon filing with the fund a claimant must file with Disc. as well. Fund waits for Disc in most cases.
West Virginia	No	No	No	No rule exists
Wisconsin	No	No	No	No rule exists
Wyoming		No	No	No rule exists

INTERPRETATIONS OF THE QUESTION

- Does there have to be a finding of dishonest conduct by the Fund to pay a claim?

Yes

- Does there have to be a finding of dishonest conduct by the disciplinary entity or court to pay a claim?

For Some
Yes

- Must the case before the disciplinary entity be concluded before the Fund can consider the claim?

For Some
Yes

THE D.C. EXPERIENCE

From the inception of the D.C Fund in 1972 until 2016, in order for the trustees to be able to consider a claim for reimbursement against a lawyer, the lawyer had to meet at least one of the following conditions:

1. The lawyer was disbarred;
2. The lawyer was suspended from the practice of law (this included administrative suspension for failing to pay licensing fees);
3. The lawyer was deceased;
4. The lawyer had been adjudicated a bankrupt;
5. The lawyer had been adjudicated mentally incompetent;
6. The lawyer had voluntarily resigned from the practice of law in the District of Columbia;
7. The lawyer had been adjudicated guilty of a crime predicated upon the dishonest conduct that gave rise to the claim; or
8. The lawyer was a judgment debtor to the claimant

THE D.C. EXPERIENCE

In late-2009, the trustees submitted a report to the D.C. Bar's Board of Governors seeking several proposed amendments to the Fund's Rules. One of the changes sought to eliminate these "jurisdictional triggers" to expand the jurisdiction of the Fund and allow the trustees to consider a claim for reimbursement involving any member of the District of Columbia Bar, including recently disbarred lawyers.

THE D.C. EXPERIENCE

The elimination of these pre-conditions for jurisdiction were sought because in practice, they stood in the way of the Fund's achievement of its mission: to protect the integrity of the legal profession.

1. The conditions had little, if any relevance to the claim at hand and served as a poor indicator of, or proxy for, misconduct by the lawyer;
2. The requirement of these conditions led to undue delay to claimants who had to wait for the disciplinary process to unfold even in situations where dishonest conduct was clear.

THE D.C. EXPERIENCE

Example of how the current rules failed:

In early-2008, the Fund received a claim for reimbursement involving a lawyer who was administratively suspended for non-payment of bar dues. The claim was opened, docketed, and given to a trustee with a recommendation that the claim be paid. Several days before the trustees were scheduled to meet and vote on the claim, the respondent-lawyer paid their bar dues and was reinstated. The trustees thus lost jurisdiction over this claim and staff had to notify the claimant that the Fund was obligated to dismiss the claim for lack of jurisdiction. At this same time, the lawyer was being investigated by disciplinary counsel; the claimant filed a complaint against the lawyer in late-2007. Subsequently, the lawyer was suspended through a negotiated discipline. The Fund proceeded to re-open this claim, as well as eight others, and ultimately paid \$76,935 to this lawyer's former clients. At the conclusion of the disciplinary process, the D.C. Court of Appeals ordered that as a condition of reinstatement, the lawyer must reimburse these clients, or the Fund directly if the Fund had paid the clients. The conditions in this case undermined the mission of the Fund, the public's trust in the legal profession, and led to undue delay for the claimant who needed the money to hire successor counsel. The claimant eventually received \$7,500 from the Fund in 2011.

THE D.C. EXPERIENCE

Timeline:

In 2010, the D.C. Bar's Board of Governors unanimously approved the trustees' proposed amendments to eliminate the pre-conditions, which would allow the Fund, to consider ALL claims filed against a member of the D.C. Bar.

The trustees and Board of Governors submitted the proposed amendments to the District of Columbia Court of Appeals in 2010.

The court put the proposed amendments out for public comment in 2015

The court adopted the proposed amendments in 2016.

THE D.C. EXPERIENCE

Brave New World:

If any jurisdiction requires these pre-conditions and are interested in eliminating them, feel free to contact me if you would like a copy of the report that the trustees submitted to seek the proposed rule amendments.

In practice, the D.C. experience was that these conditions served no relevant purpose and impeded the work of the trustees and mission of the Fund. Also of note: the analysis of the claim has not changed; the trustees still have to find dishonest conduct on the part of the lawyer, which includes the failure to return an unearned legal fee. The trustees perform their own independent investigation of each claim to ensure that the requisite information has been provided and elements necessary for reimbursement are met.

Neither the ABA Model Rules for Lawyers' Funds, nor the NCPO Standards for Evaluating Lawyers' Funds for Client Protection contain these jurisdictional requirements.

JURISDICTIONAL TRIGGERS

Who's Got Them?

What are they Good For?

Has Any Jurisdiction Shifted Towards Adding Them?

WHAT ABOUT THOSE OTHER INTERPRETATIONS OF THE SURVEY QUESTION?

- Does there have to be a finding of dishonest conduct by the disciplinary entity or court to pay a claim?

WHAT ABOUT THOSE OTHER INTERPRETATIONS OF THE SURVEY QUESTION? (CONT.)

- Does there have to be a finding of dishonest conduct by the Fund to pay a claim?