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Turning a TRO Into a Temporary Injunction

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For a lawyer who convinces a judge to grant an application for a temporary restraining order, congratulations are in order. But celebration needs to be quick, because there's an extraordinary amount of work involved in the two weeks leading up to the temporary injunction hearing. My time on the state district court bench taught me that there are three things counsel must accomplish to successfully turn a TRO into a temporary injunction.

TRIAL PRACTICE

1. Conference with the court. Texas law allows the trial judge to impose reasonable limits on the evidence presented at a temporary injunction hearing. Well before the temporary injunction hearing (and preferably when the judge enters the TRO), counsel should ask how long each side will have to present evidence and argument.

If the court provides only limited time, the legal team may need to make some difficult decisions regarding witness testimony: Must the witness testify by deposition, or is an affidavit a workable alternative? If the parties agree, the court may accept the latter.

Counsel's knowledge of the ground rules for the temporary injunction hearing will allow for a well-tailored discovery plan and avoid unnecessary depositions.

2. Conduct expedited discovery. In a case that will require a temporary injunction, a lawyer should have drafted a streamlined discovery plan before filing the petition. Meeting the evidentiary burden at the temporary injunction hearing will require expedited discovery. Because the judge wants to be fair to both sides, the savvy lawyer will be prepared to discuss



scheduling for written discovery and depositions and will be ready to narrowly tailor (and possibly limit) depositions and written discovery to manage discovery appropriately.

Instead of planning to conduct wide-ranging discovery on the merits, at the temporary injunction stage, counsel must evaluate exactly what she will need to meet her burden of proof. When applying for a temporary injunction in a case involving highly technical matters, counsel may need to retain, disclose and present an expert witness — or be ready for the opponent to bring in an expert. Finally, if the case involves confidential information, counsel should propose that the court grant a protective order at the same time that she requests expedited discovery.

- **Depositions:** There are different options for limiting depositions. Counsel can ask the court to

limit the number of permitted depositions, the time for each deposition, the subject matter (restricting depositions only to matters related to the injunction) or some combination of these.

In addition, a lawyer can avoid deposing the wrong person or getting ambushed at the hearing with new information by noticing a corporate representative deposition pursuant to Texas Rule of Civil Procedure 199.2.

But nothing says a lawyer must take depositions before a temporary injunction hearing. It may be to the client's strategic advantage to simply call live witnesses at the hearing.

- **Written discovery:** Even lawyers who elect not to take depositions will find a basic set of written discovery to be useful. Limiting the discovery by subject matter or number of requests can be a good idea. It also is important to determine an expedited schedule for responding. But before proposing an accelerated response time, the smart litigator will check with the client to make sure that schedule is realistic. The party seeking the temporary injunction bears the burden of proof at the hearing, and committing to an overly ambitious discovery schedule is risky.

The key to devising and implementing an effective discovery plan is identifying exactly what proof is required to sustain the injunction. For this reason, lawyers should begin with the end in mind. That means working from a draft proposed order that will act as the judge's framework for the evidence attorneys will present at the temporary injunction hearing.

3. *Protect the client.* A lawyer always should educate the client regarding the serious consequences of losing at the temporary injunction hearing. Texas law provides two remedies for someone injured by issuance of a wrongful injunction. First, a person who wrongfully obtains an injunction is liable for damages by forfeiture of the bond posted by the applicant. When an action is filed on the bond, it is a summary proceeding in front of the same judge who issued the injunction and does not require a separate suit. Second, Texas law permits a separate suit for malicious prosecution where damages are not capped at the amount of the bond.

Texas law requires posting a bond in virtually every case where a judge issues an injunction. The purpose of the bond is to protect the respondent and, accordingly, the amount of the bond must have some relation to the potential damages to the respondent if the injunction is wrongfully obtained. For the skillful attorney representing a respondent, the amount of the bond provides an often-overlooked opportunity for advocacy.

Even if the applicant persuades the trial court to enter a temporary restraining order or temporary injunction, the writ cannot issue before the applicant posts the bond. For this reason, it can be a game-changer for the respondent's lawyer to offer evidence of his client's potential damages in the event the applicant wrongfully obtains the injunction.

In my experience, most attorneys — whether representing the applicant or respondent — fail to offer any evidence on the potential damage to the respondent. Having received no evidence, the trial court is left with complete discretion on the amount of the bond.

Turning a TRO into a temporary injunction can be a relatively uncomplicated procedure providing counsel follows these three tips. The judge and ultimately the client will appreciate it. 



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