



*Litigating Temporary
Restraining Orders and
Preliminary Injunctions and
Handling the Business
Emergency They Represent*





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About the Presenter

Thomas E. Patterson

Mr. Patterson has been a trial lawyer since 1981, representing businesses, professionals, and entrepreneurs – often on an emergency basis. Breach of contract, theft of trade secrets, infringement of trademarks or copyrights, breach of employment agreements, professional malpractice, restrictive covenants, shareholder disputes, unfair competition, and business torts are the primary areas of his practice.

Mr. Patterson wrote the book, “Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions,” that was published by the American Bar Association in 2009. Named by Martindale-Hubbell as AV Preeminent Rated lawyer, SuperLawyer, and a LeadingLawyer by Leading and Emerging Lawyers, he often lectures on the attorney-client privilege, emergency remedies, e-commerce, and expert witness topics. Two of these lectures have been offered online as certified Illinois continuing legal education courses.

Mr. Patterson is a member of the Federal Trial Bar and is admitted to practice before the U.S. Supreme Court, the state and federal courts in Illinois and the Chicago Metropolitan area. Before his career as a trial lawyer, he was a clerk to Justice William G. Clark of the Illinois Supreme Court for two years, and a straight commission salesman.

Email Address: tpatterson@pattersonlawfirm.com

Website: www.pattersonlawfirm.com

Mailing Address: 200 W. Monroe St., Suite 2025, Chicago, IL 60606

Phone Number: 312-750-1822



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Course Description

Course Presentation

When should you seek a temporary restraining order or preliminary injunction? How can you obtain one? What should you do if a request for one is served on you? Those three questions and more are the topics covered in the course, *Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions*, offered by Thomas E. Patterson, who wrote a book by that title that was published by the American Bar Association in 2009.

Since then, he has obtained even more war stories, examples, and helpful anecdotes about injunctions. The types of cases in which injunctions can be sought, the factors the courts will rely on to grant or deny the request, the bond requirement, appeal possibilities, and what to do if the injunction is violated are all covered in this one-hour presentation.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives:

Participants will develop an understanding about when to seek an injunction, how to structure the request, and how to defend against a request.

Participants will learn how to draft or oppose injunction requests.

This is a broad fundamental course which is good for a new attorney or as an overview for any attorney.

The primary practice areas for this course are Contracts, Commercial/Consumer Law and Litigation.

This course does not contain Ethics/Professionalism information.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Time	Description
00:00:00	Program Start
00:00:20	Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions
00:00:30	Introduction of substantive material
00:04:10	TRO and Preliminary Injunctions
00:12:00	Factors: Likelihood of Success
00:13:35	Irreparable Harm
00:14:35	Balance of Harm
00:15:50	Interest of Public
00:30:00	Notice of Motion
00:37:48	Bonds
00:49:00	Orders
01:03:14	Violation of the Preliminary Injunction
01:09:45	Appeal
01:25:06	Strategic Decision Examples
01:30:45	End of Video



Litigating Temporary Restraining Orders and Preliminary Injunctions and Handling the Business Emergencies They Represent

- Big Account walks in
- Information reduces risk

TRO and Preliminary Injunction

- What are they?
- Differences
 - Mayfly life of TRO
 - Notice

Northwestern Steel & Wire Co. v. Indus. Comm'n, 254 Ill. App. 3d 472, 476, 627 N.E.2d 71, 75 (1st Dist. 1993) (defining “status quo” as the last actual, peaceable, uncontested status preceding the controversy).

Skolnick v. Alheimer & Gray, 191 Ill.2d 214, 730 N.E.2d 4, 11, 246 Ill.Dec. 324 (2000).

In re a Minor, 127 Ill.2d 247, 537 N.E.2d 292, 299, 130 Ill.Dec. 225 (1989).

Abdulhafedh v. Secretary of State, 161 Ill. App. 3d 413, 416, 514 N.E.2d 563, 565 (2d Dist. 1987) (TRO is a drastic remedy issued in exceptional circumstances to cover a brief period of time).

Westinghouse Elec. Corp. v. Free Sewing Mach. Co., 256 F.2d 806, 808 (7th Cir. 1958) (defining “status quo” as the “last uncontested status which preceded the pending controversy”).

Illusions Too Reality, LLC v. City of Harvey, 2003 U.S. Dist. LEXIS 1530, at *11 (N.D. Ill. Feb. 4, 2003) (defining purpose of a TRO).

- Power
- Speed

Four Elements

- Likelihood of success
- Irreparable harm
- Balance of Harms
- Interest of Public

Illinois:



- (1) a protectable right;
 - (2) irreparable harm;
 - (3) an inadequate remedy at law; and
 - (4) a likely success on the merits. *Murges v. Bowman*, 254 Ill. App. 3d 1071, 1081, 627 N.E.2d 330, 337 (1st Dist. 1993).
- American Telephone & Telegraph Co. v. Village of Arlington Heights*, 174 Ill.App.3d 381, 528 N.E.2d 1000, 1003 – 1004, 124 Ill.Dec. 109 (1st Dist. 1988).

Illinois Statute

(735 ILCS 5/11-101) (from Ch. 110, par. 11-101)

Sec. 11-101. Temporary restraining order. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of signing; shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after the signing of the order, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the granting of the extension shall be stated in the written order of the court. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he or she does not do so, the court shall dissolve the temporary restraining order.

On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every order granting an injunction and every restraining order shall set forth the reasons for its entry; shall be specific in terms; shall describe in reasonable



detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Federal:

- (1) a likelihood of success on the merits,
- (2) a threat of irreparable harm, and
- (3) an inadequate remedy at law. If those conditions are satisfied, the court must then
- (4) balance the hardships, and
- (5) consider the impact on public interest. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007).

Rule 65 of the Federal Rules of Civil Procedure

This rule governs temporary restraining orders and preliminary injunctions in federal court.

Rule 65 – Injunctions and Restraining Orders

(a) Preliminary Injunction.

- (1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.
- (2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

- (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:



(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk’s office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days’ notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.



(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys;
and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

Different Jurisdictions

- Sequence
- Preference
- Avoid paralysis

Buzzwords and Concepts

- Status quo
- Mandatory
- Prohibitory
- Bonds
- Appeals

Mechanics

- Client/witnesses



- Complaint
- Order
- Motion
- Memo
- Affidavits
- Notice of motion

C.D. Peters Const. Co., Inc. v. Tri-City Reg'l Port Dist., 281 Ill. App. 3d 41, 48, 666 N.E.2d 44, 48-49 (5th Dist. 1996).

Hirschauer v. Chicago Sun-Times, 192 Ill. App. 3d 193, 201, 548 N.E.2d 630, 635-36 (1st Dist. 1989).

Friedman v. Thorson, 303 Ill. App. 3d 131, 137, 707 N.E.2d 624, 627 (1st Dist. 1999).

Coca-Cola Co. v. Alma-Leo U.S.A., Inc., 719 F. Supp. 725, 726-27 (N.D. Ill. 1989).

- Notice/subpoenas of witnesses
- Exhibits
- File
- Fee

Bonds

- Purpose
- Obtaining
- Damages
- Strategy

Order

- Reasons
- Acts
- Persons
- Bond
- Date/Time
- Expiration
- Why ex parte
- Distribution



Enforcement

- Obey
- Contempt
 - Remedial
 - Coercive

Enforcement Defenses

- Complied
- Ambiguous
- Modified, expired
- Impossibility

Overturing

- Reconsideration
- Modification
- Appeal
 - Fast
 - Truncated record

Strategy

- Service of process
- Timing
- Venue & jurisdiction
- Collateral issues help or hurt
- Self-help and status quo
- Cost/benefit
- Declaratory Judgment

Strategy & Tactics

- Anticipating counter-moves

Transcript of Presentation

Handling Temporary Restraining Orders and Preliminary Injunctions and the Business Emergencies They Represent

Course Transcript - This is a computer generated transcript and is not intended to be a verbatim transcript of the presentation. It is provided as a supplement to the



material and not as an exact copy of the verbal presentation. Please refer to the video recording for any clarification of the presentation.

Hello fellow lawyers and in-house counsel and even judges my name is Tom Patterson and I started the Patterson Law Firm almost 20 years ago but 40 years ago I would not have had the time to deliver a talk like this I was too busy snowed under with assignments I be researching and writing briefs reviewing and analyzing documents in as fast as I got one assignment done they would put another one on my desk and I know there's many of you out there today to know exactly what that feels like.

I was desperate to get into court for something more than just a routine status conference and I didn't get many chances to do that but then one day one of the other partners at my firm one of the finders as opposed to me being a grinder at that time brought in a preliminary injunction action senior lawyers at the firm at the time wanted to stay up all night to prepare for the hearing that was going to take place the next day I won't say I volunteered to do but I did agree to do it and I did stay up all night and I did get to go to court the next day and I got to examine my own Witnesses and I got to cross-examine my opponents Witnesses.

Ever since then I've liked injunction actions because it allowed to get me into court fast now that I've had time to recruit my own lawyers at my own firm I have time to deliver these kinds of presentations and I enjoy doing so after I started my own Law Firm I decided that I liked injunction so much that I wanted to write a book about it and I spent three years in my spare time doing so it's got a very catchy title is called handling the business emergency temporary restraining orders and preliminary injunctions

yes it's available but I enjoyed writing it and I thought it would be useful I thought it would be useful to people who are faced with an injunction or who wanted to be prepared to be faced with an injunction and I believe that people would find the book useful because I know I would have appreciated it if someone had given a copy of such a book to me when I was a young girl why study injunctions or a potential big client walks in your door it would be useful to know what the issues are with respect to preliminary injunctions and temporary restraining orders that way you can sound intelligent sign up the big client and make a lot of money they're also situations however in which the client doesn't even know that they need a t r o or preliminary injunction and it's up to you by astute questioning of that client to figure out that it's your role or preliminary injunction is something that the client should in fact for soup so this presentation and the book would help you undertake those kinds of assignments or give you the knowledge in order to service those clients that come in that don't even know that they need a preliminary injunction.

TRO and Preliminary Injunctions



So before we figure out how to get injunctions and what to ask your clients about them what are they what is a temporary restraining order for tomorrow for sure what is a preliminary injunction they are court orders they are temporary induration and they order somebody to do something to stop doing something or to refrain from doing something their distinguishing feature can be analyzed by looking at a typical auto accident case you have an automobile accident case your automobile is damaged because of somebody else's fault you sue for money damages to repair or replace your automobile that's not an injunction that's a money damages cases a common law case money damages is your remedy.

If you send your car for example to a body shop to be repaired and that body shop keeps the car and won't give it back even though you have paid the appropriate charges to get it back then you can seek an injunction to order that car restored to you similarly if the body shop owner has the car and has not been paid for the work that they contracted to provide and did in fact provide and the owner of the car is trying to trespass on the property or even break into the property in order to retrieve the car the body shop owner could get an injunction ordering that person to stay away until they paid the appropriate charges.

So in that sense so in that sense you so in that sense you can Tiara junk they circumstance often provides an where the body shop owner could get an injunction ordering that person to stay away until they paid the appropriate charges so in that sense you can see that trw's and preliminary injunctions do not favor plaintiff or defendant they might Favorita party depending on the circumstances of the case so i t r o and a preliminary injunction is a court order punishable by contempt that will force somebody to do something prevent somebody from doing something or stop somebody from doing something that they are already doing and let's face it while that case simply illustrates what a TRO or preliminary injunction is an automobile accident case or an automobile being retained by a body shop is not the Paradigm cakes about one-third of my practice in the current firm I have is devoted to shareholder disputes or LLC member disputes.

In the typical Paradigm cases Two Brothers two friends to fraternity Brothers to Associates long time they get together and they start a business a small business they shared the profits fifty-fifty and then something happens what I like to call the green Factor sometimes come in all of a sudden money is pouring at more than they anticipated more than they thought they would need and all of a sudden one of those people decides that they deserve more money than the other one even though they set up the original event as a 50/50 proposition and so that's my Paradigm store Two Brothers they had a similar businesses they had an idea to invent a product I won't name it to avoid easy identification is going talking about they work in a rural area in a bar and actually to develop this product they had the sense to get it patented and it was packed it but then they had to



incorporate the component that they invented in an overall product they work for over two years in their Barn developing prototypes engine switches guards unit they had to go through the whole prototype that worked and it worked really well they set up a website the Incorporated they were fifty-fifty shareholders they started to offer for sale on their website they offered it for sale and trade shows I started to make money then soon after that a bigger company with a related product line decided that their product would fill a hole in their product line and so they got a distribution contract in which the larger company committed to buying a minimum quantity of these products every year at a set price as long as I painted it their color and use their name so the money started to pull rent at which point one of the brothers I will call him the evil one the evil one decided that he was the guiding force for The Guiding Light with respect to the invention and he decided that his other brother was not so well entitled to 50% of the profits there are certain other details that I won't go into but eventually tensions Rose to such a pitch that the evil brother through the other brother up against the wall lock them out of the company deprived him of his salary offered him a pittance to buy out his 50% interest and said he would never see another dime until and unless he agreed to the bile more of a paradigm situation for an injunction action here's why.

Personal called a good brother he consulted a local lawyer and the local lawyer knew a little bit about corporate law I'm not criticizing the Lord he wrote a letter saying hey let him back in your violating the business Corporation act violating the bylaws you're not treating them fairly it's a squeeze out fries out Etc you wrote a letter was ignored you got another letter suggesting mediation that letter was ignored he wrote a letter suggesting arbitration that letter was ignored now the evil brother made a mistake he failed to turn off the other brother's computer access to their online banking system and so the but I will call the good brother monitor the corporate account and saw all of a sudden that the evil brother had withdrawn a huge amount of money from the corporation I 60 and at that point the good brother freaked out and somehow found his way to me now that is a paradigm case for an injunction action and we filed a knit a t r o in a preliminary injunction request I think within 2 or 3 days after that and the purpose of our request was get that money back into the account get that business operating so it would not incur any extraordinary expenses get that business to prevent any bonuses from being provided to the evil brother until we litigated the issue is to who was going to run the business and who was going to buy who

That is a more typical case for preliminary injunction now you can see the value of that kind of an order the guy thought he was getting out of the business and taking the money but by way of an injunction he was forced to put that money back into the business and he was prevented from taking any further distributions that were outside the ordinary course so now we can see what trw's and



plundering Junctions are and we can see their value in a paradigm case how do you get let's look at the theory first.

Four Factors

There are four factors that the courts typically weigh in order to decide whether to issue either a TRO or a preliminary injunction first is likelihood of success on the merits that means can you show the actual claim on the actual claim being asserted breach of contract breach of bylaws breach of fiduciary duty theft of Trade Secrets patent infringement trademark and turn river is what if you can show a likelihood that you were going to succeed on the Merritt if it appears based on a preliminary examination that you're going to ultimately win the lawsuit you have satisfied in Spades this first requirement that I have listed I'm not saying it's the most important requirement I'll get to that in a moment I'm just saying it's the first requirement that I'm discussing do you have a likelihood of success on the merits of the claim don't remember your opponent is not going to be prevented from arguing the opposite so if you assert some facts by affidavit your opponent can assert contradictory facts by another application all I'm saying is the court on a preliminary determination makes a decision as to whether he thinks the movement is going to win the case or the opponent's is going to win the case as a preliminary not permanent matter.

The second irreparable injury gets into the crucial distinction between TRO's and preliminary injunctions as opposed to money damages as a remedy the issue is can you be compensated by money damages if you can easily be compensated by money damages and you don't sustained irreparable harm your harm will be temporary in compensated for later find a ward of money damages but real estate is unique for example a painting is unique for example the threaten destruction of a business might present irreparable harm and if you can articulate the basis of your claim that you're going to suffer irreparable harm unless you obtain a t r o or preliminary injunction then you can satisfy that element in a quart is more likely to Grant you the injunction that you've requested.

The third factor is the balance of harms just because you were going to sustain irreparable harm without an injunction your opponent May assert that they are going to sustain irreparable harm if the injunction is issued and you can see in some cases say for example you have a sales representative who claimed the right to the territory of Indiana the sales representative was going to say if he is denied the right to sell in Indiana he's going to lose existing customers and he's going to lose his customer relationships for all the time but if there is a contest if the company says or some other sales person says that they are entitled to sell in Indiana and you can see that there is an exact equivalent of irreparable harm it will be asserted by both claimants to the Indiana territory sales territory and so you get a premium on advocacy cuz you need to assert what irreparable harm you



will sustain you need to minimize the irreparable harm your opponent will sustain and your opponent has exactly the reverse set of factors to consider the fourth factor that the courts typically discuss is the public interest law this is often a makeweight factor meaning that sometimes there are public interest on both sides if you have a sales contract with a restrictive covenant in it the movements issue maybe I want to preserve the public interest in the sanctity of the contract the contract is freely bargain for this person cannot get employed by my competitor agreed to the restrictive covenant that we included in our employment contract the counter argument is that contract is in a Restraint of trade it has to be strictly construed I have a public interest in getting a job I have a public interest in not fostering a Restraint of trade therefore you will have to public interest arguments that might counter balance each other or end up requiring the court to look at the other three factors to determine how to make a decision picture of a public interest for example in Pure Food or drugs kind of drugs you may be able to add public interest is one of the factors that justify getting an injunction yourself the most of the time there is a countervailing public interest that will apply.

Now those are the four factors that the courts discuss and they discuss them in a huge number of Weights so there are few quotes that say you have to take the factors one by one you have to meet each factor one by one and as soon as you fail to meet one of those factors you lose I call that the sequential test just because they take the factors and see you have a likelihood of success on the marriage if so move on to the next Factor you have a reputable harm if so you move on to the next track is there a balance of harm way in a moving spit favor then if you move on to the next track Republican soap many other courts in special federal courts will weigh the factors in different ways some will say irreparable harm is the key component to examine and as long as you were sent a fair question on the Merritt if you start going to sustain irreparable harm without the injunction the court will issue the injunction to permit the lawsuit to be determined on the Merritt without disadvantaging someone in the meantime some judges will do a winged Factor so they will say if you have a strong likelihood of success on the marriage you don't need much of a showing of irreparable harm and if you have a weak showing on American you need an overwhelming terrible harm in order to justify an injunction tissue other courts emphasize the bouncing of the arms and you will see that there's also a premium on thinking this through if you can tailor in order an order that you propose that will give you the release that you need without disadvantaging your opponent to such an extent that they can claim the balance of Harm's Way in their favor then you're more likely to get the injunction that you seek.

Other various other ways the courts the articulate how they decide these different factors and which ones are preminent at any particular time and there are some chords that more frankly indicate that it really depends on the case and it does



and so I say do not get hung up do not get paralyzed trying to figure out what jurisdiction you're in and what kind of tests they apply in which factor they wafer sandwich factory they weigh second argue all of the factors as best you can't don't leave in

Buzzwords & Concepts

I want to discuss a couple of magic words or Buzz words that will make judges and clients think of you know what you're talking about When you come to these issues so with discuss the four factors that should be memorized you should be able to issue those factors off the tip of your tongue when you're talking to a client I'm talking to a potential client when you're talking to a colleague when you talk to the judge there are a couple of other phrases that I think can be particularly useful depending on your jurisdiction and depending on one concept is the status quo injunctions are often issue to preserve the status quote the last Peaceable position of the parties before the dispute arose so be prepared if you can to argue that hey this injunction request of mine is designed to preserve the status quo to the we can get a decision

On a couple of other phrases that are interesting and important in some jurisdictions and in front of some judges mandatory versus prohibitory a mandatory injunction forces someone to do something a prohibitory injunction prevent someone from doing something so a mandatory injunction would say hey start walking prohibitory injunction would say hey stop standing still you can see them that there is a premium on advocacy in many circumstances where you can phrase something either as a mandatory injunction or as a prohibitory injunction eunos jurisdictions that use that terminology a mandatory injunction is less likely to be honored Jennifer Hibbett Tori injunction the reason is at bottom a mandatory injunction forcing somebody to do something might have to be policed and that's more difficult for court to do they can just Envision themselves dealing with your case week after week, month after month as to whether this mandatory injunction is being followed a prohibitory injunction requires much less Khaleesi they're only going to have to police it in the event that the prohibited actions is in fact undertaken and then they can judge whether they need to enter into enforcement proceedings

So those are the factors in a couple of the buzzwords that are equally important in these types of cases now let's assume then that a big account walks in and either ask you about an injunction or reveals the facts necessary for you to conclude that an injunction is worth what kind of paperwork do you prepare what kind of steps do you take to figure out the case impark injunction actions are like any other case except under a truncated timeframe so in every case you need to talk to the client get their version of facts collect documents from the client make sure they support their story research the law to see what particular Theory you need



to assert on that client's behalf here you have to do that also but you have to do it fast because typically injunctions arise in an emergency situation and other words if we had delayed in make the so you want to act fast and typically injunction cases present themselves under emergency or crisis situations where you need to act fast.

And so you have to draft a complaint or is it case maybe the counterclaim no do not label your complaint or counterclaim with counts that say t r o preliminary injunction permanent injunction Zara remedy you're not a claim your claim is breach-of-contract your claim is theft of Trade Secrets or trademark copyright or patent infringement or breach of fiduciary duty tortious interference that's your claim or series of Clans those are what you put in your complaint count the injunction is a remedy you can put it in the wherefore Clause asking for remedy but you won't get it on the basis of a complaint alone but you won't get it without a good complaint that states a valid Theory as well so what do you do next you prepare a motion and motion should be for a t r o or a preliminary injunction or both it's a motion like any other emotion followed your local rules set it up the way you would any other motion whatever your judge wants support it with affidavits verifications and a memorandum of law state why the injunction is important why it has to be entered into fast why you I can assert and Prevail on all four factors relevant to whether an injunction should be issued so you need the complaint or counterclaim new pleading who played in the states of valid claim need a motion for injunction in should have a memorandum that would support while you're entitled to it I had a case many years ago and which I filed a motion that was two sentences long and Incorporated the memorandum the judge I was in front of didn't like that is a matter of style so I reworked it put a lengthy motion with numbered paragraphs sending out all the elements in a shorter memorandum of Law and supported then the judge was fine really need to analyze what your judge wants the form your judge wants before you prepare your papers in addition your papers cannot be for the most part on information and belief or just the environments of the pleader you need a verified complaint and preferably a verified motion as well or supported by affidavit the affidavit have to be of evidentiary quality yes in the emergency situation of an injunction the courts somewhat relaxed The Rules of Evidence they don't strictly adhere to them because they recognize that there is an emergency but for goodness sake if you can draft your affidavit so that you are sent a Kate the relevant documents that your support your position that lay a foundation for the affianced testimony and make sure that the testimony you can is not yours

Then I recommend that you draft the order that you want the judge to enter sometimes in some jurisdictions it's required I prefer to do it whether it's required or not it forces you to think through the issues in detail and I'll discuss the content of an appropriate order in just a few minutes but what I'm the saying now is draft the order up front you want to know exactly what you want and how you



want it and it will force you to really restrict the relief you want to the Nugget of relief that you need it will make sure you've identify the appropriate parties that you want to act or refrain from acting you do get to as I will explain in a moment also bind other people who Aid and abet anyone to reach the injunction as long as I have notice of its terms and you don't have to name them but my point is that if you spend the time to draft the order then you'll be farther along in your preparation and will be prepared to more effectively argue the merits of your request for an injunction to the court there are also specific findings that a court has to make before they can enter into a t r o enter a t r o or preliminary injunction and you want to make sure that you protect the judge by doing that after you prepared all those papers maybe I'm old-fashioned but I recommend walking those papers to court just to make sure that there isn't some matter of form that's required I don't depend upon us.

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Reform that's required I don't depend upon a Stafford to do it I like to do it myself that way if there's an additional filing fee or they miscalculated finals be I can write a check right on the spot if there's a cover sheet that needs to be filled out I can fill it out right on the spot I can find out in at least in Cook County who what judge has been assigned to the case I can then carry copies of the papers of the five types of the papers up to the court I can ask that court that judges Personnel when they hear injunctions when I can get on the calendar any special requirements or any special orders that they've issued as a general matter and make sure I can completely comply so I recommend that don't forget to filing fee I had a friend of mine I forgot one once and it delayed is request for injunction several days no let's discuss the issue of notice because in addition to Preparing the pleadings the motion the memorandum the order the draft order right you need to figure out notice and here is where we get the first distinction between trw's and preliminary injunction remember those farben lumping them together as to the four factors and appropriately so what's the difference between a t r o and a preliminary injunction limited. Of time depending on the jurisdiction in might be 10 business days 10 regular days 14 regular days I think Georgia has a 30-day requirement ero can only last as one commentator put it for the life of a mayfly to limited short order Tia Rose can be requested even without notice called an ex parte t r o but you have to know additional facts in your motion if you request a t r o x party primarily why do you need this tro without giving notice like if you think well as soon as he gets noticed of the tarot he's going to transfer the money to Siberia that might be a reason for the judge might want your evidence for that if the person wants to get notices going to destroy the thing that you're trying to preserve that might be reasons not to give notice so you have to analyze why you're not giving notice this is extremely important the rules if you just read them in the rules or in the statutes you see that you're permitted to get an ex parte Tron if you just say okay I can get an ex parte to Euro and ask for one in without



thinking it through in detail I think you're making a mistake as I was saying about the ex parte trw's I say in my book do not be seduced by the possibility of obtaining trw's without notice I don't know what I was thinking about when I wrote to do is to put but that's the sentence in the book page 21 I say I hate them in quote and other silly people writing more diplomatically say that they are disfavored don't be aware of this they are disfavored Judges don't like them they want to hear from the other side unless you have a compelling need not to give notice give get your opponent in front of the judge with you to discuss the case you have a better chance of sustaining your TRO request if you have given notice.

I recently got involved in a case after the fact where the lawyers had failed to give notice for an ex parte t r o they obtain the ex parte t r o they believe that they were in a jurisdiction where ex-parte trw's were not disfavored and what happened is they had the wrong venue until the appointed came in transfer venue to a jurisdiction that does not favor ex parte trw's judges found at the ex parte de trw's were issued inappropriately they found that they were requested without any good reason and the law firm was sanctioned by the judges that had to hear these are this pair of cases that in which ex parte trw's were entered let's party Tiara Roseland for 10 days in a row with notice will last for 10 days Tia Rosa reissued without argument or evidence except as presented on the papers okay so that means that you don't you're not going to get to cross-examine Witnesses on an argument over whether it's ero should issue the judge is going to decide it on the papers by themselves okay so what's the theory of having preliminary injunctions and Tiaras pateros last for limited. Of times I said 10 14 30 days whatever right and they can be extended wants for good cause but they're still limited life they're powerful they have a limited life theory of t r o is what Center disorder until we can have a hearing on a full-scale preliminary injunction a preliminary injunction is entered with notice in with in many jurisdictions if not most jurisdiction an opportunity for a hearing if there are disputed questions of fact a judge will still dispense with a hearing and preliminary injunction cases if they believe that the disputed issues of fact are not compelling relevant or whatever they would prefer just to decided on the papers and many cases but if there's a fundamental dispute on many of the facts they can have a hearing that can last for days and you can be required to call your Witnesses and cross-examine your opponent's Witnesses often in those cases and agreed order will be entered to try to preserve the status quo until you can have this hearing and in some of those orders you will get Discovery Provisions listed so that instead of having to put on a full-scale preliminary injunction Hearing in 10 days or 20 days or 30 days.

You can do it in 90 days with the benefit of some Discovery from your opponent that's up to the negotiations of the parties the rules say t r o then preliminary injunction the preliminary injunction last longer than a t r o in Junction will last



until it's modified or eliminated sale in motion or until the end of the case when the end of the case will decide is there a permanent injunction going to be issued or will the relief move the necessity for continuing the preliminary injunction that was in Teterboro limited short notice preliminary injunction longer notice contested hearing if you have a factual dispute if a t r o is wrongfully issued you can move to vacate the t r o and you can do so on two days notice so if you get service on a t r o we should move to vacate it right away if it was improperly entered I've discussed I think the basic differences between a t r o in a preliminary injunction one is limited one last longer one can be done without notice but shouldn't ordinarily the other requires notice either can be modified on motion either can be appealed and I'll get to that in just a moment there is one additional requirement that needs to be thought through before you seek an injunction and is often overlooked in the rush to prepare one and I want to treat it separately from the other aspects of the injunction because I think it's just that important and that's the requirement of a bond we can see how an injunction is so powerful it could prevent somebody from working it could shut down a business it could prevent someone from running their own business they could prevent someone from selling a product that's alleged to infringe on someone else's packed the Myriad ways in which injunction can be very powerful and very devastating to an opponent what if the moving is wrong what is the judge is wrong in entering in a preliminary injunction what's the remedy a bond is designed to provide a readily accessible some of money to compensate the victim of an erroneously and a t r o or preliminary injunction typically whether a bond is required or just permitted depends upon the rules and the statutes of the particular jurisdiction a tissue and in the federal courts depend on which circuit you're in as a practical matter it probably doesn't make much difference if you are seeking a preliminary injunction you need to be prepared to argue what the size of the bond you should be ordered to pay you obviously want to minimize the bond that you want to pay and your opponent wants to maximize the bond that should be required to pay how much you're not really Limited in the evidence you can provide to support your contention with respect to a bond and I say that both of the movements and to the respondents need to sign you could even have an expert to estimate the amount of Damages that could be sustained if an injunction is entered into erroneously this is another reason why you want to tailor your order to minimize the potential harm to the opponent because then that will decrease the amount of the bond that you might be asked to post what would found or what some people have found in their studies of the various bonds that have been issued is that they are often entered in round numbers or not at all and the suggestion by the scholars who have studied the matter is that they are often an afterthought they often just issue round numbers they do rough Justice they enter these bond amount without a great deal of thought so I think that is a mistake and there have been cases that I have been involved in where when I brought up the necessity of the moving to post a bond and the movement confessed and inability to do so the judge is all of a sudden excused from greatly



analyzing the four factors for injunctions and can deny the injunction because of an ability to post a reasonable bond that would be required so you have to know your judge you have to know your jurisdiction you have to know the rules with respect to bonds but if you are responding to a request for preliminary injunction you need to be prepared to argue why it's an injunction is granted the movement should be required to post a very significant find and if they aren't then you should be able to defeat the in junk the reason I say it's important for the moving You oughta think that through at the time you're deciding whether to ask for the injunction to spend thousands and thousands of an injunction and then have it fail because your client lacks the resources to post a bun doesn't make any sense whatsoever so think this through with your client before you actually make the motion no it for the smaller clients out there sometimes have never had experience with a big client will typically have their Finance people able to post a bond without significant difficulty they'll have a relationship with a financial institution financial institution will know their financial statements and they will typically be able to post a bond even on their own a big sophisticated client isn't going to need much help from you other than you telling them what amount of the bond is likely to be and when if you're successful they have to post it but for a smaller client they may have to talk to people who specialize in providing these Bonds in Cook County Illinois for example on the 12th floor of the Daley Center there a bondsman who sit there long tables and they are sitting there to accept request for Vermont so you'll have to provide those bonds people. The relevant pleadings the amount of the bond acquired your financial statements other personal information and then you'll make a request for Bond Hill charge you for providing the bond but you'll have the bond and then you can comply with the order Flats at the end I think if you're in a strange jurisdiction you should ask the clerk or other knowledgeable local people and every jurisdiction has faced the issue of bonds you're not the only one who's going to have to request a bond or obtain want to post one so don't be concerned that you don't know how to do it somebody there would have done it already you can find that out as a clerk at the judge's personnel as local lawyers in town know another key component of the bond is if it is determined later that the injunction was improperly issued some jurisdictions limit the damages to the amount of the bond posted in the theory of that is it tells the movement what they are risking by asking for the injunction and it also allows the moving to calculate the amount of risk they are undertaking by seeking the injunction it also tells the respondent what they remedy is and it secures them gives him a secure feeling that if it is later determined that the injunction was improperly entered that they have a sum of money holy separate and apart from their opponent in order to Levy against to compensate them for the harm that's chart there are a few jurisdictions I believe Pennsylvania is one of them which does not limit damages to the bond posted the Syrian in Pennsylvania if my memory serves is that hey if you ask for the injunction you caused damages the fact that you did we didn't set an adequate Bond shouldn't prevent the wrongly enjoined party from having a remedy so you have to check



your jurisdiction and decide what do you want to make an argument as to whether you're limited to the bond or not in addition in Illinois for example there's a special code provision that permits summary damages for the improper issuance of a t r o or preliminary injunction and in Illinois that includes attorney fees that's why it doesn't say that in the cold but the way the cases have interpreted that statute they get attorney fees so I know of at least one case in which there were no actual damages from the entry of a t r o but the party was able to get damages for the improper issuance of a t r o consisting of their own attorney fees incurred the vacated so that's a very dangerous position for the movement of a t r o u need to make sure that you are appropriately asking for a t r o okay now we discussed the fact that you should draft the order as you're preparing your pleadings motions affidavits Etc you want to drafted early not only to help you think through that what you're asking for and what who you're asking to enjoin and from what but you also want to make sure that you protect the judge if the judge is nice enough to enter the t r o or preliminary injunction that you request you want to make sure that you draft an order that will be upheld on appeal so you want to follow the particular rules of your jurisdiction like rule 65 if you want to articulate findings of fact conclusions of law in the form required to sustain the Judgment that the injunction should be entered you want to comply with the requirements of the rules otherwise you are risking getting over turn on the pill why would you want to do that so you want to protect the judge an additional reason to draft the order that you want ahead of time is that many injunction cases once the original papers are filed are resolved by settlement I don't mean settlement of the entire case I mean settlement of the injunction issues another words preserving the status quo until the parties can have a trial on them and so there's often a lot of give-and-take and settlement discussions with respect to an order that can be entered and if you draft an order by agreement then it can last for a long or short is a party's determine it is necessary so it's not another issue if Atia roll last for 45 days it's improper on that basis alone right when you can appeal that and get that vacated because the judge no judge can enter a t r o that last for too long longer than the rules allow.

Okay but in order that's dropped by both parties and agreed to by both parties design in both our interests to preserve the status quo then is not subject to that time limitation and so if you have your order drafted ahead of time if forces you to think through what you want what you absolutely need and you'll be better prepared to identify those crucial issues and make sure you don't give way on them and then you will know some other things that are not so important and maybe you can concede some of those points to your opponent and that way you can both minimize the harm to each other and you can sometimes maybe all the time by agreement dispense with the necessity of a bond because you both work to Taylor you order to protect each of you while you have Discovery discuss settlement and then prepare for trial on the merits I want to give you an example of an order that I don't think was adequate every order needs to Think Through



the reasons the court issued the order are the persons or companies that are required to be restrained and then the acts that are designed to be restrained or performed and should if the jurisdiction requires discuss whether a bond is required or not and it's amount typically you also want the date and hour of the issuance of the t r o specially the trw's expiration date or the fact that the preliminary injunction will last until the end of the case or until modified and if the ex parte TRL despite my warnings today if you persist in getting an ex parte to Euro then you need to put in the order why notice was not provided the findings that relate to that there is a particular order that highlights I think the problems with drafting the order and the importance of thinking it through ahead of time so there was a particular case that I know about in which a 5 million dollar investment was sent overseas and listed in a bank and there was an injunction proceeding and the order said roughly speaking that the respondents are preliminary early restrained and in joined from transferring or otherwise encumbering or using for any purpose the funds in that particular banking institution or any other banking institution that are traceable to that trust res the rest being the 5 million dollars Okay so what's wrong with that sounds like an order that gave the movement some of the release that they request well when I would say that they should have asked in the course I have the benefit of observational hindsight to look at it so I'm not criticizing anybody but if you could think it through what kind of order would you really want well I think you would want to force the respondents to get an acknowledgement from those banking institutions that the money in their account actually belong to the movement because what in fact happened in that particular cases the money was further drain from the thing banking institution not form any fault of the defendant but from the fault of other parties to the case in the banking institution itself so if some banking institution Enterprise alter has 5 million dollars of money that you think is yours and you've got the court to agree that is your money at least preliminarily you want to make sure that that banking institution acknowledges that the money is subject to the jurisdiction of the court in at the bank won't allow the depletion of the funds even if they think it is proper to do so because of the actions of non-parties to your case in any event let's say that the respondents were not permitted 2 or we're not allowed or could not obtain the bank's agreement to that effect well then the court would be so advised and so with the movie and they would need to see additional relief and an expedited trial on the merits to make sure that the money was there so that they could commence enforcement proceedings against bank to get that money back.

It might also have the effect of bringing other parties before the court there are a lot more things that could have been done in that order for example in many cases you want the permit the company to continue to operate while a dispute is pending between directors or between shareholders or other officers of the company you want the company to continue to sell its widgets so you want to permit the company to operate in the ordinary course of business and you want to



prohibit any extraordinary expenses want to prohibit bonuses or New Capital expenditures or entry of new contracts that might be disadvantageous to the company or at least you want if you are the aggrieved shareholder you want notice of those things before they're done put that in the order required weekly or monthly financial statements to be issued in bank statements to be issued think through how you are going to police the enforcement that order don't depend on the good faith of a litigation opponent to do so he must presume that you're litigation opponent not the lawyer but the litigation opponent will be looking for ways to evade the order so if you have washing like that you want to make sure that you require disclosure of the key documents not just once but periodically and that ought to be a very significant point of discussion so orders sometimes will protect assets I've got forms and draft the people of used in other cases for protecting assets corporate issues you may have an order that requires the holding of a shareholder meeting or that prevents a shareholder meeting if it's done without proper notice I would not generally suggest asking for an order in advance of a shareholders meeting preventing the show photos from doing one thing or another by the guys going to say let's see what happens at the meeting and then you can talk to me so typically unless you're asking to hold a meeting or to prevent and improperly noticed meeting I would see what the result was you can talk ahead of time and say we're going to move for injunction on this cuz it's country the bylaws of What Not if you do it you can tell the people you going to do that but you can wait for the action to take place and then immediately move for the t r o war so we also have Provisions that apply to restrictive covenants for example where you can restrain somebody from joining the employment of a competitor or from selling the products that are competitive with your employer's products trade secret violations can be enjoying by preventing the sale of the product a trademark infringement likewise you can have an injunction that would prevent the sale of products that contain a trademark that infringes on yours I suggest that you think through what do you need immediate Discovery while you're drafting your order do you need minutes of shareholders meeting immediately turned over the books and Records immediately turned over or whatever it is that you think you might need to prove your contentions ask for it think about asking for it in the order you do risk overwhelming the judge on everything right now we can just handle it in ordinary discover with think it through if there's something you need immediately ask for it in the order at a minimum even though it's redundant with the protections that are provided by the rules already I would put in in the order preserving the records that you want to make sure are preserved he don't want any argument later that somebody destroyed some records in the ordinary course of business right and the order said ordinary course of course I destroy the records in the ordinary course of this right so you want to make sure that there is a provision in the order that says hey don't destroy anything maintain it all or better yet I turn it over typically you won't get in a t r o a preliminary injunction it's ordered by the court you won't get expedited Discovery but think about that if you are in a situation where you can



negotiate with your opponent expedited a discovery that would be useful or issuing subpoenas or whatever it is you think you might need to think beyond the injunction proceeding itself think through think it through all the way to the end of the case where you going to need to win the case in the end so if there are documents that have to be served turned over and over quickly I do that one thing I move it for an injunction can sometimes offer to their opponent is an expedited Discovery and trial proceed so let's say that you have an injunction that is hurting the opponent but you want to obtain documents to help you prove your case and you want Discovery to take place fast sometimes it again depending on the judge sometimes you can talk to the opponent's a look it's in your interest to have the nurse determine fast let's expedite the discovery and suggested the judge that we have a hearing or trial on the merits more quickly than average as a way to obviate the need to argue push and pull over extensive injunction proceedings that don't even get to the merits of the case at all think through the general Provisions think through duration to make sure you comply with the t r o rules if you need a briefing schedule on something like for example you get an injunction but the you want to be comprehensive in the order you want to know who your target is and you want to be careful not to overreach one of the issues with injunctions is that they are as I have said emergency or crisis proceedings So In the Heat of the Moment your grafting as fast as you can laugh at Davidson pleadings and what not you are not excused from your obligations to the court and your opponent from the diligence necessary to make good faith allegations and if your client depending on memory alone I search something in an affidavit that a year later after full Discovery turns out to be false that's not a good situation to be you are eventually going to have to have or least prepare for a trial on the merits so getting your client to make bowl over broad statements of fact in an affidavit without a full opportunity to review the documents that would affirm or negate those statements is a mistake need to protect your clients from themselves analyze the documents make sure that your cross examine your own client about anything they put in an affidavit cuz if you over reach it could come back to bite you I have mentioned the possibility of negotiating an agreed order and I want to go beyond just mentioning that is a possibility and offer that as a particular recommendation if you can get an agreement you get the certainty of relief rather than the uncertainty of judicial ruling and the lawyers knowing their case better than the judge will have an opportunity to know it are perhaps in a better position to work with each other to draft an order that truly maintains the status quo permits a resolution on the marriage without disadvantaging the parties and you know and I know the judge is generally appreciate agree orders so I would and if you're offering notice for example in a t r o u r allowed to give informal notice right men against doing ex parte trw's but you can give telephone notice or fax notice or what not but I recommend at that time so you look I'm going to ask for a t r o m sending over the papers I want to give you notice it up at 2 before judge someone so let's think it through talk to your client let's figure if we can work something out nothing wrong with that and there was a lot right



with that again I'm not saying you should do that if you think your phone's going to run to the client say you don't dispose of those widgets now right for Purge your files now I'm not saying you should do it in that circumstance but in a normal case especially if you know you're opposing lawyer maybe you can do it and get an agreed order .



Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org

