

Covering All The Bases: Per Diem Work

Before you have clients, settlements, retainers or billable hours, you have expenses. As a small businessperson, your alpha and omega is expenses¹. How will you pry open the cash flow spigot to pay your bills when you don't even have clients? With per diem work. Appearances on conferences and motions pay between \$75 and \$125 per appearance and depositions pay between \$150 and \$250 per witness. Small and medium sized firms often retain per diem attorneys to cover all the bases when there are simply too many counties to cover in one morning.

Peter Ferraiuolo, a well-respected solo practitioner in Manhattan made two per diem appearances the first day he started his practice. He had already worked both side of the tort fence, first at the New York City Corporation Counsel's office and then with a plaintiff's office. He now reports steady income from the per diem work as his practice grows with his own cases. Often, referrals come from adversaries who appreciate Ferraiuolo's ability to fight hard, but fair, and end every case with a handshake.

Considerations for the Per Diem Attorney

So what will you be getting yourself into? Per diem work runs the spectrum from adjourning a motion in IAS Parts where appearances are required even for adjournments, to extensive motion practice, depositions all the way up to trials and appeals. Trials and appeals may be compensated on a contingency, hourly or daily basis, but operate under the same principles: the per diem attorney takes limited responsibility and remains "of counsel" to the attorney of record"

Even before you have your own caseload, working as a per diem enhances your network of

contacts in the courthouse and with other attorneys. It allows you to develop a reputation with court personal and establish a presence among attorneys in the courtroom. Early in your practice, when time is your most abundant resource, you can sharpen your skills working other attorneys' cases, and get paid to do it.

Per diem work allows the greatest flexibility of scheduling. Some attorneys use this flexibility to build their own caseload, making appearance for other attorneys in the mornings and seeing their own clients in the afternoons. Other per diem attorneys use the time to raise kids or otherwise have a life. Indeed, a successful practice can be built exclusively on per diem appearances without ever developing a caseload or the accompanying ulcers.

Swati Mantione is appreciated Queens County for reliability and attention to detail, where her practice consists exclusively of per diem motion and conference appearances. Mantione made the unusual decision to exclude depositions from her per diem practice, so her clients know that they can call her late with a virtual guarantee of availability for a motion or conference the next morning. Mantione is accessible to clients and colleagues on an emergency basis by cell phone, even on a Sunday evening. The inconvenience is slight and the payoff is high, as her practice flourishes. Mantione provides her clients with important reminders about adjournments and matters needing follow-up that arise during an appearance.

Strategies for a Successful Per Diem Practice

The key to a successful per diem practice is efficiency. The overhead of a per diem practice can be minimal. Hang a shingle over the basement door, buy a good computer and a cellular plan with lots of anytime minutes, because your real office is your cell phone². No office expenses, no case expenses and no staff expenses. The trick is to stack multiple appearances in the same county since the fee per

¹ See Small Firm Life: *Figuring your Horizon of Doom*, NYLJ August 3, 2001, page 16, col. 1

² See Small Firm Life: *Running A Law Firm on \$10 A Day*, New York Law Journal, March 29, 2002, page 16, col. 1

appearance is limited. In addition to developing clients, per diem attorneys network extensively among themselves to refer assignments in other counties. Some per diem attorneys can handle 10 – 15 appearances a morning in one county. The afternoon is devoted to report writing and billing and maybe a quick catnap.

Could there be a downside? Well, there are two well-known frustrations for the per-diem attorney. The most common problem is the deadbeat client. Chasing an attorney of record for a \$75 fee is frustrating and quickly cuts into the profit margin. A more serious concern arises when an appearance proves to be much more than the attorney of record described. Per diem attorneys tell tales of picking juries on cases they were retained to get a simple adjournment. No adjournment is available when the case is marked triple final against the plaintiff! That's when you start dancing as fast as you can. Your reputation is at stake if you are unprepared or look foolish. To avoid this, check the Court Calendar on www.elaw.com before you leave for court, and question the attorney of record carefully.

The Other Side of the Story: Considerations in Retaining the Per Diem Attorney

Over time, you may find that you have gone from working for-hire as per diem attorney to hiring your own per diem attorneys. As your practice grows, hiring a per diem attorney is an excellent practicality. There are no employment benefits or taxes for you to pay, minimal supervisory requirements. Best of all, you have complete control over cost because you can instantly adjust your use of per diem attorneys as your needs change.

The keys to good utilization of the per diem attorney include retaining the proper attorney, selecting the suitable matter for a per diem appearance, and properly preparing the attorney for the appearance.

Know the attorney you retain to make your appearances. Good per diem attorneys are careful, have a high standard of work quality and a strong

work ethic. Do not retain an attorney who does not care about your case. The two best ways to find good per diem attorneys are by referral and by taking the card of a per diem attorney who's work you like when you see her in court yourself. When you have a good per diem attorney, pay your bills quickly, and always be honest with the per diem attorney about what to expect at the appearance for which you have retained her. Do not send a per diem attorney into a hornets' nest without at least a fly swatter. Let the per diem attorney know she may need to duck, she may even need to run.

Carefully choose the assignment for the per diem attorney. Per diem attorneys are best retained for routine discovery conferences and motions. Be careful with all other matters that require extensive knowledge of a complicated fact pattern, or a nuanced finessing of any of the circumstances of the appearance. Never forget that per diem attorneys, though highly competent and experienced, work on volume and should not be expected to engage in extensive preparation for the appearance. Never forget that the case, the client and the responsibility for the outcome are yours, and yours alone. Be sure to provide your per diem with a written overview of the case, and detail any issues that can be anticipated during the appearance. Imagine what you'd want to know about the case if you were the per diem, and fill in the blanks for them. Provide all prior orders, a bill of particulars and explicit instructions regarding what agreements you wish the attorney to enter into. Set aside about one-half hour to review the paperwork and speak to the per diem attorney about the case. Be sure that the per diem attorney has your cell phone number to contact you if something unexpected arises during the appearance. This will prevent unwelcome surprises³.

If you fail to heed this advice, I refer you to the case of *Weeks v. Karayianakis*⁴, wherein the Second Department accepted the excuse of law office failure based on unintentionally misleading information received from a per diem attorney regarding an

³ See Small Firm Life: *Handling the Mishandled File* NYLJ, August 30, 2002, page 16, col. 1

⁴ 304 A.D.2d 561, 758 N.Y.S.2d 117 (2nd Dept. 2003)

adjournment of a cross motion for summary judgment. Finding that the default in responding to the motion was inadvertent, the Appellate Division reversed the Supreme Court's denial of the motion to vacate the default in answering the motion. Although the day was saved, that was a lot of work caused by a miscommunication with a per diem attorney.

The Win- Win Scenario

Care and attention on both sides of the retainer agreement results in financial gains and reduced stress for all the attorneys involved. Per diem work for other attorneys is the quickest way to make some money as an attorney out practicing on your own. The per diem practice is efficient, lucrative and relatively stress free. For the attorney of record, hiring per diem attorneys when the practice gets busy is an excellent economy. It allows for controlled spending while obtaining experienced coverage for your appearances, from the preliminary conference through to trial and appeal⁵.

⁵ See Small Firm Life: *Capitalism Works on a Small Scale*, NYLJ October 12, 2001. page 16, col. 1