

Approved December 1, 2011

**REPORT OF THE ADMINISTRATIVE BOARD  
ON THE ISSUANCE OF PROPOSED GUIDELINES  
FOR THE OPERATIONS OF THE OFFICES OF  
THE PUBLIC ADMINISTRATORS  
OF NEW YORK STATE**

Approved December 1, 2011

**ADMINISTRATIVE BOARD  
FOR THE OFFICES OF THE PUBLIC ADMINISTRATORS**

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Pursuant to its authority under SCPA 1128, the Administrative Board for the Offices of the Public Administrators (“the Board”) hereby issues Proposed Guidelines for the Operations of the Offices of the Public Administrators of New York State (“Proposed Guidelines”), which accompany this Report. The issuance of this Report and the accompanying Proposed Guidelines marks the opening of the comment period.

This Report summarizes the main changes and enhancements introduced by the Proposed Guidelines, which are intended to promote accountability, efficiency, and adherence to legal standards in the Offices of the Public Administrators.

## Background

The Board was established in 1993 pursuant to Surrogate’s Court Procedure Act (“SCPA”) 1128 to “establish guidelines and uniform fee schedules” for the operation of the offices of the Public Administrators throughout New York State.<sup>1</sup> The composition of the Board is prescribed by statute.<sup>2</sup> Its thirteen members – who include practicing attorneys, representatives from the Offices of the New York State Comptroller and the New York State Attorney General, and judges of the Surrogate’s Court – provide diversity of viewpoint and experience.

Public Administrators are responsible for handling the estates of decedents who have no close relatives or named executors eligible or willing to serve as the fiduciary of their estates. The Public Administrators within New York City are appointed by their respective Surrogate judges, and are governed by SCPA Article 11. The Public

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<sup>1</sup> SCPA §1128 (2).

<sup>2</sup> SCPA 1128(1).

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Administrators of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester Counties are likewise appointed by their respective Surrogate judges, and are governed by SCPA Article 12. In all other counties, the Public Administrator's function is carried out by the Chief Fiscal Officers of each county, usually the county treasurer. The Board has jurisdiction over the eleven Public Administrators in New York State and over the Chief Fiscal Officers with respect to their "administrator's duties." <sup>3</sup>

### Prior Board Action

On November 13, 1995, the Board issued two sets of Guidelines, respectively, for the Article 11 Public Administrators ("the 1995 Article 11 Guidelines"), and the Article 12 Public Administrators ("the 1995 Article 12 Guidelines"). The two sets of Guidelines were virtually identical. They primarily addressed the manner in which the Public Administrators ran their offices and the operational aspects of estate administration: office procedures and record keeping, cash management, management and sale of real and personal property, and selection and payment of vendors.

On October 3, 2002, the Board issued an Interim Report and Guidelines, applicable to the Public Administrators within New York City, promulgating a sliding scale fee schedule for Public Administrator's counsel fees. The fee schedule resulted in a substantial reduction of legal fees historically paid to counsel to the Public Administrator as, prior thereto, the prevailing practice in New York City was to pay counsel 6% of the total charges reported in the account regardless of the size of the estate. In its Report in support of the sliding scale fee schedule the prior Board noted:

"The adopted schedule provides the "customary fee charged...  
for similar services" in the overwhelming majority of estates

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<sup>3</sup>SCPA 1219.

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that are administered by the Public Administrators.... The Board also considered that it is well settled that it is not appropriate to base a legal fee in this area of the law solely on a “time- clock” approach and, in some instances, time might be the least important factor to be considered (*Matter of Brehm*, 37 AD2d 95; *Matter of Snell*, 17 AD2d 490; *Matter of Kentana*, 170 Misc. 663). Additionally, in arriving at a fair fee for the services performed, the Board balanced the fact that each estate pays for its legal services against the economic reality that most estates administered by the Public Administrators are relatively modest<sup>4</sup> and that the Public Administrators would be unable to retain competent counsel to provide legal services in many of these estates if counsel did not have the opportunity to receive more significant compensation in the more substantial estates.”

On March 20, 2006, the Board issued fee guidelines for Public Administrator’s counsel in wrongful death cases, again applicable only to the Public Administrators within New York City.

### The Current Board

In January 2010, a newly constituted Board convened. As required by statute, its membership comprised practicing attorneys, representatives from the Offices of the New York State Comptroller and the New York State Attorney General, and judges of the

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<sup>4</sup>At the present Board’s request, each of the five New York City Public Administrators furnished statistics as to the number and value of the estates they administered. Those statistics establish that it remains factually accurate to report that most of the estates administered by those Public Administrators have a relatively modest value.

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Surrogate's court. Its purpose was twofold. First, in light of the fifteen years that had passed since the promulgation of the 1995 Article 11 and Article 12 Guidelines, the Board sought to assess whether the existing Guidelines currently provided the Public Administrators with an appropriate framework to ensure the integrity of their public offices. Second, the Board sought to provide oversight and guidance for the Chief Fiscal Officers who serve as default estate fiduciaries in 51 counties. Although the Board clearly has jurisdiction over the Chief Fiscal Officers with respect to their estate administration activities, it was unsettled as to whether the 1995 Article 12 Guidelines were appropriately tailored to their operations. The Board designated three committees to recommend a course of action with respect to 1) the 1995 Article 11 and Article 12 Guidelines; 2) the counsel fee guidelines of October 2002 and March 2006; and 3) the Chief Fiscal Officers.

Ultimately, the Board determined that the promulgation of new Guidelines would benefit both the Public Administrators, the Chief Fiscal Officers, and the public. To this end, the Board reviewed empirical data, and solicited comments and documentary information from a variety of sources throughout the state. On December 1, 2011, the Board adopted the Proposed Guidelines. The Proposed Guidelines apply to the operations of the Public Administrators of New York City, and the Public Administrators of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester Counties. Once formally issued by the Board, they will supersede and replace all previous guidelines applicable to those offices. The Board also determined that it was appropriate to promulgate a separate set of guidelines for the estate operations of the Chief Fiscal Officers. That project is nearing completion.

### The Proposed Guidelines

For ease of reference and greater transparency, the 1995 Article 11 and Article 12 Guidelines, along with the October 2002 and March 2006 Guidelines, are now consolidated

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into a single set of guidelines. While some provisions from the former guidelines have been incorporated into the Proposed Guidelines, many provisions have been modernized to improve efficiency and to reflect the technological resources now available to the Public Administrators. Most important, the Proposed Guidelines contain significant enhancements with respect to accountability. These enhancements include 1) the requirement that counsel to the Public Administrators maintain contemporaneous time records; 2) limitations on the advancement of counsel fees; 3) detailed audit standards; 4) expanded controls for estate accounts; and 5) strengthened rules on the hiring of outside vendors.

Perhaps of most significance is the requirement, in Section II(D)(4), that Public Administrator's counsel maintain contemporaneous time records for each estate, and that these records be made available to any party to the proceeding and to the court. It is against this backdrop that the Board elected to retain the sliding fee schedule, initially adopted in October 2002, which is applicable to fees requested by counsel to the New York City Public Administrators.

The current Board unanimously concluded, as did its predecessor, that a sliding fee schedule is in the public's best interest in that it provides a uniformity of result with the concomitant benefit of public confidence in the legal fee charged. The use of a uniform fee schedule is particularly appropriate among the offices of the Public Administrators in New York City, where the five counties are in close proximity to each other and the statutory factors which the court must consider in awarding compensation, such as the difficulty of the questions involved, the skill required, the lawyer's experience, ability and reputation, and the customary fee charged by the bar,<sup>5</sup> are quite similar in estates of like size.<sup>6</sup> It is

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<sup>5</sup> SCPA 1108(2)(c).

<sup>6</sup>Public Administrator cases usually involve issues requiring specialized knowledge and skills, which typically do not arise in the administration of other estates. Specifically, in Public Administrator cases, the

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for this reason that the Board found it appropriate to extend the uniform fee schedule to small estates administered by the Public Administrators within New York City. The Board concluded, however, that with respect to the more geographically widespread counties outside of New York City, at the present time it should be left to the discretion of the individual Surrogates to determine whether the fee schedule is appropriate for that county.

While the Board expects that the sliding scale fee schedule may be appropriate in the majority of New York City Public Administrator cases, it does not envision that the fee schedule will be used in each and every estate.<sup>7</sup> The contemporaneous time record requirement will provide valuable information to ensure that all involved in the proceeding can make a fully informed decision on whether or not a particular estate is one of the unusual cases where a lower or higher legal fee than that computed strictly according to the fee schedule is appropriate.<sup>8</sup>

## Conclusion

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distributees of the decedent usually are not determined until near the end of the administration of the estate and the search for the decedent's assets is an ongoing process. Moreover, counsel to the Public Administrator, unlike other attorneys, cannot decline to represent the Public Administrator in any case based on the insufficiency of the projected legal compensation.

<sup>7</sup>For example, a fee calculated pursuant to the schedule might appear to be inappropriately high in a multi-million dollar estate where, from the inception of the estate: (1) it was known that the assets of the estate could routinely be collected from the one or two institutions where they were held; and, (2) the identity and whereabouts of all of the distributees were also known. At the other end of the spectrum, a fee calculated pursuant to the schedule might appear to be inappropriately low in an estate where counsel to the Public Administrator, in addition to performing the usual services required to complete the administration of an estate, was also trial counsel in hotly contested litigation resulting in a judgment or decree in favor of the estate.

<sup>8</sup>In most cases, a reduction in the requested legal fee arises from objections interposed by a party to the proceeding. Although the Surrogate has the authority, *sua sponte*, to inquire into the reasonableness of an uncontested legal fee, as the Court of Appeals cautioned in *Stortecky v. Mazzone*, 85 NY2d 518, 525 (1995), Surrogates "must be sensitive to the prejudice which may accompany unnecessary hearings," which can cause the estate and its beneficiaries unwarranted expense and delay.

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Following the closure of the comment period on February 3, 2012, all comments will be reviewed and the final new Guidelines for the Operations of the Offices of the Public Administrators of New York State will be issued. The Board intends to follow the same procedure following the issuance of proposed guidelines for the operations of the Chief Fiscal Officers appointed administrators of estates.

As a statutorily constituted Board with ongoing responsibilities, it is the Board's intent, following the issuance of the new Guidelines, to meet at least annually, and more frequently if necessary, to assess and review all aspects of the Guidelines, including the sliding scale fee schedule, and to serve as a resource for the Public Administrators and Chief Fiscal Officers as to their questions and concerns.

*Respectfully Submitted,*

*Hon. John M. Czygier, Jr., Chair*