

## ***Per Diem* Lawyers Subject To Sanctions For Missing Court Appearances**

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A lawyer who fails to appear for a scheduled court appearance faces civil sanctions if the lawyer's failure to appear is without "good cause." 22 N.Y.C.R.R. § 130-2.1. Nearly a decade ago, the Appellate Division, Second Department, upheld the discretion of the trial courts to impose sanctions upon attorneys who fail to appear for scheduled court appearances without adequate explanation. *Walsh v. People of the State of New York*, 206 A.D.2d 434, 614 N.Y.S.2d 441 (2nd Dept. 1994).

Although the *Walsh* Court vacated the \$150 sanction imposed by the trial court upon an attorney who was 23 minutes late for a single court appearance, it affirmed the propriety of imposing sanctions upon lawyers who fail to meet their responsibilities to the courts. *Walsh* offered an "adequate explanation" for his late appearance: he was conducting a hearing in another courtroom in the same courthouse and had asked a fellow lawyer to advise the trial court of that fact. The trial court did not get the message, if indeed it was delivered. *Walsh* had never been late for any prior appearances and apparently had a good record. The Appellate Division found his explanation satisfactory and held that sanctions were not warranted.

Two important First Department cases addressed similar conduct. In *Marcus v. Bamberger*, 180 A.D.2d 533, 580 N.Y.S.2d 256 (1st Dept. 1992), the Court affirmed a \$100 sanction imposed upon a lawyer who arrived in court 21 minutes late, in violation of a specific court order. As Justice Asch pointed out in his dissent, the sanction relied in part on the attorney's lateness on prior occasions, although she was not given an opportunity to offer an adequate explanation of her conduct. In *In re Gurwitch*, 256 A.D.2d 180, 681 N.Y.S.2d 534 (1st Dept. 1998), the Court upheld a \$50 sanction imposed upon an attorney who failed to appear on time for a scheduled hearing or to notify the court. See also, *Gutin-Nedo ex rel. Hamilton v. Marshall, Cheung & Diamond, P.C.*, 301 A.D.2d 728, 753 N.Y.S.2d 548 (3rd Dept. 2003) (a good summary of the requirements of § 130-2.1).

These cases illustrate the daily tension that exists between lawyers with conflicting responsibilities and obligations and state courts with busy calendars and limited resources. Unfortunately, despite many well-intentioned efforts to solve the problems created by scheduling conflicts, things have only gotten worse. Court caseloads are high, judges are under considerable pressure to clear their dockets, and judicial resources are woefully slim. Moreover, these competing pressures are resolved in a state court system that presently requires personal appearances by lawyers even for routine matters. Lawyers are often required to appear in person for what may be little more than calendar control dates at which nothing substantive is expected to occur. They may be required to appear in person when a decision on a motion is to be issued. Although such matters could easily be handled in telephone conferences, it is still routine practice in state courts to require lawyers to appear personally. As a consequence, many lawyers, particularly those in solo practices or small firms with active or high-volume litigation practices, may be required to appear in several courtrooms simultaneously, often in different counties.

The predictable result is that, despite more than a decade of civil sanctions imposed pursuant to 22 N.Y.C.R.R. §130-2.1, lawyers continue to appear late for court appearances, or to miss them entirely. While conscientious lawyers generally manage to file affidavits of actual engagement or call adversaries and court clerks in advance to alert them to scheduling conflicts, the conflicts are unavoidable, and the frustrations on all sides are palpable.

### ***Per Diem* Lawyers Help With Schedule Conflicts**

One solution has been the increased reliance on *per diem* lawyers or contract lawyers. A *per diem* lawyer is hired for the day to handle one or more court appearances for one or more attorneys or law firms. Some *per diem* lawyers work regularly for one or more law firms. Others work in a particular court or area of practice, while others accept assignments from many different lawyers and in different courts. *Per diem* lawyers may be lawyers in transition - those looking for full-time work or trying to build a practice of their own - or they may prefer to work part-time or without daily obligations to clients or employers, often because they are primarily engaged in other activities, such as child care or pursuit of another career.

In a typical arrangement with a lawyer or law firm, a *per diem* lawyer accepts an assignment, picks up a file (or relevant portions of the file), appears in court on behalf of the attorney of record, and reports back at the end of the day. The *per diem* lawyer may never hear about the matter again. That depends entirely on the attorney of record, who may or may not ask the *per diem* lawyer to handle subsequent court appearances or do any further work on that case.

What are the responsibilities of the *per diem* lawyer to the court? Should a *per diem* attorney be sanctioned for missing a scheduled court appearance, or for arriving late? If a *per diem* lawyer misses or arrives late for a court appearance, should sanctions be imposed on the attorney of record? A recent decision by Supreme Court Justice Charles Ramos may send shivers down the spines of many New York lawyers.

In *George Constant, Inc. v. Berman*, (NYLJ, 12/4/03), the plaintiff's lawyer hired a *per diem* lawyer to appear at an initial court conference before Justice Ramos because the plaintiff's lawyer had to be in another court that morning. The *per diem* lawyer, who had agreed to handle two matters that morning, arrived late in Justice Ramos' courtroom. By the time he arrived, the court had issued a preliminary conference order and the defendant's counsel had gone back to his office. However, with his adversary's gracious consent, the *per diem* lawyer was able to reschedule the preliminary conference for five days later.

On the rescheduled court date, neither the plaintiff's counsel of record nor the *per diem* lawyer appeared. The Court called the plaintiff's counsel, who advised that the *per diem* lawyer was expected to appear. When he failed to appear, Justice Ramos imposed a sanction of \$860 upon the *per diem* lawyer for being late at the original scheduled court date and missing the adjourned date, which had been set at his request. The sanction was computed by multiplying the usual billing rate of the defendant's attorney by two hours.

The *per diem* lawyer moved to vacate the sanction. He stated that he had not been retained to appear on the rescheduled court date and that he was not responsible for appearing on that date because he was not the attorney of record. Rather than resolve the "battle" between the attorney of record and the *per diem* lawyer, Justice Ramos granted the motion to vacate the sanction.

The defendant's attorney graciously did not oppose the *per diem* lawyer's request.

Citing the growing reliance on *per diem* lawyers by sole practitioners and small law firms, Justice Ramos concluded that both the attorney of record and *per diem* counsel have obligations to the client and the court and that they should communicate "fully and completely" with each other. Justice Ramos held that the attorney of record had ultimate responsibility for the matter and "could not absolve herself or himself of responsibility for a *per diem* attorney's violative behavior." That seems utterly reasonable; the *per diem* attorney is the agent of the attorney of record, who remains responsible to the client. However, Justice Ramos held that the *per diem* attorney also was responsible by virtue of his retention in the matter, however limited: "notwithstanding that a *per diem* lawyer is not the attorney of record, responsibility attaches once any agreement, action or appearance is taken in furtherance of the representation." Both the attorney of record and the *per diem* lawyer are "responsible to the client and answerable to the court."

Justice Ramos was justifiably concerned by what he described as the ethical dilemmas raised by the matter. The *per diem* lawyer took the view - rejected by Justice Ramos - that because he was only retained for the day, he could not be held responsible for the subsequent missed conference. The attorney of record took the view - also rejected by Justice Ramos - that she was not responsible for the failure of the *per diem* lawyer to appear in court as scheduled.

If their views were correct, both the client and the court would be left without remedy in the event the court had taken harsher action, such as dismissal of the case or preclusion of a claim or defense. However, if the attorney of record and the *per diem* lawyer is each responsible for the actions (and inactions) of the other, as Justice Ramos held, then prudent lawyers and law firms would be well-advised to carefully document their arrangements with *per diem* counsel and make sure that they follow up each assignment. Similarly, for their own protection, *per diem* lawyers should document, preferably in writing, the scope of their assignment from the attorney of record and the results of their work, no matter how brief.

New York lawyers have been warned: the consequence of a missed court appearance by a *per diem* lawyer may be the imposition of civil sanctions pursuant to 22 N.Y.C.R.R. §130-1.2 on both the *per diem* lawyer and the attorney of record. In serious instances, one or both may also face professional discipline. See, e.g., *Matter of Osborne*, 766 N.Y.S.2d 33 (1st Dep't 2003). In *Osborne*, a lawyer was suspended for six months based upon the imposition of sanctions for, among other things, failing to appear in court. That is a result which every attorney wants to avoid.