



**New York State Bar Association  
Committee on Professional Ethics**

**Opinion 1293 (02/13/2026)**

**Topic:** Conflict analysis for per diem attorney

**Digest:** A per diem lawyer may not represent a client against a former client in a substantially related matter, or against a current client in any matter, absent the person's informed consent, confirmed in writing. A per diem lawyer may not represent a client where the opposing party is represented by counsel for whom the per diem lawyer frequently appears (or hopes to frequently appear) if the relationship with that opposing lawyer raises a significant risk of adversely affecting the per diem lawyer's professional judgment, unless the per diem lawyer's client provides informed consent, confirmed in writing.

**Rules:** 1.0(f), 1.2(c), 1.7(a)(1)-(2), 1.7(b)(3)-(b)(4), 1.9(a) & (c), 1.10(e), 1.16(b)(3) & 1.18(a)

**FACTS:**

1. A number of companies (which we will refer to as "per diem companies") offer to connect clients or their lawyers with per diem attorneys (sometimes called "appearance counsel") to appear in court when the attorney of record cannot appear. The inquirer has been working with several companies as a per diem attorney, making one-time appearances for status conferences, settlement conferences, default judgments, motions for summary judgment, and the like. (Some per diem attorneys also maintain a private law practice serving traditional clients with whom they have ongoing attorney-client relationships, not short-term per diem relationships. For such lawyers, conflicts may arise between their private clients and their per diem clients -- but the inquirer here works only on per diem assignments and does not maintain a separate private practice.)

2. Lawyers who receive work through per diem companies do so as independent contractors and typically agree to make only one court appearance in place of the attorney of record, and to send a report to the per diem company or the client's attorneys shortly after an appearance (typically within 24 hours) regarding the results of the appearance, the next court date, the terms of any settlement agreement, and other pertinent information.

3. Per his contract with the per diem company or with a specific law firm in whose place the inquirer agrees to appear, the inquirer's engagement with a particular law firm and that firm's client typically ends after a single court appearance. This is consistent with the understanding we set forth in N.Y. State 1113 ¶ 10 (2017), where we provided background on the per diem relationship and noted that per diem lawyers "are unlikely to have ongoing involvement in the pending matter after appearing on the specific date for which they are hired." (The inquirer says he has occasionally returned to court for the next court appearance in a given matter but also says that is rare.) The per diem attorney thus generally has no ongoing attorney-client relationship with a per diem client after the court appearance ends, apart from reporting the results of the appearance and related information. Once the inquirer has appeared in court on a matter and sent a report, the inquirer's work on that matter is done and, per contract with a per diem company or a law firm, the inquirer destroys the file.

4. Up to now the inquirer has appeared only in place of lawyers who represent credit card companies and banks who are *plaintiffs* in matters where the defendants have allegedly defaulted

on their credit card payments or loans. (For convenience, we will refer to banks, credit card companies, and other lenders as “Lender,” and we will refer to all defendants in such cases as “Debtor.”) Recently, however, one of the per diem companies asked the inquirer to appear in court on behalf of a *defendant* (a Debtor), which the inquirer has never done before. The prospect of representing a defendant Debtor rather than a plaintiff Lender led the inquirer to ask us a number of questions about conflicts of interest.

## QUESTIONS:

5. The inquirer has three questions:
  - A. If the inquirer is asked to appear in the *future* as a per diem attorney on behalf of a given Lender but the inquirer has not yet appeared in that matter, may the inquirer agree to appear per diem on behalf of a defendant Debtor in a different and unrelated matter against Lender?
  - B. If the inquirer has *previously* appeared as a per diem attorney on behalf of an opposing Lender, will appearing on behalf of a defendant Debtor being sued by that Lender create a conflict of interest?
  - C. If the inquirer has agreed to appear as a per diem attorney on behalf of a given plaintiff Lender and is then asked to appear as a per diem attorney on behalf of a defendant Debtor in an unrelated matter against the same *lawyer* that represents the Lender, will accepting the per diem assignment for the defendant Debtor create a conflict of interest?

## OPINION:

6. Before we address the inquirer’s questions about conflicts, we will make a number of preliminary observations.

7. First, a per diem appearance is a type of limited scope representation that must comply with Rule 1.2(c), which provides: “A lawyer may limit the scope of the representation if the limitation is *reasonable under the circumstances*, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” (Emphasis added.)

8. In our view, a limitation on the scope of representation would not be “reasonable” under Rule 1.2(c) if the limitation would violate court rules. Accordingly, the inquirer should consider New York’s Uniform Rules for the Supreme Court & The County Court (22 NYCRR Part 202). For example, Rule 202.1(f) says that counsel who appear before a court “must be familiar with the case with regard to which they appear and be fully prepared and authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance.” *See also* Uniform Rule 202.12(b) (at a preliminary conference, “an attorney thoroughly familiar with the action and authorized to act on behalf of the party shall appear”). This Committee’s jurisdiction is limited to interpreting the Rules of Professional Conduct so we do not opine on whether and how such provisions of the Uniform Rules (or other court rules) apply to per diem lawyers, but the quoted rules illustrate that authorities beyond the Rules of Professional Conduct may govern the inquirer’s conduct as appearance counsel.

9. Second, Rule 1.10(e) requires that the inquirer, like all attorneys, must keep records of all engagements and check each new per diem engagement for conflicts with current and former clients. As we said in N.Y. State 1113 ¶ 20 (2017), which addressed the duties of per diem lawyers and the lawyers who hire them:

... [U]nder Rule 1.10(e), both the hiring law firm and the per diem lawyer must maintain a written record of engagements, at or near the time of each new

engagement, and maintain a system by which proposed engagements are checked against current and previous engagements. Under Rule 1.10(e)(3), this conflict check must be performed by the hiring firm whenever the firm hires or associates with another lawyer. Although the [per diem] Service may assist participating lawyers in identifying conflicts ... the obligation under Rule 1.10 to check for and identify conflicts falls on both the hiring lawyer and the per diem lawyer.

10. Third, given the narrow scope of the inquirer's representation of Lenders to date, we see no need to consider whether so-called "playbook" conflicts might arise if the inquirer, after repeated appearances on behalf of a particular Lender, has learned a Lender's settlement policies, negotiating strategies, discovery tactics, or other information that could give the inquirer an advantage if appearing on behalf of a Debtor against that Lender. *See* N.Y. State 960 ¶ 5 (2013) (indicating that a lawyer should not be disqualified merely due to possession of general information concerning a former client's "financial exposure, corporate or financial structure, workplace rules, settlement policies, and the like, . . . unless there are peculiar aspects of the current representation making such information particularly relevant") (*citing* N.Y. State 723 (1999)); and Comment [3] to Rule 1.9 ("In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation").

11. We now turn to the inquirer's specific questions about conflicts of interest.

#### **Question A. Conflicts with current clients**

12. The inquirer first asks whether he may agree to appear per diem on behalf of a defendant Debtor in a matter against a Lender whom he has agreed to represent at a *future* court appearance that has not yet occurred. The essence of this question is whether the Lender became a *current* client within the meaning of Rule 1.7 the moment the inquirer agreed to represent the Lender at a future court appearance. We cannot definitively answer that question because, as paragraph [9] of the Preamble to the New York Rules of Professional Conduct explains, "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."

13. Paragraph [9] continues, however, that "[m]ost of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." Based on the inquirer's question, we assume that these steps (the client's request and the lawyer's agreement) have already occurred. By contrast, Rule 1.18(a) provides that "a person who consults with a lawyer about the *possibility* of forming a client-lawyer relationship with respect to a matter is a *prospective* client." (Emphasis added.) Here the inquirer seems to have moved beyond the stage of "possibility" to an actual agreement. We will therefore assume for purposes of this inquiry that the Lender is already an actual client.

14. Rule 1.7(a)(1), as amended by the Appellate Division effective November 10, 2025, provides that, absent a current client's informed consent confirmed in writing, a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation of one client will be *directly adverse* to another client." (Emphasis added.) (Before the amendment, the rule referred to a representation that would involve the lawyer in representing "differing interests.") Comment [6] to Rule 1.7 (which was also amended in November 2025) elaborates as follows:

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. ...

15. Thus, the inquirer will be prohibited from agreeing to appear per diem on behalf of a defendant Debtor in a matter against a Lender whom the inquirer has already agreed to represent at a future court appearance, even if the two matters are "wholly unrelated," unless the conflict is

consentable under Rule 1.7(b)(1)-(3) and the inquirer obtains informed consent, confirmed in writing, from “each affected client,” per Rule 1.7(b)(4). The phrase “affected client” would include not only the Lender but also the defendant Debtor, since both the Lender and the defendant Debtor would be the inquirer’s current clients who are being opposed by their own lawyer, the inquirer.

16. The disclosures required to obtain informed consent from a defendant Debtor might be more complex than the disclosures required to obtain informed consent from a plaintiff Lender, because a Lender (typically a corporation) might well be a repeat client for a per diem lawyer whereas a Debtor (almost always an individual) will seldom be a repeat client. A Lender also typically has in-house counsel to advise about whether to waive the conflict, whereas a defendant Debtor will seldom have a lawyer on retainer and will usually have had limited experience retaining lawyers or assessing conflicts of interest. When seeking a Debtor’s consent, therefore, the inquirer will need to explain the conflict thoroughly.

17. Many factors might be relevant when seeking the Debtor’s informed consent if the inquirer will appear on behalf of a defendant Debtor against a Lender who is the inquirer’s current or former client. For example: how many times has the inquirer previously appeared on behalf of the opposing Lender? Over what period of time and how recently? Does the inquirer hope or expect to be hired in the future by this Lender? We are not mandating these specific disclosures every time the inquirer opposes a Lender who is a current or former client, but these questions illustrate the kinds of information a Debtor client might want to know before consenting to a conflict.

18. In some instances, a conflict arising out of the Inquirer’s past or present relationship with a Lender might be non-consentable. Under Rule 1.7(b)(1), a lawyer who has a concurrent conflict of interest under paragraph (a) may represent a client only if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” If the inquirer is financially dependent on a certain Lender as a per diem client, or if the inquirer is concerned that the Lender will stop using the Inquirer or will stop referring other clients to the inquirer, then the inquirer might “pull punches” or otherwise be unable to provide “competent and diligent” services to the Debtor client. The relevant facts will vary from case to case. (Similar factors may also be relevant to determining whether the Inquirer has a conflict in opposing a *lawyer* that has frequently retained the per diem lawyer – see below.)

### **Question B. Conflicts with former clients**

19. The inquirer’s second question is whether he may appear on behalf of a defendant Debtor being sued by a Lender for whom the inquirer has previously appeared as a per diem attorney. Based on the inquiry here, it appears that the Lender would be the inquirer’s *former* client, rather than the inquirer’s current client. The inquirer tells us that his contract with the per diem agency provides that the per diem lawyer’s attorney-client relationship with the Lender terminates when the court appearance concludes and the inquirer has submitted the required post-appearance report. In effect, the inquirer is discharged at that point. Under Rule 1.16(b)(3), a lawyer ordinarily “shall withdraw from the representation of a client when ... (3) the lawyer is discharged.” Our analysis is consistent with N.Y. State 1008 ¶ 9 (2014) (citing cases holding that “an attorney-client relationship ... is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place”).

20. May the inquirer ethically later appear per diem *against* the same Lender (a former client) on behalf of a defendant Debtor being sued by that Lender? That question is governed by Rule 1.9 (“Duties to Former Clients”), which provides, in pertinent part, as follows:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of

the former client unless the former client gives informed consent, confirmed in writing.

21. Thus, under Rule 1.9(a), if the new matter and the former matter *are not* “substantially related,” then no conflict arises under Rule 1.9(a) and the inquirer may represent the Debtor against the Lender (the former client) without the former client’s informed consent. Conversely, if the new matter and the former matter *are* “substantially related,” then the inquirer must not oppose the former client “unless the former client gives informed consent, confirmed in writing.” *See* N.Y. State 1113 ¶ 19 (“Even if the per diem lawyer is hired solely to cover a specific appearance or to argue a specific motion, a per diem lawyer could not later appear on behalf of the other side in that case or one that is substantially related”).

22. Whether former and current matters are substantially related is a case-by-case determination, but a good general rule is stated in Comment [3] to Rule 1.9, which provides:

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. . . .

23. We note that even if the new and former matters involving the Lender are not substantially related, or even if the Lender gives informed consent, the inquirer must still abide by Rule 1.9(c), which imposes a duty of confidentiality with respect to former clients.

24. Moreover, whether or not the current and former matters are substantially related, under Rule 1.7(a)(2) the inquirer will need to obtain the consent of the defendant Debtor if there is a “significant risk” that the inquirer’s independent professional judgment on behalf of the Debtor will be “adversely affected” by the inquirer’s own interests, including the inquirer’s interest in keeping the Lender as a client for future per diem appearances. We discuss Rule 1.7(a)(2) in more detail below in response to the inquirer’s third question.

### **Question C: Conflicts arising from the Inquirer’s personal interests**

25. The inquirer’s third question is whether he may ethically agree to appear as a per diem attorney if the inquirer has appeared in the past (or has agreed to appear in the future) as a per diem substitute for the opposing *lawyer*. This situation would not necessarily pit the inquirer against a current or former *client*, but it could create a personal interest conflict for the inquirer under Rule 1.7(a)(2), which (as amended effective November 10, 2025) provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . .

(2) there is a ***significant risk*** that (i) the lawyer’s independent professional judgment on behalf of a client will be ***adversely affected*** by, or (ii) the representation of one or more clients otherwise will be ***materially limited*** by, the lawyer’s responsibilities to another client, a former client or a third person or by the lawyer’s own financial, business, property or other ***personal interests***. [Emphasis added.]

26. Amended Rule 1.7(a)(2) is explained in Comments [8] and [10] to Rule 1.7, which were also amended in November 2025. Those Comments provide as follows:

#### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adversity, a concurrent conflict of interest exists if there is a significant risk that a lawyer’s independent exercise of professional judgment in

considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. ...

### **Personal-Interest Conflicts**

[10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client.

27. As we suggested earlier, many factors may be relevant to determining whether there is a "significant risk" that the inquirer's independent professional judgment will be "adversely affected" or "materially limited," such as whether the inquirer has often appeared as a per diem attorney in place of opposing counsel in the past and/or hopes to appear per diem in place of opposing counsel in the future. The closer the inquirer's personal and business relationship is with the Lender's lawyer in a given matter, and the more important the Lender's lawyer is to the inquirer financially (*e.g.*, as a source of income or referrals), the more likely it will be that the inquirer has a "significant risk" conflict under Rule 1.7(a)(2) and cannot proceed without the Debtor's informed consent, confirmed in writing. (In theory, the same conflict could arise if the inquirer is representing a Lender against a Debtor, but since the inquirer has not previously appeared on behalf of Debtors, that situation is not before us now. If the inquirer begins to appear frequently as a per diem substitute for counsel to Debtors, however, then the inquirer may need to obtain informed consent, confirmed in writing, from the opposing Lender regarding the inquirer's close relationship with the Debtor's counsel of record.)

28. For the sake of completeness, we add that under Rule 1.7(b)(3), a lawyer must not represent a client if the representation "involve[s] the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." In other words, a lawyer is barred from representing both sides in the same case. Thus, the inquirer may not agree to appear as a per diem attorney for both the plaintiff Lender and the defendant Debtor in the same matter, even if both sides give their informed consent, because representing opposing parties in the same litigation creates a non-consentable conflict. The inquirer has not specifically asked about appearing for both sides in the same matter – he has asked only about appearing for a Lender in one matter and on the same day appearing on behalf of a defendant Debtor in a different and *unrelated* matter – but we mention this situation because it could arise if the inquirer agrees to work per diem for plaintiffs as well as for defendants.

### **CONCLUSION:**

29. A per diem lawyer may not represent a client against a former client in a substantially related matter, or against a current client in any matter, absent the person's informed consent, confirmed in writing. A per diem lawyer may not represent a client where the opposing party is represented by counsel for whom the per diem lawyer frequently appears (or hopes to frequently appear) if the relationship with that opposing lawyer raises a significant risk of adversely affecting the per diem lawyer's professional judgment, unless the per diem's lawyer's client provides informed consent, confirmed in writing.

(06-25)