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Risky Business: Four Things a Judge Will Analyze Before Entering a TRO

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Judges are afforded almost absolute discretion when considering an application for a temporary restraining order (TRO), and a skilled attorney can increase the odds the judge will exercise that discretion in his client's favor.

My time on the state court bench taught me that judges want to make the right decisions. Like all people, they rely heavily upon their instincts when they must make quick decisions based on incomplete information. Information is particularly incomplete in the risky situation of an ex parte application for a TRO: By definition, the application contains only one side of the story.

Psychologists teach that people are more likely to take a risk when they trust the others involved. Building trust with the judge is the best way for a lawyer to increase the odds that the judge will take the particular risk of granting a TRO.

1. Counsel's credibility. The best way for attorneys to establish credibility with the court is to demonstrate that they know what they're doing. That means making sure all pleadings comply with the legal requirements, including the local rules.

A quick survey of the local rules of the district courts hearing civil cases in Bexar, Dallas, Harris and Travis counties demonstrates how important it is to check the local rules.

For example, in Bexar County counsel first must approach the judge assigned to the case before seeking out another judge to hear the application. But in Harris County bypassing the ancillary judge for the assigned judge would violate the local rules.

Travis County has a specific certification form an attorney must complete before presenting an application for a TRO, and Dallas County requires a certificate in the application for injunctive relief.

One of the fastest ways counsel can diminish credibility is by a thoughtless false start — violating the local rules by approaching

the wrong judge or not having the court papers together. Why would a judge trust a careless lawyer?

2. The proposed order. When considering a TRO application, most judges will go first to the proposed order to determine precisely what counsel wants them to enjoin. From there, the judge will work backward to analyze whether the pleadings and proof support that request. If counsel successfully passes these tests, the judge probably will have some questions before deciding whether to use her substantial discretion and enter the TRO.

Counsel should remember that, when a judge signs a TRO, she lends her credibility to the document. Her signature transforms that piece of paper into a legally enforceable document with all of the power of the government behind it. If the proposed order doesn't comply with the stringent legal requirements necessary for the extraordinary relief sought, the judge likely will start doubting counsel and the client.

3. The argument. The distinguishing characteristic of an injunction proceeding is establishing irreparable harm and an inadequate remedy at law. To meet this burden, counsel must articulate why money damages will not adequately compensate the client for the claimed harms.


For example, breach of a sales contract where goods are available in the marketplace cannot, by itself, qualify for injunctive relief. However, allegations of trade secret misappropriation or a dispute over corporate control between feuding directors present textbook examples of irreparable harm and an inadequate remedy through money damages. But counsel cannot merely tailor the argument to maximize likelihood of success at the TRO hearing.

Maintaining consistent, credible arguments throughout the litigation requires thoughtful representations regarding whether the client can calculate money damages for the harms

claimed. If counsel says that calculating money damages is impossible and thus he deserves a TRO, he later will struggle to defend his expert's damages model. Counsel should choose his words judiciously with the entire case in mind and resist the temptation to overreach rhetorically to win a TRO, thereby compromising the merits of the damage claims.

Counsel can gain another advantage by pleading for a prohibitory rather than a mandatory injunction. Texas law requires lawyers to adduce additional supporting proof when seeking a mandatory injunction. Accordingly, couching the request as a prohibitory injunction increases the likelihood of success. Being aware of these and other legal principles will allow the advocate to gain every advantage for the client.

4. The plan going forward. Judges are busy people. Entering a TRO means further complications in the judge's life, because she must squeeze in a temporary injunction hearing within the next 14 days. Lawyers should anticipate questions from the court such as: "How long will you need for the hearing? Are you going to conduct expedited discovery so the hearing can be streamlined? How many witnesses are you going to call live at the hearing?"

Failure to think through these questions and present a plan for the future sends the message that counsel is not serious about litigating the matter. It makes the judge wonder whether she would be making a mistake by granting the TRO in the first place. 



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