ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I recently started a solo practice and my practice is growing slowly. A friend recently asked me to appear for him in court when his per diem attorney had a last-minute emergency. I realized that while my practice is still growing, making occasional appearances as a per diem attorney might be a good way to bring in some additional fees. In hindsight, after making the appearance on behalf of my friend, I realized I never did a conflict check and didn't have a written arrangement as to my representation, and I am sure my friend's client didn't know who I was. Although I don't think anyone was concerned about this in the least, did I act improperly? I can't imagine attorneys who appear on a regular basis as per diem attorneys run conflict checks on a daily basis. But if I do this going forward, what rules do I need to consider when appearing as a per diem attorney? For example, do I need to have formal relationships with each of the attorneys or firms that I appear for? Are there certain types of cases I should reject if I am asked to appear? When I worked for my prior firm, I occasionally would show up for a conference expecting to resolve a discovery dispute only to discover that the opposing attorney sent a per diem attorney with no knowledge of the case or authority to act. It would drive me crazy. Am I exposing myself to professional liability even though I was just asked to show up for a routine conference? Any advice would be appreciated.

Yours truly,
Attorney Foraday

Dear Attorney Foraday:

The market for per diem attorneys has been booming in recent years as the "on-demand" economy has expanded and as people and businesses have grown accustomed to addressing their most pressing needs with the click of a button. When last-minute court appearances and unavoidable scheduling conflicts arise, hiring a per diem attorney can be a very attractive option – particularly for solo practitioners or smaller law firms that lack the resources to handle these types of unexpected developments. However, despite the temporary and sometimes narrow scope of per diem work, it is important to bear in mind that per diem attorneys are still members of the Bar and owe the same professional and ethical obligations to their clients, adversaries, and courts as their more traditional, full-time legal colleagues. In addition, the hiring firms should be aware of their own supervisory and ethical responsibilities before retaining per diem attorneys to perform even the simplest of legal tasks.

"Today, nearly 3 million people are employed in temporary jobs," notes Kyle Braun, president of the employment website CareerBuilder.com, "and that number will continue to grow at a healthy pace over the next few years as companies strive to keep agile in the midst of changing market needs." (*See* www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?ed=12%2F31%2F2016&id=pr947&sd=5%2F5%2F2016).

The use of per diem attorneys by law firms large and small has become commonplace throughout the legal services industry, and is poised to grow even further as the market for temporary employees of all kinds continues to expand. Law firms may opt to hire per diem attorneys for a variety of logistical and economic reasons. Similarly, per diem work can provide an attractive and flexible professional option for attorneys who are inbetween firms, transitioning to another career, or – like you – embarking on a new journey as a solo practitioner.

And while their assignments are temporary, per diem attorneys can participate in projects that can go on for months, or even years.

Despite the transitory nature of their engagements, per diem attorneys are bound by the same ethical obligations as all other attorneys. In January 2017, the New York State Bar Association (NYSBA) Committee on Professional Ethics issued Opinion No. 1113 (NYSBA Op. 1113), which addresses some of the most pressing ethical issues raised by per diem practice. *See* NYSBA Op. 1113. In essence, the opinion outlined the basic ground rules for per diem attorneys, and made clear that they are required to comply with the same obligations in the New York Rules of Professional Conduct (NYRPC) as the law firm that hired them.

First, while they are not hired directly by clients and typically have limited contact, per diem attorneys owe duties to clients. Under NYRPC 1.4(a)(3), they are responsible for keeping the client (through the hiring firm or lawyer) reasonably apprised of the status of the matter they are covering. Moreover, under NYRPC 1.6, they are bound by the obligation to preserve the confidentiality of any confidential client information to which they are privy.

Second, per diem attorneys are also bound by standard conflict of interest rules concerning current and former clients. *See, e.g.*, NYRPC 1.7, 1.8, 1.9;

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

see also NYSBA Op. 715 (1999) ("contract lawyers, like other lawyers, must comply with the conflicts rules with respect to current and former clients"). NYRPC 1.10(e)(3) imposes a sweeping mandate that a conflict check be performed by the hiring firm or attorney *anytime* the firm or attorney hires or associates with another attorney, and per diem attorneys are not exempt from this obligation. The rule requires *both* the hiring firm and the per diem lawyer to maintain a formal written record of prior engagements, and to implement a system by which proposed engagements can be checked against this formal written record. If a conflict is discovered, the per diem lawyer and the hiring firm or attorney must obtain client consent, or decline representation. Similarly, if a per diem attorney is hired in a limited capacity to cover a single appearance or to argue a specific motion, the per diem attorney cannot later appear on behalf of the adversary in that case or in one that is substantially related. *See* NYSBA Op. 1113; *see also* Am. Bar Assoc. Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988). Third, per diem attorneys owe duties of honesty and integrity to their adversaries and third parties. Under NYRPC 4.1, a per diem attorney must not make a false statement of fact or law to an adversary or any other third party. Under NYRPC 4.2, he or she must not discuss or otherwise communicate about the subject of the representation with a party they know to be represented by counsel unless they have that counsel's prior consent.

Fourth, per diem attorneys owe duties to the courts before which they appear. Pursuant to NYRPC 3.3(f)(1), when appearing before a court or tribunal, the per diem lawyer must comply with local rules of practice of the particular court or tribunal, just as the hiring law firm or attorney would. In NYSBA Op. 1113, the Committee confirmed that per diem attorneys are bound by the Uniform Rules for the Supreme Court and the County Courts, and noted that failure to comply with court rules can result in the imposition of sanctions and professional discipline. Maintaining familiarity with the rules of all the courts in which a per diem attorney may appear can seem daunting, but doing so is essential to the per diem attorney's ability to uphold his or her obligations to the courts.

And finally, like all members of the Bar, per diem attorneys owe their clients general duties of competency and diligence. NYRPC 1.1 provides that any lawyer appearing in a given matter – including per diem attorneys – should be competent and well-versed in whatever knowledge is required for the particular appearance or assignment. Under 22 N.Y.C.R.R. § 202.12(b), attorneys attending preliminary conferences must be "thoroughly familiar with the action and authorized to act on behalf of the party" on behalf of whom they are appearing, and "sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery." Rule 1(a) of the Commercial Division, 22 N.Y.C.R.R. § 202.70(g), takes it one step further, and requires that all counsel who appear before the Commercial Division to be "fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients." *See* NYSBA Op. 1113. In other words, the ethical bar for competency and diligence will not be lowered for per diem attorneys, regardless of the circumstances of their retention.

Where per diem attorneys fail to comply with their ethical obligations, they may be subject to sanctions. *See, e.g.*, 22 N.Y.C.R.R. § 130-2.1(a) (imposing sanctions and awarding costs and fees upon an attorney who fails to appear at a court-scheduled matter without good cause). In one incident in New York County, a per diem attorney agreed to appear at two conferences, in two separate cases, on the same morning. After he failed to appear on time at one of the two conferences, the preliminary conference was adjourned. However, on the adjournment date, the per diem attorney failed to appear for a second time, claiming that he had not been retained by the hiring firm to appear on the adjournment date. Nevertheless, the court imposed an $800 sanction on the per diem attorney. While the sanction was eventually vacated, the court made clear in its opinion that both the attorney of record and per diem counsel owed the same professional and ethical obligations to the court and their client, noting that "responsibility attaches once any agreement, action or appearance is taken in furtherance of the representation." *George Constant, Inc. v. Berman*,N.Y.L.J., Dec. 3, 2003, at 18, col. 1 (Sup. Ct., N.Y. Co.).

The hiring of per diem attorneys can also give rise to important, and sometimes novel, ethical issues for the law firms that retain them. First and foremost, the hiring attorney or law firm remains counsel of record and retains full responsibility for the per diem's work for the duration of the per diem attorney's involvement – just as they would for any other full-time associate. *See* NYRPC 5.1 (requiring that all New York law firms properly supervise subordinates); *see also In re Berkman*, 55 A.D.3d 114, 116 (2d Dep't 2008) (attorney's failure to adequately supervise lawyers in his firm to whom he delegated responsibilities violated rules of professional conduct). In other words, throughout the course of the per diem attorneys' engagement, the hiring attorney or law firm must monitor and ensure the quality of their work product, and their compliance with applicable ethical rules.

In addition, the hiring law firms are required to obtain client consent before a per diem attorney may exercise his or her professional discretion with respect to substantive and/or strategic aspects of the representation. In 2015, the NYSBA specifically amended the Comments to NYRPC 1.1 to, among other things, make clear that a firm "should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer." NYRPC 1.1, Comment 6A. By contrast, client consent "may not be necessary for discrete and limited tasks supervised closely

by a lawyer in the [hiring] firm" such as "an outside lawyer [hired] on a per diem basis to cover a single court call or a routine calendar call."

For example, the firm employing the per diem attorney may not need to obtain client consent before the per diem attorney can exercise his or her judgment with respect to a ministerial issue of largely logistical significance, such as the scheduling of a conference or the setting of a procedural deadline. Therefore, when the hiring attorney or law firm reasonably anticipates that a court appearance will be simple or non-substantive, there may be no need to obtain client consent before sending a per diem attorney to cover the appearance. On the other hand, if the hiring attorney or law firm has reason to expect that the court appearance will involve substantive arguments, require strategic decision-making, or expose the per diem attorney to highly confidential client information, the hiring attorney or law firm has a professional duty to obtain consent from the client. *See also* NYRPC 1.1, Comment 7A ("if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client . . . whenever the retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a)").

Law firms also have ethical obligations with respect to how their clients are billed for the work performed by per diem attorneys. In 2009, New York adopted NYRPC 1.5(g)(2), which requires New York firms to first obtain written consent from the client before hiring per diem attorneys if the firm intends to divide its fees with the per diem attorney. The rule further requires New York firms to disclose the rate at which their per diem attorneys will be paid. This disclosure can be made to the client in either the initial retainer agreement, in a written notice, or in the client's billing statement. However, when a per diem attorney's rate is merely billed to the client on an hourly or fixed-fee basis, client consent is not required. *See* NYSBA Op. 1113 ("[W]e do not believe that Rule 1.5(g) applies where a hiring lawyer is hiring a per diem lawyer on an hourly or fixed fee basis that is based on the fair value of the work and that is similar to what the hiring lawyer would pay an employee of the firm.").

As you can see, the hiring of per diem attorneys can give rise to a wide range of potentially thorny ethical issues. It is therefore crucial for both per diem attorneys and the law firms that hire them to familiarize themselves with the nuances of per diem practice, and understand their respective obligations under the NYRPC. When used properly, per diem attorneys can provide a useful and cost-efficient alternative for law firms and clients alike. But if per diem attorneys and the firms that hire them fail to contemplate how their ethical obligations apply in the context of a per diem retention, they may be subject to professional sanctions and left with an unhappy client.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Richard W. Trotter
(trotter@thsh.com)
Amanda Leone, Esq.
(leone@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am dealing with an adversary who communicates very differently than I do. We had a discovery dispute and I would spend time drafting specific letters with references to statutes, case law, and bates numbered documents. After I would send out the letters, I would immediately get back a vague one paragraph response that didn't address any of the issues I raised. I tried calling him, but his number always went directly to voicemail and he would only respond, days later, with another vague email. I expressed my frustration with the attorney and finally received an email saying that due to my "excessive" communications with him, he was sending me a list of "rules" that I was supposed to follow going forward. Some of the rules seemed outlandish: "1) Do not call or leave messages on my voicemail unless it is to notify me of an Order to Show Cause or some other emergency relief being sought (in which case, the phone call is MANDATORY); 2) You must copy my client on all e-mail communications to me; 3) You may not copy or blind copy your own client to e-mails to me and my client; 4) Do not follow up on any communications with me until I have had a week to respond." Can an attorney dictate rules for how another attorney communicates with them? Even if I ignore these rules, what can I do to deal with an attorney who is so difficult and non-responsive?

While I am on the subject of attorney communications, I just learned that one of my clients was getting a "second opinion" from another attorney about a case I am handling. I am not sure how this new attorney met my client, but I know that her firm advertises heavily in our area for giving second opinions on pending cases and there was recently an article in the law journal that one of our motions was partly denied. I am concerned because I have no idea what this attorney is telling my client and she might be bad-mouthing me in the hopes of taking over the case. This firm's business model appears to be based upon taking over cases from other attorneys and does not have a very good reputation in the local legal community. Can I ask my client about what the other attorney is saying about the case? Can I warn my client that there are rules about how attorneys solicit clients and that the other attorney may have violated them? Can I contact the other attorney to explain some of the legal aspects of the case that my client may not fully grasp? Even if I can talk to my client or this other attorney, should I?

Very truly yours,
Attorney Worrywart

Addendum to the June 2017 Forum

RPC 1.6(c), which was discussed in our June 2017 *Forum*, was recently amended and now states, "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b)." Comments 16 and 17 to RPC 1.6 were also amended to include several factors which are to be considered in determining the reasonableness of a lawyer's efforts to safeguard confidential information including "(i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients." ■

Forms Products

NYSBA's Document Assembly Products.

Automated by industry-leader HotDocs® software. Increase accuracy, save time and money. Access hundreds of forms, including many official forms promulgated by the Office of Court Administration.

New York State Bar Association's Surrogate's Forms—Powered by HotDocs®
NYSBA's Trusts & Estates Law Section, Wallace Leinheardt, Esq.
Product Code: 6229
Non-Member Price: $796.00
Member Price: $681.00

New York State Bar Association's Family Law Forms—Powered by HotDocs®
Willard DaSilva, Esq.
Product Code: 6260
Non-Member Price: $731.00
Member Price: $622.00

New York State Bar Association's Residential Real Estate Forms—Powered by HotDocs®
Karl B. Holtzschue, Esq.
Product Code: 6250
Non-Member Price: $871.00
Member Price: $743.00

New York State Bar Association's Guardianship Forms—Powered by HotDocs®
Howard Angione, Esq. & Wallace Leinheardt, Esq.
Product Code: 6120
Non-Member Price: $879.00
Member Price: $749.00

NYSBA Estate Planning System*

Created by Syracuse attorney Michael O'Connor, former Chair of NYSBA's Trusts and Estates Law Section and Elder Law Section and an estates lawyer with more than four decades of experience, the Estate Planning System is fully automated, document-assembly software that enables the user to draft customized, estate planning documents for a client.

Quickly and easily assemble wills, trusts, powers of attorneys, codicils, and more using the System. Enter key facts and client information once and let the System do the rest, populating every form with the relevant data. There is no need to keep re-populating the same information over and over for every document.

PN: 6270 | Non-Member Price: $1,299 | **Member Price: $1,104 (CD-ROM)**
PN: 6270E | Non-Member Price: $1,299 | **Member Price: $1,104 (Downloadable exe file)**

ALSO: NYSBA DOWNLOADABLE FORMS
Visit **www.nysba.org/downloadforms** for a list of all forms by practice area that you can download for instant use

HotDocs pricing includes shipping and handling.* Prices do not include applicable sales tax.
***This item is non-refundable once the seal is broken (CD version) or the contents are downloaded (Downloadable.exe).**

To Order call **1-800-582-2452** or visit us online at www.nysba.org/pubs

Source Code: PUB8640