

FROM MY SIDE OF THE BENCH

Restraining Orders

BY HON. RANDY WILSON

I JUST COMPLETED MY ANNUAL TWO WEEK STINT of hearing emergency applications for temporary restraining orders. In Harris County, we have a long standing procedure whereby once a year each civil judge hears all TROs for half a month. The volume varies. During that time, we can hear as few as one or two per day to as many as ten or more a day.

It's always an interesting half month; you never know what's going to walk in the door. A few patterns emerge, however. Foreclosures are conducted on the first Tuesday of the month, so we see an increase of TRO applications as foreclosure Tuesday nears. Additionally, you can always count on a good number of covenant not to compete and trade secret TRO applications. As a result, prior to my two week ancillary term, I always brush up on non-compete law.¹ Beyond these two predictable dietary staples of ancillary, we always buckle up and prepare for anything and everything. The ancillary judge can hear TRO applications to restrain elections, stop buildings from being razed, halt evictions, and prevent medical care from being terminated (or require that medical care be given to minors over the objections of parents holding certain religious convictions). In short, there's no limit to the range of requested restraining orders that are requested.

While every judge has different criteria for evaluating and granting a TRO application, here are a few suggestions I've assembled over the years to improve your odds of getting that restraining order:

- **Give Notice.** While the rules envision *ex parte* TROs,² most courts are reluctant to grant *ex parte* applications. Judges want to hear from both sides. There are some situations, however, where it is essential to hear an application *ex parte*. For example, if the defendant has embezzled money and the plaintiff is trying to freeze bank accounts, you have to proceed *ex parte*. If you give notice, the defendant will undoubtedly commit the very act you are trying to prohibit. Absent such dire

circumstances, however, notice is almost always required.

- **Be Prepared to Post a Bond.** I can't tell you the number of times that the plaintiff/applicant asks me to waive the bond. The judge cannot waive bond except in rare exceptions. If no bond is included in the temporary restraining order, the order is void and unenforceable.³

The bond must bear some relation to the potential harm that might result to the defendant if the restraining order is granted. If the injunction is later found to have been wrongfully granted, the defendant is limited to recovering on the bond.⁴ In other words, if the bond is only \$100, the defendant's recovery for wrongful injunction is capped at \$100, regardless of the extent of harm caused by the restraining order. As a result, be prepared to post a reasonable bond. One of my co-judges tells the story of the plaintiff who complained that the City of Houston had wrongfully deprived plaintiff of a kiosk at Houston Intercontinental Airport. Plaintiff sought a restraining order shutting down the airport until plaintiff received his kiosk. When the judge advised the plaintiff that the bond would probably have to be a billion dollars, the plaintiff rapidly lost interest in the TRO.

The TRO is not effective unless and until the bond is posted. As a result, unless you anticipate that the bond will be minimal and you can post a cash bond, take steps in advance to get the bond posted quickly. Have your client on standby ready to get the bank to issue a cashier's check. Have your client's insurance agent poised to issue a bond. If the bond is going to be substantial, it may require time get the paperwork together to post a bond. Be prepared.

- **Get Your Affidavits in Order.** A TRO hearing is

decided on the written application and affidavits. No testimony is taken. As a result, your affidavits need to tell the story. That being said, it's not a bad idea to have your clients present and ready to tell their story. The judge may often want to question the clients to get a sense of what's going on.

- **If You're Going After Hours, Make Sure It's Really An Emergency.** From time to time, we are called at nights and on weekends for an emergency TRO. Most of the time, these truly are emergencies. However, occasionally, we will be contacted by lawyers for fairly routine matters that could easily be dealt with the next business day. If you're going to call a judge at night or on weekends for a restraining order, the wrecking ball had better be ready to knock down your building or the hospital about to pull the plug.
- **Be Prepared to Serve the TRO.** The TRO is not enforceable until it is served. As a result, have your process server ready to go. As a precaution, you also should fax and email the TRO to the defendant and his counsel.
- **Don't Forget Expedited Discovery.** In all probability, the temporary injunction hearing will be conducted within 14 days. The movant has little time for discovery. As a result, the plaintiff should prepare in advance a motion and order for expedited discovery. If this is granted, this can be served along with the TRO; this will save several precious days and perhaps permit discovery to take place prior to the temporary injunction hearing.

If the sides are reversed and your client is served with a TRO, all is not lost. The defendant has several options available. You can:

- Move to dissolve the TRO;
- Move to modify the TRO;
- Move to increase the bond; and
- Engage in expedited discovery, *e.g.*, immediately notice the depositions of all persons who signed affidavits in support of the TRO.

Situations involving restraining orders and temporary injunctions are often one of the most enjoyable litigation experiences today for trial lawyers. The temporary injunction trial is often case dispositive. The trial lawyers get to "try" their cases after only a few weeks of hurried discovery. A generation or two ago, trial lawyers tried cases by the seats

of their pants with skinny files and limited discovery. The temporary injunction hearing is the closest that modern trial lawyers can experience to the rough and tumble trial practice of a time now past.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective.

¹ My current reading list includes the following. TEX. BUS. & COM. CODE § 15.50 et seq.; *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009); *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 209 S.W.3d 644 (Tex. 2006); *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994); and *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).

² TEX. R. CIV. P. RULE 680.

³ *Ex Parte Jordan*, 787 S.W.2d 367, 368 (Tex. 1990). Governmental agencies are not required to post a bond for temporary restraining orders and temporary injunctions. Additionally, bonds are not required if the TRO is agreed.

⁴ *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).