CHAPTER ONE

Sometimes Money Is Not Enough

Before we can determine how to win injunctions, we should first understand what they are and when they can be sought.

1.1 An Injunction's Significance

Lawsuits usually arise because of disputes over money: someone wants money from someone to compensate for his or her injuries or to pay what is due under a contract. But sometimes money is not enough: You cannot find an easily ascertainable price tag to compensate for the theft of trade secrets or the infringement of trademarks and copyrights; for the breach of restrictive covenants included in employment agreements; or for the violation of certain rights of shareholders, partners, and limited liability company (LLC) members.

The difficulty is not only in quantifying money damages as a remedy; it is also a matter of speed. If your employee has stolen your client's secret formula

and is giving it to a competitor, you need to stop him before your business is ruined. What if, by the time the lawsuit is decided, the treasurer has run off to Siberia with all of the money? Despite winning the case, you would end up with only a worthless money judgment—a *piece of paper*—after spending time and money to litigate.

Injunctions are important legal weapons because of their power and the speed with which they can be obtained. It behooves business owners and their lawyers to know what they are and when and how they can be obtained. To know what injunctions are, we should define the terms.

1.2 Essential Vocabulary

An *injunction* is a "court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury"[1] (thus, you can see its limitless potential power). A *preliminary injunction* is an injunction that can be obtained quickly upon an emergency hearing and lasts until it is modified by the court that issued it, vacated on an emergency appeal, or replaced by a permanent order issued after a normally scheduled trial. Its cousin, the *temporary restraining order* (TRO), is an injunction that can be obtained immediately without notice, formal or otherwise, to your opponent, but it generally lasts for only 14 days (28 if the court allows an additional 14-day extension)—enough time to hold a hearing to determine whether you are entitled to a preliminary injunction. Some cases discuss *mandatory* and *prohibitory* injunctions. Mandatory injunctions *force* someone to do something, whereas prohibitory injunctions *forbid* someone from doing something. Courts that use this terminology require more justification to issue a mandatory injunction than they do to issue a prohibitory injunction.

TROs and preliminary injunctions are the focus of this book. There is a chapter on declaratory judgments because they also can be obtained quickly, and they are sometimes used at the same time as a preliminary injunction. Permanent injunctions are discussed as they relate to the tactical and strategic decisions attendant to TROs and preliminary injunctions. *Emergency injunctions* here refer to both TROs and preliminary injunctions.

1.3 The Elements and More Vocabulary

To obtain a preliminary injunction, you generally need to show that you have (1) an *ascertainable right* that you will probably vindicate when the case is fully tried (a *likelihood of success on the merits*); (2) that you will suffer *irreparable harm* without the injunction, which usually means that monetary compensation is an *inadequate legal remedy*; (3) that this irreparable harm outweighs the burden of harms the injunction would cause to the opponent (the *balance of harms*); and

1. Black's Law Dictionary 540 (6th ed. 1991).

(4) that your request is not against or is supported by public policy. Judges preserve the status quo with emergency injunctions until a trial on the merits can be had. When issuing an emergency injunction, a *bond* should be required to protect the respondent from the harm caused by the possibility of an erroneous grant of an injunction. A bond is necessary because there is an increased risk of an incorrect order when issued during an emergency hearing, before the facts can be fully investigated.

TROs use these same principles, but are applied to the pleadings[2] (no hearing). The purpose of a TRO is to preserve the status quo until the preliminary injunction hearing can take place.

All courts give a slightly different gloss to these elements. For the most part, both state and federal courts consider the above four factors when deciding whether to grant relief. The weight given to the four factors, however, varies depending on the court. The phrases are legal jargon, but unless you are familiar with these magic words, you might lose. Here is what they mean in brief.

1.3[1] Ascertainable Right

Litigation can be divided into rights and remedies. Emergency injunctions are remedies. In almost any case, and especially in a case involving injunctions, the first question a court asks is: What is the basis of the claimed right? Each of the following sources of law has developed its own rules that must be applied in any particular case.

1.3[1][a] *Contract*

Often, the basis is a contract, and the court will analyze what the contract says.

1.3[1][b] *Statute or Constitution*

Other cases involve rights founded upon a statute or constitution. For example, the federal government and the states have statutes that protect trade secrets. Corporate shareholders and LLC members also have rights under state statutes. Antitrust laws are federal statutes. Federal statutes protect trademarks and copyrights.

1.3[1][c] *Common Law*

In the absence of a contract or a statute, judge-made common law might provide a right. Judicial common law decisions have required partners to act loyally with respect to each other, give businesses the right to sue if their product or company is disparaged by a competitor, and protect businesses from having their contracts unjustifiably interfered with by others.

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2. "Pleadings" is used here to refer to complaints and counterclaims. A complaint is the paper you file to initiate a lawsuit and states what you are complaining about and "prays" for certain remedies, such as an injunction or money damages. A "counterclaim" is a complaint made against the person who sued you first.

1.3[1][d] *The Need for a Valid Claim*

The right at issue needs to be claimed in a complaint (or counterclaim or cross-claim) and should include a prayer for the relief sought. You need to assert a valid claim in your pleadings, follow all rules of pleading style, and have personal and subject matter jurisdiction and appropriate venue.[3] There is no claim for a preliminary injunction or TRO. The claim requires a valid legal theory (such as breach of contract) and then, if justified, an injunction can be requested to enforce the claim, and a preliminary injunction can be requested so that your claim will not be lost or you will not suffer further harm before a final decision on the merits can be made.

In federal court, notice pleading rules allow a certain generality to your complaint. If you take advantage of that leniency in pleading a complaint, however, you must make your TRO or preliminary injunction motion factually specific.

Contrast the pleadings with the *motion* for a preliminary injunction or TRO. The TRO or preliminary injunction motion is filed with the pleadings or after the pleadings are filed and starts the quick court consideration of your request for an emergency remedy.

1.3[2] Likelihood of Success on the Merits

Because an injunction arises during an emergency, a full investigation is not possible before a contested hearing is held. Thus, the decision is both preliminary and temporary. Nevertheless, after the preliminary injunction hearing, the judge must be persuaded that you will probably win after a full investigation and trial is conducted. There are variations among case decisions and between the state and federal courts about how probable this likelihood must be. At a minimum, the party requesting an injunction must raise a fair question as to the existence of the right claimed.

1.3[3] Irreparable Harm

Because a normal lawsuit addresses whether to award money damages, one of the key questions in an injunction action is whether a money-damages award will provide an effective remedy. If it will, an injunction is not necessary. If it

3. "Personal jurisdiction" is the power that the court has over the parties. For example, a hermit living in Illinois lacking contact with anyone outside of Illinois could not be sued in Alaska because the Alaska courts would lack personal jurisdiction over him. In contrast, if an Illinois resident drove through Alaska and hit an Alaskan pedestrian, the pedestrian could sue him in Alaska. "Subject matter jurisdiction" refers to the power of the court to hear a certain class of disputes. For example, a federal court can only hear cases arising under federal law or between two people of different states under any law if the amount in controversy exceeds $75,000. "Venue" refers to which court can hear the case. For example, if some parties are located in Cook County, Illinois, and other parties are located in St. Clair County, Illinois, or Las Vegas, Nevada, the venue rules determine which court should decide the case. Jurisdiction and venue occupy volumes of case decisions, books, and treatises and are therefore beyond the scope of this book.

is difficult to *quantify* the amount of money damages, if an opponent is likely to spend all of his money to become judgment-proof before you can collect your judgment against him, if the wrong is continuing such that multiple legal actions would be required to redress the harm, or if, without an injunction, a monetary loss is unlikely to be recovered for some other reason, you are more likely to win your injunction.

Irreparable harm may be the most important factor of the analysis. The factual variations of irreparable harm are infinite.

1.3[4] Balance of Harms

The irreparable harm about to be suffered by one party unless it obtains an injunction might be equaled or outweighed by the irreparable harm to the opponent if the injunction is granted, so a court will ask what will happen if it grants the requested relief. What will happen if it denies it? How would each outcome affect or harm each party? The court will minimize the risk of a wrong decision to each party and do the least harm to both parties.

1.3[5] Public Interest

Judges are required to consider the public interest in their orders. If a business is going to be destroyed absent an emergency injunction, the judge should consider the loss of employee jobs in addition to the rights of the parties;[4] if food in a restaurant is being contaminated, the judge should consider the public interest in uncontaminated food; if a dangerous condition exists in which nonparties might be injured, the judge should factor public safety into the decision. Whenever your interest in getting the injunction is aligned with a public interest, your chances of winning it increase, but in many cases the public interest favors neither party, and in practice the courts often spend little time analyzing this factor.

1.3[6] Preservation of the Status Quo

Generally, a court will maintain the status quo until a full trial can be held. The status quo means the last undisputed position of the parties. In a dispute over the ownership of a business, for example, preserving the status quo means that the person in control maintains control, and exemplifies the principle that "possession is nine-tenths of the law."

Even though injunctions are designed to preserve the parties' rights until a trial may be held on the merits, the decision on an emergency injunction sometimes decides the entire case. Each side gets to present its case to the judge and the judge's opinion, even though preliminary, might function as a fast arbitration and be accepted by both parties. Or an injunction might disable a party from conduct or resources that are essential to its ability to litigate.

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4. *But see* chapter 2, *infra*.

1.3[7] The Bond

One who seeks an injunction must be prepared to post a bond covering the likely costs to the opponent if it turns out that the injunction should not have been granted. If you represent the party seeking the injunction, you should be prepared to tell the court what bond should be required and why. Your client should be prepared to post any reasonable bond that the judge might order. If you are defending the case, consider how you can justify requesting a large bond. I have defeated injunction requests because my opponent could not post a bond large enough to secure my client from the damage that would be caused by the injunction if it later turned out that the order was erroneously granted. By asking whether the injunction requestor could post a bond, you allow a judge to avoid having to decide anything on the merits if the answer is no.

1.3[8] Appeal

Appeals on emergency injunctions have different rules than most appeals. They are considered on an expedited, emergency basis.

CHAPTER TWO

Preliminary Injunction and Temporary Restraining Order Rules, Factors, and Standards

The power to issue temporary restraining orders (TROs) and preliminary injunctions is an inherent power of the court,[1] but the requirements have been codified: in federal court by Rule 65 of the Federal Rules of Civil Procedure[2] and by statute in most states.[3] Local rules often apply as well.[4]

This chapter—an overview—covers the following topics: choice of law (federal and state courts both permit injunction actions), how to prepare the case (mechanics), the differences between TROs and preliminary injunctions (duration of, notice, and hearing requirements), the quality of evidence necessary to litigate, the decisional standards, and the individual factors relevant to the decision. This chapter seeks to provide the basics of injunctive relief wile later chapters provide more insight into winning or successfully defending against emergency injunctions.

2.1 Choice of Law: Federal or State Law

Where a federal court is sitting in diversity, the Erie[5] doctrine holds that a federal court should apply state law unless doing so would undermine an important federal interest.[6] Federal Rule of Civil Procedure 65 reflects an important

1. Bradford E. Dempsey et al., *Using Presumptions to Tip the Balance for Equitable Relief*, 33 Litig. 15 (2006): tracing the historical power of "chancellors" to the English courts of equity and through certain American statutory limitations of their broad power to simply "do justice" through injunctions. *See also* United States v. Cohen, 152 F.3d 321, 325 (4th Cir. 1998): "Federal Rule of Civil Procedure 65 is not a source of power for a district court to enter an injunction. Rather, it regulates the issuance of injunctions otherwise authorized."

2. Fed. R. Civ. P. 65.

3. For the most part, statutory requirements for the granting of preliminary relief are similar to Federal Rule of Civil Procedure 65. *See, e.g.*, *In re* Tex. Nat. Res. Conservation Comm'n, 85 S.W.3d 201, 204 (Tex. 2002): noting that the Texas rule was "taken almost verbatim from Rule 65(b)." Section 2.8[1] of this chapter provides the time limits for TROs and whether they may be extended, section 2.8[2] lists which states allow TROs to be issued without notice, and section 2.8[3] lists which states require a hearing for a preliminary injunction. However, be aware that the statutes cited are not comprehensive. *See* John L.B. Gohn & Michael D. Oliver, *In Pursuit of the Elusive TRO*, 19 Litig. 25, 26 (1993): "Most states also have statutory standards for the issuance of injunctions in particular kinds of cases, such as orders to restrain a foreclosure sale, to avert a public riot (as, for example, sit-ins in front of abortion clinics), to prohibit a zoning change, or to protect marital assets in divorce. In New York, under section 7502(c) of the Civil Practice Law and Rules, there is a specific standard for an injunction in aid of arbitration; it requires only a showing that the arbitration remedy will be vitiated if the defendant is not enjoined. Where a specific statute provides standards, there can be difficult questions about whether the statute supplants the general test for injunctive relief or whether the statutory requirements supplement the four prongs, which also must be met."

4. The applicable local rules are often available on the court's website. Individual judges may have their own procedures for hearing emergency motions. Obtain these from the individual judge's clerk.

5. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

6. S. Milk Sales v. Martin, 924 F.2d 98, 102 (6th Cir. 1991). While the *Erie* doctrine applies in all cases involving diversity, this principle is sometimes overlooked. *See, e.g.*, Outsource Int'l v. Barton, 192 F.3d 662 (7th Cir. 1999) (Posner, J., dissenting): "As a detail, I noted that the court

federal interest.[7] It is a matter of procedure and controls the factors that the court must consider, as well as whether and how it can grant relief.[8]

Thus, in a diversity case in federal court, under Rule 65, a claimant seeking a TRO or preliminary injunction must prove that he or she is reasonably likely to succeed on the merits,[9] but the merits of the case are governed by state law.[10]

For example, a federal court sitting in diversity considering an employee's claim of retaliatory firing could not enjoin the employer from firing the employee if the state substantive law prohibited such claims. If the state substantive law allowed retaliatory firing claims, however, the federal court could issue an emergency injunction if the employee demonstrated the elements required by Rule 65, weighed as the federal court is instructed to weigh them. This might be different from how the state would have considered the same factors. In other respects, normal choice-of-law rules apply.

2.2 How to Prepare the Case: Mechanical Details

Here are the mechanical details necessary to win—or defeat—an emergency injunction.

2.2[1] Seeking an Emergency Injunction

If you seek a TRO or preliminary injunction, take these steps:

1. Consult with the client and witnesses.
2. Draft the complaint or counterclaim.
3. Prepare a motion and memorandum (for the TRO, preliminary injunction, or both).
4. Write affidavits and collect exhibits as necessary.
5. Draft an order (required in federal court; recommended in all cases).
6. File the papers, keeping in mind that, if more than one way to file documents exist, the most expeditious should be chosen.
7. Provide the filing fee.
8. Give notice (if you have not adequately explained in your papers why you should not have to).

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assumes that the state rather than federal law governs the standard for the grant or denial of a preliminary injunction. Not so; it is federal law." *But see* David Crump, *The Twilight Zone of the Erie Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away?,"* 1991 Wis. L. Rev. 1233: arguing that federal courts should turn to state law in determining whether to grant a remedy.

7. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945); *Martin*, 924 F.2d at 102.

8. *Martin*, 924 F.2d at 102. *See generally* Mayer v. Gary Partners & Co., 29 F.3d 330, 333 (7th Cir. 1994): "From beginning to end, diversity litigation is conducted under the federal rules of procedure."

9. RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1208 (10th Cir. 2009); Mantek v. Share Corp., 780 F.2d 702, 706 (7th Cir. 1986).

10. *See Mayer*, 29 F.3d at 332: "[S]tate law supplies the substantive rules that govern."

9. Provide courtesy copies.
10. For a hearing in the case of a preliminary injunction, issue subpoenas on crucial witnesses not under your control.

2.2[1][a] ***Consulting with the Client and Witnesses***

You should first consider pursuing an emergency injunction at the initial client interview, and continue to consider it as an option thereafter, depending on the behavior of your opponent or the circumstances surrounding the case. Often, the reason for the consultation itself reveals the need for an injunction (e.g., "Our treasurer was fired, but he won't return our checkbook"), but in some cases the need is only revealed after careful questioning.

Ask your clients if they believe that some immediate and irreversible harm will befall them if some right is not protected. Consider whether and how the opponent can retaliate upon learning of the suit. Probe the merits of the claim to determine your client's likelihood of success, but also ask, "What harm might happen if?" What harm might happen if the shareholders vote for resolution X, if your former employee goes to work for your competitor, or if your opponent shreds relevant documents?

These questions probe whether your client faces irreparable injury. If an injury can be fixed with money, an emergency injunction is generally unnecessary and unavailable. Your client's credible explanation of irreparable harm that will occur without an injunction may be the most important reason that an injunction should issue.

Once an injunction is under consideration, undertake a cost/benefit analysis. It is costly to seek a TRO, followed by a hearing on a preliminary injunction, followed by a trial on the merits. Add to that cost the amount of time and money necessary to spend defending a motion to dissolve, various appeals, and the bond securing your opponent from the cost of a wrongly issued emergency injunction. Some clients will be unable to afford these costs, and the feared harms might be too slight to justify a high cost. Consider other options: proceeding directly to the merits, seeking a declaratory judgment action, working out some consent order with the other party to preserve the status quo until the trial, or seeking only a preliminary injunction (rather than a TRO) when no harm will occur before a preliminary injunction with notice and a hearing can be scheduled. Chapter 8 discusses some of these factors in more detail.

2.2[1][b] ***Complaint or Counterclaim***

In fact-pleading states, the complaint must be detailed.[11] Federal courts' notice pleading rules, however, are a trap for the unwary lawyer because injunctive

11. *See, e.g.*, Hough v. Weber, 560 N.E.2d 5, 13 (Ill. App. Ct. 1990): "A complaint for [an interlocutory] injunction must plead facts which clearly establish a right to injunctive relief, and allegations consisting of mere opinion, conclusion or belief are not sufficient to support issuance of the writ." The Supreme Court of Illinois Rules §§ 131–38 describe the general pleading requirements of the state's courts.

relief will only be granted on pleadings with specific facts.[12] So either your complaint has to be specific and factual, which exceeds the requirements of the federal pleading rules, or your TRO or injunction motion has to be specific. Because the burden of proof is on the movant to prove he has the right to the requested relief and because injunctive relief is an extraordinary remedy, the movant's pleadings and writings must contain a clear right to relief and establish the right to an injunction with detailed facts.[13] Part II of this book demonstrates how to allege valid facts in many recurring controversies: constructive trusts and asset freezes; copyright, trademark, or patent infringement; and trade secret, restrictive covenant, shareholder, and LLC member disputes.

2.2[1][c] ***Motion and Memorandum***

Your papers (i.e., the complaint, motion, memorandum, affidavits, and exhibits) alone have to establish the proof required for a TRO; you will not be granted a hearing in the federal courts.[14] Similarly, most state courts do not allow hearings and require specific paperwork.[15] Generally, you will need to support your motion for a TRO or preliminary injunction with a memorandum of law. Because courts do not grant a hearing on a motion for a TRO, this may be your only opportunity to educate the judge as to the issues of law and fact before the issuance or denial of a TRO. If you are in a jurisdiction that requires a memorandum of law to accompany a motion, the motion itself can be brief. It should state the statutory or common law elements of the TRO or preliminary injunction.[16] The memorandum will be similar to a brief in support of a summary judgment motion.

2.2[1][d] ***Affidavits and Testimony***

Write supporting affidavits and collect exhibits because this will be the only evidence the judge can rely on in ruling on a TRO. In a preliminary injunction, you can sometimes use affidavits, but see the discussion on the quality of evidence in section 2.4.

2.2[1][e] ***Draft Order***

A draft order is recommended in every case.[17] It forces you to focus on what relief you want. It directs the judge to the key issues. It allows you to draft an order that will be impervious to attack on appeal. When drafting an order,

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12. Fed. R. Civ. P. 65(d).

13. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Granberg v. Didrickson, 665 N.E.2d 398, 401 (Ill. App. Ct. 1996).

14. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2941 (1995).

15. *See infra* section 2.8[2], which lists what each state statute requires for the granting of ex parte TROs.

16. The factors are set forth later in this chapter, starting at section 2.5.

17. *See infra* chapter 4, which covers orders.

make sure you identify the persons to be enjoined and the actions to be prohibited.[18] Do not overreach; the court should not grant an overbroad order and, if it does, it may be reversed on appeal.[19] Remember that courts will not grant preliminary injunctions that enforce a personal services contract because this would result in the equivalent of indentured servitude,[20] although they can forbid the offering of services to a competitor.[21]

2.2[1][f] ***File the Papers Expeditiously and Correctly***
If permitted, bring the papers to the court yourself and get the assignment of a judge, then walk the papers to the judge and get a hearing date.[22] Even if the court papers are filed electronically, personally ensure that courtesy copies of the essential pleadings get to the judge so that he or she and the law clerks can actually read them. Obtain any applicable local rules and standing orders your judge has issued. Figure out when your motion can be heard.

2.2[1][g] ***Filing Fee***
Do not forget to pay the filing fee.

2.2[1][h] ***Notice***
You have to explain the notice you have provided or, if you are requesting an ex parte TRO, why you are excused from doing so. See the discussion on notice rules for TROs and preliminary injunctions in section 2.3.

2.2[1][i] ***Subpoenas***
For a hearing on a preliminary injunction, issue subpoenas for witnesses not under the control of a party. Issue the appropriate notices for witnesses under the control of an adverse party.

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18. *See* Bielonko v. Blancheet Builders, No. CV 980581188S, 1999 Conn. Super. LEXIS 257, at *15 n.2 (Conn. Super. Ct. Feb. 2, 1999): discussing the movant's draft order; Rural Water Dist. No. 4 v. City of Eudora, No. 07-2463-JAR, 2009 U.S. Dist. LEXIS 79725, at *6–9 (D. Kan. Sept. 2, 2009): finding the proposed order was specific enough to issue an injunction; Wallace v. Greene Cnty., 618 S.E.2d 642 (Ga. Ct. App. 2005): discussing the movant's draft order.

19. *See, e.g.*, Brookline v. Goldstein, 447 N.E.2d 641, 646 (Mass. 1983): vacating a preliminary injunction because "the injunction here reaches too far."

20. *See* Soldevila v. Sec'y of Agric., 512 F.2d 427, 430 (1st Cir. 1975): "equity policy against enforcing personal service contracts." Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719, 727 (1991): "It is a fundamental rule that specific performance cannot be decreed to enforce a contract for personal services. . . ."

21. Marchio v. Letterlough, 237 F. Supp. 2d 580, 589 (E.D. Pa. 2002): "where an employee refuses to render services to an employer in violation of an existing contract, and the services are unique or extraordinary, an injunction may issue to prevent the employee from furnishing those services to another person for the duration of the contract"(internal quotation marks and citation omitted).

22. Janet Napolitano, *Injunctions in the Nineties*, 17 Litig. 23 (1991).

2.2[2] Defending against an Emergency Injunction

In both federal and state court, to oppose a TRO or preliminary injunction, take the following steps:

1. Consult with the client and witnesses.
2. Draft a motion to dismiss, if appropriate.
3. Prepare verified pleadings opposing the claim or counterclaim.
4. Draft a response memorandum to the motion, citing cases and evidence.
5. Write supporting affidavits and collect exhibits, as appropriate.
6. Prepare the appearance and get the check for the filing fee.
7. File and then serve the papers, ensuring courtesy copies are delivered.
8. For a hearing, issue subpoenas to indispensable witnesses not under your control and notices to adverse witnesses.

Do not rely on a motion to dismiss alone. Have the other pleadings filed or ready to be filed. If you fail to do this and lose your motion to dismiss, your opponent's alleged facts will be uncontroverted, which will justify the entry of a preliminary order of relief. If you represent more than one defendant, make sure to file responsive papers for each one you represent.

This checklist was provided to lawyers who were working on their first injunction cases. Their feedback was that the checklist failed to give a sense of how much time it took to put all of these items together and the repetitive ping-pong that takes place between client interviews and legal research. In one case, we started on a contract analysis and had draft motions, affidavits, and memoranda in preparation. But when the research showed that the contract theory would not yield one of the desired remedies, we decided to add a trade secrets theory that would allow it. Once this was decided (the number of communications with the clients cannot be conveyed adequately here), the motion, affidavits, and memorandum had to be changed—all in the rush of an emergency.

Care needs to be taken in deciding assignments and supervising the work. Usually, affidavits, the motion, and the memorandum are being written and edited at the same time. Affidavit changes require alterations in the motion or memorandum; ongoing research can require constant modifications to all or some affidavits. Good coordination and communication among lawyers and between lawyers and the client are essential.

2.3 TROs versus Preliminary Injunctions

The life span of TROs is limited to a few days (usually 14 days) with some flexibility for extensions,[23] whereas preliminary injunctions, though tempo-

23. Fed. R. Civ. P. 65(b)(2). *See infra* section 2.8[1], which charts the states that allow for extensions.

rary, are not extinguished until dissolved by the court, reversed on appeal, or replaced by the case's ultimate disposition.[24] Each is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."[25] Generally, movants should only seek a TRO when they are faced with the prospect of irreparable harm before a preliminary injunction can issue or, to state it another way, to preserve the status quo until a hearing on a preliminary injunction can take place.[26] The following discussion illustrates the differences between TROs and preliminary injunctions, including whether and what kind of notice is given to one's opponent, how long they last, and whether the parties are entitled to a hearing.[27]

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24. *See* Madison Square Garden Boxing, Inc. v. Shavers, 562 F.2d 141, 144 (2d Cir. 1977): "With the entry of final judgment, the life of a preliminary injunction came to an end, and it no longer had a binding effect on anyone. The preliminary injunction was by its very nature interlocutory, tentative, and impermanent."

25. Mazurek v. Armstrong, 520 U.S. 968, 973 (1997). *See also* West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1220, 1221–22 (D. Kan. 1998): "A temporary restraining order is an emergency remedy which may only issue in exceptional circumstances and only until the court can hear arguments or evidence on the subject matter of the controversy. A preliminary injunction is an order issued after notice and hearing which restrains a party pending a trial on the merits. Each of these is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion[.]" (internal quotation marks and citations omitted).

26. Pan Am. World Airways, Inc. v. Flight Eng'rs Int'l Ass'n, 306 F.2d 840, 842–43 (2d Cir. 1965): "The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. Such an order is necessarily limited to a very brief period because what may later prove to be a right of the party who is restrained is suspended before even a tentative adjudication as to that right has been had." *See, e.g.*, Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975): granting a TRO to halt the demolition of a historic courthouse.

27. Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194, 197 n.7 (Cal. Ct. App. 1989): "A temporary restraining order is issued to prohibit the acts complained of, pending a hearing on whether the plaintiff is entitled to a preliminary injunction. A temporary restraining order is distinguishable in the following respects: It may be issued ex parte; a bond, though commonly required, is not essential; and it is of short duration, normally expiring at the time of the hearing on a preliminary injunction." (internal citations omitted); Firchau v. Barringer Crater Co., 344 P.2d 486, 488–89 (Ariz. 1959): "A temporary restraining order, while in effect a species of injunction, is in some respects to be distinguished therefrom. It is an interlocutory order or writ issued by the court upon an application for an injunction, and is intended as a restraint on the defendant until the propriety of granting a preliminary injunction can be determined, thus going no further in its operation than to preserve the status quo until that determination. When that determination is made, the *whole force* of the temporary restraining order ceases *by its own limitations*. It is intended only as a restraint on the defendant until the propriety of granting an injunction pendente lite can be determined, and it goes no further than to preserve the status quo until that determination. Although a temporary restraining order has the force and effect of an injunction until superseded, it *becomes functus officio when the temporary injunction is granted, having then served its purpose*. In its usual form it fixes a day for the defendant to appear and show cause why a temporary injunction should not be issued, and continues the order in force and effect until such hearing." (internal quotation marks and citation omitted) (emphasis in original).

2.3[1] Notice

The following section discusses the notice requirements for TROs and preliminary injunctions.

2.3[1][a] *TROs without Notice*

In federal court, TROs may be issued without written or oral notice (ex parte) if:

- 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 the adverse party or his attorney can be heard in opposition; and
- the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.[28]

TROs "should be limited to preserving the status quo only for so long as is necessary to hold a hearing."[29] An ex parte TRO is an extraordinary remedy and is only available in limited situations, such as the following:[30]

(a) Where immediate and irreparable injury will result.[31] Courts have issued ex parte TROs to freeze assets (and to prevent their dissipation),[32] preserve documents from destruction,[33] appoint a receiver,[34] halt a

28. Fed. R. Civ. P. 65(b)(1), (2). Most state courts have similar restrictions on the granting of ex parte TROs; *see infra* section 2.8[2].

29. First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 650 (6th Cir. 1993) (citing Granny Goose Foods v. Bhd. of Teamsters, 415 U.S. 423, 439 (1974)).

30. Hill v. Pawnee, 305 N.E.2d 740, 741 (Ill. App. Ct. 1973): "Preliminary injunctions, or temporary restraining orders, without notice and without bond, to say the least, should issue only under the most grave circumstances[.]"; Reed v. Cleveland Bd. of Educ., 581 F.2d 570, 573 (6th Cir. 1978): "[T]he Rule 65(b) restrictions 'on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.'" (quoting *Granny Goose Foods*, 415 U.S. at 439).

31. Fed. R. Civ. P. 65(b). State statutes also require a showing of irreparable harm before an ex parte TRO can issue; *see infra* section 2.8[2]. *See also In re* Intermagenetics Am., 101 B.R. 191, 193 (Bankr. C.D. Cal. 1989): explaining that "the opportunities for legitimate *ex parte* applications are extremely limited." One of the limited scenarios where an ex parte TRO may be available is "where there is some genuine urgency such that 'immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.'" *Id.* (quoting Fed. R. Civ. P. 65(b)).

32. *See, e.g.*, Janvey v. Alguire, 647 F.3d 585 (5th Cir. 2011); Lake Shore Asset Mgmt., Ltd. v. CFTC, 511 F.3d 762 (7th Cir. 2007); McGregor v. Chierico, 206 F.3d 1378 (11th Cir. 2000). *See also infra* chapter 9.

33. *See, e.g.*, FTC v. Am. Inventors Corp., No. 95-302129, 1995 U.S. Dist. LEXIS 18854, at *5–8 (D. Mass. Nov. 19, 1995): granting an ex parte TRO with asset freeze to preserve documents.

34. FTC v. Assail, Inc., 410 F.3d 256, 259–60 (5th Cir. 2005): "[O]n the day the complaint was filed, the court issued an ex parte temporary restraining order barring the defendants from continuing their scheme and freezing their assets. . . . The court also appointed [a] receiver."

building's imminent demolition,[35] and stop an environmental hazard from posing immediate health concerns.[36] It is difficult, however, to distinguish these cases from those that allege irreparable harm in which notice was required. Thus, if you are seeking a TRO for one of these reasons, you have to explain why notice to the opposing party is likely to result in irreparable harm.

(b) Where there is a risk that the respondent will take adverse action if provided with notice. Ex parte proceedings are appropriate where there is a danger that notice to the respondent will result in flight[37] or the destruction of evidence.[38] The order that a court makes should serve to preserve the status quo and should not affect the opposing side's legitimate operations. Thus, an ex parte request to seize documents and deliver them to the movant is often refused,[39] whereas orders to preserve documents are more likely to be granted.[40]

(c) Where notice would render further prosecution of the action fruitless.[41] "[W]hen a party threatens imminent destruction of the disputed property, its removal beyond the confines of the state, or its sale to an innocent third party, giving the defendant notice of the application for an injunction could result in the inability to provide any relief at all."[42] This is the most extreme example of the adverse consequences

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35. *See, e.g.*, Strand v. Cass Cnty., 721 N.W.2d 374 (N.D. 2006), granting ex parte TROs to halt building demolition; Levatte v. Wichita Falls, 144 S.W.3d 218 (Tex. App. 2005).

36. People v. Conrail Corp., 613 N.E.2d 784 (Ill. App. Ct. 1993): affirming an ex parte TRO against defendants who created an environmental hazard by their transfer and storage of waste at a rail yard, resulting in substantial danger to the environment or public health of the area.

37. *See, e.g.*, Fink v. Walker, No. 06-cv-807-JPG, 2007 U.S. Dist. LEXIS 1826, at *13 (S.D. Ill. Jan. 10, 2007). *In re* Intermagnetics Am., 101 B.R. 191, 193 (C.D. Cal. 1989).

38. *See, e.g.*, Magnesita Refractories Co. v. Mishra, No. 2:16-CV-524-PPS-JEM, 2017 U.S. Dist. LEXIS 22656 (N.D. Ind. Feb. 17, 2017): where the court granted a TRO that resulted in the seizure and secured custody of an individual's laptop to prevent destruction of evidence and dissemination of trade secrets; Cincinnati *ex rel.* Cosgrove v. Grogan, 753 N.E.2d 256, 260 (Ohio Ct. App. 2001): granting a TRO that resulted in a business being closed and padlocked to prevent the location from being used for drug deals and to prevent the destruction of incriminating evidence.

39. Warner Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1125 (2d Cir. 1989): "An order issued without notice directing an agent of plaintiff's attorney to search a defendant's premises, seize documents and records and deliver them to the attorney, is not an order aimed at maintaining the status quo."

40. *Magnesita Refractories Co.*, No. 2:16-CV-524-PPS-JEM. *But see In re* African-Am. Slave Defendant's Litig., MDL No. 1491, No. 02-c-7764, 2003 U.S. Dist. LEXIS 12016, at *14 (N.D. Ill. July 13, 2003): denying a motion to preserve documentary evidence for failing to show irreparable harm in light of protections afforded by the Federal Rules of Civil Procedure.

41. Am. Can Co. v. Mansukhani, 742 F.2d 314, 322 (7th Cir. 1984) ("Plaintiff agrees that notice could have been given to the defendants, but it argues that this case falls within a very narrow band of cases in which ex parte orders are proper because notice to the defendant would render fruitless the further prosecution of the action.").

42. Dent Zone Network, L.L.C. v. Heritage Admin. Co., No. 4:03-CV-195, 2003 U.S. Dist. LEXIS 8738, at *4 (E.D. Tex. May 22, 2003) (quoting *In re* Vuitton et Fils S.A., 606 F.2d 1, 4 (2d Cir. 1979)).

set forth in subparagraph (b) earlier;[43] the action would be terminated as fruitless absent an injunction. Where the court fears that notice of the action would result in the dissipation of counterfeit goods, for example, an ex parte TRO would probably be entered.[44]

(d) Where notice to the adversary is impossible.[45] Notice is impossible because "either the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing."[46] The more effort you have made in trying to provide notice (telephone, facsimile, mail, e-mail, special delivery), the more reasonable you will look to the court.[47] Because ex parte TROs require certification by the lawyer of the effort made to contact the nonmovant, such statements are subject to Federal Rule of Civil Procedure 11.[48] Untrue statements before the court regarding how one sought to give notice or how one would be harmed if made to wait for notice may result in sanctions. Some state courts have comparable provisions to ensure that lawyers make proper representations when requesting injunctive relief.[49]

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43. In fact, one court cited both circumstances, stating that an ex parte TRO may issue only when "notice of the TRO might 'tip the hand'" of the movant to the respondent, causing imminent and irreparable harm against the movant. Cenergy Corp. v. Bryson Oil & Gas P.L.C., 657 F. Supp. 867, 870 (D. Nev. 1987). The court concluded that "[i]n such a case, it appears proper to enter the TRO without notice, for giving notice itself may defeat the very purpose for the TRO." *Id.*

44. *See, e.g.*, *In re Vuitton et Fils S.A.*, 606 F.2d at 5: accepting petitioner's argument, in a trademark infringement case, that notice would frustrate the purpose of the action because the respondent would dispose of its inventory, which consisted of counterfeit merchandise, thus making further litigation futile.

45. *Mansukhani*, 742 F.2d at 322.

46. *Id. See also* Ind. R. Trial P. 65(b); Nev. R. Civ. P. 65(b): requiring that the movant's lawyer must give written certification to the court of "the efforts, if any, which have been made to give notice and the reasons supporting the claim that notice should not be required"; *Cenergy Corp.*, 657 F. Supp. at 870: "If it is impossible to give notice, then the Rule requires the applicant to indicate why it should not be required."

47. *See, e.g.*, *In re Vuitton et Fils S.A.*, 606 F.2d at 3. Here, the plaintiffs asked the district court for an ex parte TRO to last for a few hours to prevent the defendants from destroying counterfeit merchandise. *Id.* However, the court refused to grant a TRO because the plaintiffs were capable of giving defendants notice. *Id.* As such, even though the TRO would be for a short time, it was unreasonable for the plaintiffs not to give sufficient notice. *Id.*

48. *See* Fed. R. Civ. P. 11(b): stating that a lawyer's signature constitutes an agreement that the pleading is likely to have evidentiary support and that the pleading is not presented for improper purposes.

49. For example, in Massachusetts, when a lawyer signs a motion for an ex parte TRO, which is governed by Massachusetts Rule of Civil Procedure 65(a), he is certifying it, as per Massachusetts Rule of Civil Procedure 11. *See also Ex parte* Hurst, 914 So. 2d 840, 841–42 (Ala. 2005): "The motion requested, among other things, that the court order the Hursts '*immediately to return, within 72 hours, all of the personal property which was removed by the [Hursts]* to the [Cooks'] home.' Accompanying the motion was an affidavit from the Cooks' counsel, which stated, in pertinent part: 'I . . . do hereby certify that *I have made no effort to give notice* for the Temporary Ex Parte Restraining Order to the [Hursts] in this cause. Based upon the information supplied [to me by the Cooks], it is my judgment that notice should not be required in that giving notice would very

The adverse party can ask the court to dissolve or modify the TRO as long as he or she gives two days' notice to the party who obtained the ex parte order.[50] (See chapter 6 for more information.)

Do not be seduced by the possibility of obtaining TROs without notice. Judges hate them.[51] They want to hear from the other side and will want to know why they should not wait until the other side can appear.[52]

Unless a TRO without notice is truly proper, there is no strategic advantage to avoiding notice. Wrongfully issued TROs can subject the party that obtained them to damages, including attorney fees incurred in the dissolution. Credibility will be severely harmed if it turns out that notice could have been provided. Given that a TRO is by its nature temporary, any strategic gain of a TRO without notice in a questionable situation will quickly be outdone by the

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likely or possibly cause the [Hursts] to take an action to *remove the furnishings from the property* belonging to the [Cooks].'" *Id. See also* Bryant v. Bloch Cos., 800 P.2d 33 (Ariz. Ct. App. 1990) (discussing whether sanctions could issue under Ariz. R. Civ. P. 11 for a wrongfully issued TRO).

50. *See, e.g.*, Fed. R. Civ. P. 65(b); Nev. R. Civ. P. 65(b); Neb. Rev. Stat. § 25-1064; Ohio Civ. R. 65(b); 12 Okla. Stat. § 1384.1; Tex. R. Civ. P. 680.

51. *See* Conservatorship of Schaeffer, 119 Cal. Rptr. 2d 547, 550 (2002): "Ex parte proceedings are of course highly disfavored. They lead to a 'shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision . . . .'" Hawthorne Bank of Wheaton v. Glen Ellyn, 506 N.E.2d 988, 995 (Ill. App. Ct. 1987) ("The law does not favor the granting of injunctive relief without notice, and such a drastic remedy is appropriate only under the most extreme circumstances."); *In re* Wilder, 764 N.E.2d 617, 620 (Ind. 2002): holding that sending a secretary to opposing counsel's office with pleadings at the same time that a hearing for a TRO was going on was not meaningful notice. *See also* Gohn & Oliver, *supra* note 3, at 26: "The '*ex parte*' nature of TROs merits discussion. *Ex parte* is often thought to mean simply that the other side has not been notified. While historically TROs were that kind of *ex parte* proceeding, their true *ex parte* elements have been curtailed in most jurisdictions over the years. Nowadays, in many courts, *ex parte* usually means something more like 'without a full-dress hearing at which the other side can be fully heard.' It rarely means 'without the other side present.' And it almost never means, 'without telling the other side anything.' Federal Rule 65(b) contains no language explicitly contemplating a situation where the moving party may deliberately omit notice to the other side—although in true emergencies, that can be the result, at least temporarily. Immediate action may be essential, and there may be good reason for not telling the other side. For example, receipt of notice might trigger conversion of assets and flight before the court act. Some jurisdictions, recognizing this problem, do allow true *ex parte* actions."

52. *See* Gohn & Oliver, *supra* note 3, at 26: "The general rule is that if you can safely notify the other side, do so—and the earlier the better. Even if the other side is represented by counsel, notify the party personally. (Such notice does not violate ethical prohibitions, because it is a prerequisite to obtaining relief; but all you should tell a party/adversary is the action you intend to take, where and when the application will be heard, and what relief is sought.) If the other side is represented by counsel, call that attorney too. Keep track of the times and telephone numbers; these details should appear in your certificate of efforts to notify the other side. If the efforts were reasonably and demonstrably calculated to effect notice, and the opponent does not appear, the court will be much happier to act *ex parte* than if your efforts had been perfunctory."

harm to later efforts, including the effort to obtain an injunction. TROs without notice should be preserved for those unique situations when notice will defeat the purpose or is truly impossible.

2.3[1][b] ***TROs with Notice***

If you have decided to request a TRO with notice, there is the question of how much notice is sufficient. In state courts, movants have sought TROs after giving only informal, same-day notice to the opposing party, although one state requires at least one day's notice.[53] Notice may be held to be adequate one day before the hearing, by telephone at 5:25 p.m. the day before the hearing,[54] 30 minutes before the motion was granted,[55] or only minutes before the movant appeared before a judge.[56] What constitutes sufficient notice is fact specific and can vary with different circumstances.[57] In federal court, "same-day notice . . . suffices for the issuance of a TRO."[58]

A TRO with formal (rather than, say, by telephone) notice is similar in form to a preliminary injunction. A TRO may be drafted so that it does not differ functionally from a preliminary injunction. A TRO issued with notice that continues indefinitely is treated as a preliminary injunction.[59] In such a

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53. *See, e.g.*, Mo. Sup. Ct. R. 92.02(a)(3): "[N]o temporary restraining order shall issue without reasonable notice at least twenty-four hours before a hearing on the motion to the party against whom relief is sought."

54. *See* Diamond Sav. & Loan Co. v. Royal Glen Condo. Ass'n, 526 N.E.2d 372, 373–74 (Ill. App. Ct. 1988): noting that the TRO was scheduled for the next morning. *See also* Water Works & Sewer Bd. v. Anderson, 530 So. 2d 193 (Ala. 1988): noting that the movants could have notified the defendants of their intention to seek injunctive relief by telephone. During the call, you should discuss how to get your court papers into your opponent's hands as soon as possible.

55. Am. Warehousing Servs. v. Weitzman, 533 N.E.2d 366, 370 (Ill. App. Ct. 1988).

56. *Id.*: citing Skarpinski v. Veterans of Foreign Wars, 98 N.E.2d 858, 860 (Ill. 1951), for the proposition that "a telephone call to defendant or counsel can produce an appearance within a few minutes."

57. *Compare Ex parte* Health Care Mgmt. Grp., Inc. v. Health Mgmt. Grp. of Camden, Inc., 522 So. 2d 280, 281–82 (Ala. 1988) (holding that 20 minutes of notice before a hearing is fine), *and In re* Tex. Nat. Res. Conservation Comm'n, 85 S.W.3d 201, 202 (Tex. 2002): stating "[t]he plaintiffs telephonically notified the [defendants] that the trial court had scheduled a hearing on the temporary restraining order," *with In re* Wilder, 764 N.E.2d 617 (Ind. 2002): holding that sending a secretary to opposing counsel's office with pleadings at the same time that a hearing for a TRO was going on was not meaningful notice.

58. CIENA Corp. v. Jarrad, 203 F.3d 312, 319 (4th Cir. 2000).

59. Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965): "where the opposing party has notice of the application for a temporary restraining order such order does not differ functionally from a preliminary injunction"; Kable Printing Co. v. Morris Bookbinders Union, 349 N.E.2d 36, 40 (Ill. 1976): "[T]he 10-day limitation of a temporary restraining order relates only to those orders issued *ex parte*. The language of the statute is quite clear and explicit in this regard. The obvious purpose behind the 10-day limitation is not present when the adverse party has notice and the opportunity of a hearing." *See also In re* Arthur Treacher's Franchise Litig., 689 F.2d 1150, 1153–54 (3d Cir. 1982): stating that a TRO extended for 80 days was more like a preliminary injunction; Sims v. Greene, 160 F.2d 512, 517 (3d Cir. 1947): discussing an ex parte TRO, which had been extended more than once, the court stated:

case, calling the order a TRO would not prevent its treatment as a preliminary injunction.[60]

2.3[1][c] ***Preliminary Injunctions and Notice***

Rule 65(a)(1) and various state statutes prohibit courts from issuing preliminary injunctions "without notice to the adverse party."[61] "[Rule 65] implies a hearing in which the defendant is given a fair opportunity to oppose the application and prepare for such opposition."[62] However, Rule 65 is silent as to the appropriate timing and type of notice required.

2.3[1][c][i] Timing of Notice

There is some disagreement among federal courts as to what constitutes sufficient notice that would allow a preliminary injunction to issue.[63] Some courts have held that preliminary injunctions are subject to Rule 6 of the Federal Rules of Civil Procedure.[64] Other courts have left the issue to the "[trial] court's discretion [which is subject to a] deferential standard of review."[65] The affidavits supporting the motion must be served on the adverse party with the motion.[66] Under Rule 6, any affidavits provided to contest the motion for preliminary injunctions should be submitted to the moving party at least seven

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When a temporary restraining order, purporting to be "temporary" is continued for a substantial length of time . . . without the consent of the party against which it issued and without the safeguards prescribed by Rule 65(b) it ceases to be a "temporary restraining order" within the purview of that section and becomes a preliminary injunction which cannot be maintained. . . . In our opinion the restraining order now in effect in the District Court must be treated as a temporary injunction, issued without the consent of the defendant.

See also Burnette v. Haywood Cnty. Bd. of Educ., No. 06-1197, 2007 U.S. Dist. LEXIS 78304, at *4–5 n.4 (W.D. Tenn. Aug. 1, 2007): "There is some authority for the proposition that a temporary restraining order with notice to the adverse party should actually be treated as a Rule 65(a) preliminary injunction."

60. Wright, Miller & Kane, *supra* note 14, at § 2951. The language of Federal Rule of Civil Procedure 65(b) governs only TROs issued without notice. A TRO issued *with* notice falls outside of that rule. Fed. R. Civ. P. 65(b). *See* NutraSweet Co. v. Vit-Mar Enters., Inc., 112 F.3d 689, 693 (3d Cir. 1997). *See also, e.g.*, Coca-Cola Co. v. Alma Leo, U.S.A., Inc., 719 F. Supp. 725, 726 (N.D. Ill. 1989); Ragold, Inc. v. Ferrero, U.S.A., Inc., 506 F. Supp. 117, 122 (N.D. Ill. 1980).

61. Fed. R. Civ. P. 65(a)(1). However, it provides no more; Rule 65(a)(1) gives no guidance on when that notice must be sent or what form it may take. *See* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495, 504 (2003).

62. Granny Goose Foods v. Bhd. of Teamsters, 415 U.S. 423, 434 n.7 (1974).

63. Anderson v. Davila, 125 F.3d 148, 156 (3d Cir. 1997): "sufficiency of prior notice is a matter left within the discretion of the trial court" (quoting United States v. Alabama, 791 F.2d 1450, 1458 (11th Cir. 1986)).

64. Under Rule 6(c), "[a] written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing." Fed. R. Civ. P. 65. *See, e.g.*, Harris Cnty. v. CarMax Auto Superstores, Inc., 177 F.3d 306, 326 (5th Cir. 1999); Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc., 446 F.2d 353, 358 (5th Cir. 1971) (discussing a previous version of Rule 6).

65. People *ex rel.* Hartigan v. Peters, 871 F.2d 1336, 1340 (7th Cir. 1989); SEC v. Capital Growth Co., S.A. (Costa Rica), 391 F. Supp. 593, 600 (S.D.N.Y. 1974): "The sufficiency of notice is for the trial court's determination under the circumstances of each particular case."

66. Fed. R. Civ. P. 6(c)(2): "Any affidavit supporting a motion must be served with the motion."

days before the hearing, although the court can relax this requirement.[67] In state courts, while some statutes specify how much notice must be given to the opposing party, many, like the federal statutes, do not.[68]

2.3[1][c][ii] Type of Notice

In terms of how notice should be served, while personal service to the adverse party would be ideal, state courts have approved service by delivery to the opposing lawyer, by delivery to an adult at the lawyer's office or home, by mail to the lawyer's business address, by e-mail or by facsimile.[69] Federal courts recognize personal service, leaving it at the person's office or home, mailing to the last known address, leaving it with the clerk of court if no address is known, serving it through the court's electronic filing systems, or through other means that the person consented to in writing.[70]

2.3[2] Duration

This section explains the length of time that emergency injunctions may last.

2.3[2][a] ***Duration of TROs***

Because of the powerful nature of TROs, they are meant to have a short life span. TROs issued with or without notice may last 14 business days in federal court and in many state courts.[71] In federal court, they can be renewed for an

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67. *Id.*: "[A]ny opposing affidavit may be served at least 7 days before the hearing, unless the court permits service at another time."

68. *See, e.g.*, Mont. Code Ann. § 27-19-301; Ohio R. Civ. P. 65(b): requiring "reasonable notice to the adverse party" before a preliminary injunction will be issued. *See also* Or. R. Civ. P. 79(c): requiring five days' notice before a hearing, unless a court orders a different time.

69. *See, e.g.*, Ill. Sup. Ct. R. 11(b); Kan. Stat. Ann. § 60-903(b); N.Y. C.P.L.R. §§ 308, 312(a); N.C. Gen. Stat. § 1A-1, Rule 5; S.D. Codified Laws § 15-6-5(b). *See generally* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950): "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them notice to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied."

70. Fed. R. Civ. P. 5(b).

71. U.S. D.I.D. Corp. v. Windstream Comm'cns, Inc., 775 F.3d 128, 132 n.2 (2d Cir. 2014): "A TRO cannot exceed fourteen days unless the district court, for good cause, extends it for another period of no more than fourteen days" (internal quotation marks omitted). When determining what the operative time period is for a TRO, reference Federal Rule of Civil Procedure 6 for the rules regarding the computation of time. Fed. R. Civ. P. 6(a). *See also* Granny Goose Foods v. Bhd. of Teamsters, 415 U.S. 423, 439 (1974): explaining that "under federal law [TROs] should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." The TRO may continue beyond 28 days with the consent of the adverse party. *See* H-D Mich., LLC v. Hellenic Duty Free Shops S.A., 694 F.3d 827, 844 (7th Cir. 2012): finding that "the language of Rule 65(b)(2) and the great weight of authority support the view that 28 days is the outer limit for a TRO without the consent of the enjoined party, regardless of whether the TRO was issued with or without