

New York Law Journal

Select '**Print**' in your browser menu to print this document.

Copyright 2009. Incisive Media US Properties, LLC. All rights reserved. New York Law Journal Online
Page printed from: <http://www.nylj.com>

[Back to Article](#)

Departing From Guidelines, Surrogate Reduces Fee for Counsel

Daniel Wise
06-19-2009

A Brooklyn surrogate has shaved 2 percentage points off the 6 percent guideline for the compensation of counsel to the public administrator in a case where the only asset of an estate was the \$225,000 proceeds of a wrongful death settlement.

Surrogate Diana S. Johnson explained that she was using an amount lower than the 6 percent guideline promulgated by the Administrative Board for the Offices of the Public Administrators because "the majority of the work in obtaining the [estate's] assets" was performed by the personal injury lawyer who had been retained by the family of S.M. Abdul Hai, who died in a workplace accident.

Limiting the fee to 4 percent of the value of the estate resulted in reducing the amount awarded to counsel for the Brooklyn public administrator by slightly more than \$3,000, to \$6,309.

In applying the lower fee, Surrogate Johnson wrote in [her decision](#) that "the court would be remiss" to follow the guidelines "blindly and undiscerningly."

The Brooklyn Surrogate's Court decision appears on **page 38** of the print edition of **today's Law Journal**.

"The guidelines of the Administrative Board are just that," she wrote, leaving her the discretion to award counsel for the public administrator fees in amounts higher or lower than 6 percent.

The statutory factors the judge must consider in setting counsel's fees under the Surrogate's Court Procedure Act §1108(2)(c) include the amount of time expended, the difficulty of the issues presented and the amount of risk undertaken.

The Administrative Board for the Offices of the Public Administrator was reconstituted in 2002 after it became known that then-Brooklyn Surrogate Michael R. Feinberg was routinely awarding Louis R. Rosenthal, then the counsel to the Brooklyn public administrator, fees equal to 8 percent of an estate's value, which was two points higher than surrogates in other counties were awarding.

Eight percent was also two points higher than the level contained in an agreement between the state Attorney General's Office and the Brooklyn Surrogate's Court in 1988 and renewed in 1994.

Mr. Feinberg was subsequently removed from the bench (NYLJ, June 30, 2005), and Mr. Rosenthal suspended from the practice of law for two years (NYLJ, Dec. 5, 2008).

In October 2002, five months after the New York Daily News broke the story of the higher payments to Mr. Rosenthal, the reinvigorated board issued guidelines for the compensation of counsel for the public administrator.

Compensation Scale

The guidelines set a sliding scale for compensating counsel to the public administrator, starting at 6 percent on the first \$750,000 of an estate and declining in increments for higher amounts. The awards to public administrator's counsel are to be limited to the guidelines schedule "in the absence of extraordinary circumstances."

Conversely, Surrogate Johnson wrote, the Court of Appeals has instructed surrogates to award counsel less than the guidelines amount if evaluation of the statutory factors requires it.

The public administrators in each borough handle the estates of those who die without a will and have no close relative to wind up their affairs.

Surrogate Johnson awarded \$62,346 to Carey Scott Goldinger, the lawyer retained by the family of Mr. Hai, who died in a fall from a ladder while working on the renovation of a Brooklyn brownstone.

Mr. Goldinger, after being hired to handle the action for wrongful death and Mr. Hai's conscious pain and suffering, initially petitioned Surrogate's Court for letters of administration, though that task was subsequently taken over by Mr. Rosenthal.

Mr. Goldinger's fee amounted to 28.3 percent of the \$225,000 he recovered for Mr. Hai's wife and children, after the deduction of litigation-related costs.

Surrogate Johnson awarded Mr. Rosenthal and Steven R. Finkelstein, who succeed him as public administrator, a total of \$6,309.

That amount was calculated by taking 4 percent of the balance of the settlement proceeds left after the deduction of Mr. Goldinger's fees and disbursements.

The surrogate ordered a hearing to determine how the fee should be divided by Mr. Rosenthal and his successor, Mr. Finkelstein.