

TROs:

A Guide to Winning Emergency Relief in Illinois

Here's a step-by-step guide to seeking a temporary restraining order and preliminary injunction when an emergency threatens your client with irreparable harm.

By Richard L. Miller II

Imagine that a client comes into your office with a business emergency. His small corporation has been thriving, largely due to strong relationships with long-term customers. Based upon your prior advice, he obtained covenants not to compete from all of his salespeople two years ago. Today, he learned that his star salesperson, supposedly on vacation last week, has gone to work for a competitor.

That salesperson has begun soliciting your client's customers for his new employer. Realizing that the wheels of justice turn slowly, you wonder what you can do for your client. In a matter of days, the salesperson could steal enough customers to destroy your client's business. You recall from law school that there are ways to obtain immediate relief from the courts: a temporary restraining order ("TRO") and a preliminary injunction.

When should you seek a TRO?

You should seek a TRO only when your client is likely to suffer serious, immediate harm that cannot be cured through monetary relief. A TRO is a drastic, emergency remedy available only in exceptional

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circumstances.¹ Indeed, the purpose of a TRO is to preserve the status quo pending a hearing on a preliminary injunction.² The status quo is the “last, actual, peaceable, uncontested status which preceded the controversy.”³

In our hypothetical case, your client needs an immediate court order prohibiting his former employee from stealing customers. If a court does not intervene, your client could lose most of his customers before the court could hold a trial or even a preliminary injunction hearing.

Moreover, if your client’s customers are stolen, his losses will be difficult to quantify. Assuming his customers were free to take their business elsewhere at any time, it is impossible to say how long they would have continued to purchase goods from him or what amount of goods they would have purchased. Accordingly, your case likely presents a set of facts under which the issuance of a TRO, and possibly a preliminary injunction, is appropriate.

The importance of a verified complaint

The means by which parties seek TROs and preliminary injunctions vary based upon the facts, the preferences of counsel, and local practice. However, the most common method is to simultaneously file a verified complaint and a motion seeking both a TRO and a preliminary injunction. Indeed, when your client signs a verification page and attaches it to his complaint, he gets valuable benefits that would not be available if he filed an unverified complaint.⁴

Courts have determined that where no answer is filed, a motion for TRO is “properly granted on the uncontroverted facts of the verified complaint.”⁵ Moreover, by statute, a TRO without notice to the opposing party cannot be granted in the absence of either a verified complaint or an affidavit.⁶ Thus, you should prepare a complaint that your client can verify, consistent with and complementary to your motion for a TRO and preliminary injunction.⁷

How long will a TRO last?

As its name indicates, a TRO is a temporary form of relief. Indeed, by statute, a TRO issued without notice to the opposing party can last no longer than 10 days.⁸ Though a TRO with notice can last longer than 10 days, a hearing must be set within a short time.⁹ Consequently, if your client

wants protection from his ex-salesperson for substantially longer than 10 days, he will need to seek relief in addition to a TRO.

In practice, TROs are often extended by agreement of the parties or by order of the court for weeks or even months. A busy court sometimes cannot find time on its calendar for a preliminary injunction hearing for several months. Hence, many litigants are surprised at how “untemperary” a TRO can be. Nevertheless, to protect your client during the interim between the entry of a TRO and the conclusion of a trial, you should seek a preliminary injunction.

TRO and preliminary injunction hearings compared

Emergency TRO hearings are normally held within a few days of filing the complaint and the motion for a TRO. Whether a TRO is sought with or without notice to the opposing party, it should be issued upon a summary showing that it is necessary to prevent immediate and irreparable harm.¹⁰

This means that you will typically appear at the TRO hearing and proceed based solely upon your client’s verified complaint and your oral argument.¹¹ In other words, you should argue that your client’s ex-salesperson should be prohibited from approaching your client’s existing customers based solely upon (a) the allegations in your verified complaint and (b) the law.

A preliminary injunction hearing is much different from a TRO hearing. It usually does not take place until days or even weeks later, after discovery has been taken. At the typical preliminary injunction hearing, both sides give opening statements and present evidence much like they would at a trial.¹²

Thus, at the preliminary injunction hearing you might call your client and/or his customers to testify. You might present documents and even call his former salesperson to the stand. You will probably make a closing argument to the court. If the court rules in your favor, your client should be protected until the case is settled or a full trial on the merits is completed.¹³

Notice to opposing party

You may be wondering whether you should advise your client’s former employee that you are seeking a TRO preventing him from contacting your client’s customers. In the vast majority of cases, the answer is “yes.” The Code of Civil Procedure provides as follows:

You should seek a TRO only when your client is likely to suffer serious, immediate harm that cannot be cured through monetary relief.

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

1. *Abdulhafedh v Secretary of State*, 161 Ill App 3d 413, 416, 514 NE2d 563, 565 (2d D 1987).

2. *Passow TCR, Inc.*, 242 Ill App 3d 259, 264, 608 NE2d 1346, 1350 (2d D 1993); *Diamond Savings & Loan Co v Royal Glen Condo Assn*, 173 Ill App 3d 431, 434, 526 NE2d 372, 374 (2d D 1988); *Bismarck Hotel Co v Sutherland*, 92 Ill App 3d 167, 175, 415 NE2d 517, 522 (1st D 1980); *Stocker Hinge Mfg Co v Darnel Indus, Inc.*, 94 Ill 2d 535, 541, 447 NE2d 288, 291 (1983).

3. *In re Marriage of Weber*, 182 Ill App 3d 212, 218, 537 NE2d 1024, 1028 (1st D 1989).

4. See 735 ILCS 5/1-109.

5. *Stanton v City of Chicago*, 177 Ill App 3d 519, 524, 532 NE2d 464, 468 (1st D 1988). The first district has also observed that when only questions of law are present a court “is not precluded from issuing a preliminary injunction upon the as yet undisputed facts alleged in a verified complaint.” *Seagram Distillers Co v Foremost Sales Promotions, Inc.*, 13 Ill App 3d 166, 169, 300 NE2d 490, 493 (1st D 1973).

6. 735 ILCS 5/11-101.

7. But see *Hough v Weber*, 202 Ill App 3d 674, 688, 560 NE2d 5, 15-16 (2d D 1990) (verified pleadings not required where a preliminary injunction is sought upon notice).

8. 735 ILCS 5/11-101; *Abdulhafedh* at 416, 514 NE2d at 565.

9. *Greenspan v Mesriow*, 132 Ill App 3d 508, 511, 478 NE2d 20, 21-22 (1st D 1985).

10. *Peoples Gas Light & Coke Co v City of Chicago*, 117 Ill App 3d 353, 355, 453 NE2d 740, 742 (1st D 1983); see also *Passon* at 263, 608 NE2d at 1349.

11. *Stanton v City of Chicago*, 177 Ill App 3d 519, 524, 532 NE2d 464, 467-68 (1st D 1988); see also *Lauter Intl, Inc v Carroll*, 107 Ill App 3d 938, 939-40, 438 NE2d 590, 591 (1st D 1982).

12. See *Paddington Corp v Foremost Sales Promotions, Inc.*, 13 Ill App 3d 170, 174, 300 NE2d 484, 487 (1st D 1973).

13. This assumes there are no changes in circumstances justifying the court’s modification of its order.

a hearing had thereon.¹⁴ Stated another way, a TRO without notice is considered a drastic remedy and is thus available only under the most extreme circumstances.¹⁵ Also, if you are seeking to prevent the opposing party from engaging in particular conduct, you might want to have that party before the court so there can be no dispute over notice of the TRO's entry.

Elements of a motion for TRO or preliminary injunction

As you begin to draft your motion seek-

Your client should be prepared to post, and possibly lose, a bond if a court wrongfully grants an injunction.

ing a TRO and preliminary injunction, you should immediately ask yourself, "What must I demonstrate to convince the court that my client is entitled to an injunction?" To begin with, it is well established that a party seeking a TRO or preliminary injunction need not make out a case that would entitle it to relief on the merits.¹⁶ The party seeking relief need only raise a "fair question" whether the right at issue exists.¹⁷ To obtain a TRO, a plaintiff must establish that (a) it has a protectable interest, (b) it will suffer irreparable injury if the restraining order does not issue, (c) its remedy at law is inadequate, and (d) it is likely to succeed on the merits.¹⁸

Not surprisingly, the elements entitling a party to a preliminary injunction are similar: a plaintiff must establish (a) a clearly ascertainable right that needs protection, (b) a likelihood of irreparable harm absent an injunction, (c) no adequate remedy at law, and (d) a likelihood of success on the merits.¹⁹ Given the overlap between the elements, it is usually most efficient to file a single motion seeking both a TRO and a preliminary injunction. However, resolving such a joint motion will normally require both a summary proceeding on the TRO and a later evidentiary hearing on the preliminary injunction.

Establishing the four elements

Clear and ascertainable right. To es-

tablish the first element – that you have a "clear and ascertainable right" – your client must raise a fair question as to a substantive interest recognized by statute or common law.²⁰ Although this requires a fact-specific determination, case law provides examples of adequate interests.

For example, a wife's interest in marital assets, the nature and extent of which were unknown her, has been found to constitute a clearly ascertainable right in need of protection.²¹ Also, a trial court's granting of an injunction restraining the city of Chicago from enforcing a retirement ordinance has been upheld.²²

Your hypothetical client is in good shape because at least one court has ruled in explicit terms that a "legitimate, threatened business interest is a right which may receive injunctive protection."²³ Moreover, that court has also stated that an employer has a valid interest in protecting its long-standing client relationships against the sabotage and subterfuge of former employees.²⁴

Irreparable injury. To satisfy this second element, a plaintiff must show it will suffer irreparable injury in the absence of injunctive relief. Various Illinois courts have ruled that once a protectable interest is established, it is presumed that irreparable injury follows if the interest is not protected.²⁵ As a result, this element is deemed satisfied where a plaintiff has shown a protectable interest – as your hypothetical client can do.

No adequate remedy at law. In order to be adequate, a remedy at law must be as clear, complete, practical, and efficient as the equitable remedy.²⁶ Of course, if a remedy at law were adequate, a plaintiff could simply wait until the end of a trial to obtain relief.

In your case, your client clearly has no adequate remedy at law because an entity's competitive position is intangible and incapable of being measured.²⁷ Indeed, the potential loss of customers, goodwill, and future profits is so variable that damages could not be assessed with any degree of accuracy.²⁸ Hence, your hypothetical client can easily satisfy this third element.

Probability of success on the merits.²⁹ In considering the fourth element, remember that a preliminary injunction

does not anticipate or depend upon the ultimate conclusion of the case. The

14. 735 ILCS 5/11-101 (emphasis added).

15. *Bettendorf-Stanford Bakery Equip Cov Intl Union of United Auto, Aerospace & Agr Implement Workers of America*, UAW: Local Union No. 1906 of United Auto Workers, 49 Ill App 3d 20, 24, 363 NE2d 867, 870 (5th D 1977) (finding that granting of TRO was improper in the absence of showing why informal notice could not have been given to defendants); *Streamwood Home Builders, Inc v Brolin*, 25 Ill App 2d 39, 47-48, 165 NE2d 531, 536 (1st D 1960) (concluding that due to threat of repeated harmful action within 24 hours, issuance of TRO without notice was proper); *Hill v Village of Pawnee*, 16 Ill App 3d 208, 209, 305 NE2d 740, 741 (4th D 1973) (determining court was in error in granting injunctive relief without notice).

16. *Buzz Barton & Assoc, Inc v Giannone*, 108 Ill 2d 373, 382, 483 NE2d 1271, 1275 (1985).

17. *Id.*

18. *Murges v Bowman*, 254 Ill App 3d 1071, 1081, 627 NE2d 330, 337 (1st D 1993); *Stanton* at 522, 532 NE2d at 466; *Houseknecht v Zagal*, 112 Ill App 3d 284, 291-92, 445 NE2d 402, 407 (1st D 1983).

19. *Save the Prairie Society v Greene Dev Group, Inc*, 323 Ill App 3d 862, 867, 752 NE2d 523, 528 (1st D 2001); *Prairie Eye Ctr, Ltd v Butler*, 305 Ill App 3d 442, 445, 713 NE2d 610, 613 (4th D 1999).

20. *Delta Med Systems v Mid-America Med System, Inc*, 331 Ill App 3d 777, 789-90, 772 NE2d 768, 779 (1st D 2002); *Kilhafner v Harshbarger*, 245 Ill App 3d 227, 229, 614 NE2d 897, 899 (3d D 1993).

21. *In re Marriage of Schmitt*, 321 Ill App 3d 360, 371, 747 NE2d 524, 533 (2d D 2001).

22. *Stanton* at 520, 532 NE2d at 465.

23. *Weber* at 219, 537 NE2d at 1028. However, restrictive covenants, such as the one at issue in the instant hypothetical, are only enforceable if it is reasonable and necessary to protect a legitimate business interest. *Office Mates 5, North Shore, Inc v Hazen*, 234 Ill App 3d 557, 568, 599 NE2d 1072, 1080 (1st D 1992).

24. *A-Tech Computer Services, Inc v Soo Hoo*, 254 Ill App 3d 392, 399, 627 NE2d 21, 26 (1st D 1994). Courts will deny injunctive relief when a party fails to prove the existence of an ascertainable right. See, e.g., *Liebert Corp v Mazur*, 357 Ill App 3d 265, _____, 827 NE2d 909, 924 (1st D 2005) (determining that no injunctive relief could issue where party seeking relief could not show that sales quotes and customer lists were trade secrets); *Sparks v Gray*, 334 Ill App 3d 390, 397, 777 NE2d 1026, 1032 (5th D 2002) (finding that injunctive relief was improper where plaintiff had no protectable interest).

25. *A-Tech* at 400, 627 NE2d at 26; *A.B. Dick Co v American Pro-Tech*, 159 Ill App 3d 786, 794, 514 NE2d 45, 49 (1st D 1987); *McRand, Inc v Van Beelen*, 138 Ill App 3d 1045, 1054, 486 NE2d 1306, 1313 (1st D 1985); *Morrison Metalweld Process Corp v Valent*, 97 Ill App 3d 373, 380, 422 NE2d 1034, 1039 (1st D 1981); see also *Sherman v Cryns*, 203 Ill 2d 264, 278, 786 NE2d 139, 150 (2003); *Village of Riverdale v Allied Waste Transp, Inc*, 334 Ill App 3d 224, 229, 777 NE2d 684, 688-89 (1st D 2002) (holding that when a party seeks injunctive relief expressly provided for by statute, a plaintiff is not required to plead or prove irreparable harm).

26. *A.B. Dick* at 794, 514 NE2d at 50 (concluding that plaintiff might never be able to ascertain extent of damages); *K.F.K. Corp v American Cont'l Homes, Inc*, 31 Ill App 3d 1017, 1021, 335 NE2d 156, 159 (2d D 1975) (determining no adequate remedy at law would exist); but see *Diamond* at 435, 526 NE2d at 375-76 (finding that rents are a fixed amount that is readily ascertainable, so plaintiff had an adequate remedy at law); *Wood River Township v Wood River Township Hosp*, 331 Ill App 3d 599, 606, 772 NE2d 308, 314 (5th D 2002) (concluding that taxpayers had right to file tax-objection claim and as such had an adequate remedy at law prohibiting injunctive relief).

27. *A-Tech* at 401, 627 NE2d at 27.

28. *Id.*

29. *Id.* But see *Schmitt* at 372, 747 NE2d at 534 (stating that where a preliminary injunction motion seeks to protect property that would be lost or dissipated, injunctive relief may be granted even if the movant's success on the merits is in serious doubt).

granting of a preliminary injunction means only that a sufficient cause has been presented to preserve the movant's rights until a final hearing on the merits.³⁰

Consequently, you are not required to prove your claim but only to present a "fair question" on the matter.³¹ Assuming your client can make a prima facie showing on its cause of action and no affirmative defenses clearly trump the party's claim, this element will likely be satisfied.

The additional element: balancing the hardships

Prior to ruling on a motion for a preliminary injunction (but not on a TRO motion), some courts consider a fifth factor. They determine whether the "balance of hardships" to the parties supports the granting of preliminary injunctive relief.³²

With respect to your hypothetical client, a court would likely weigh the harm suffered by your client's loss of long-standing clients against the ex-employee's right to freely contact potential customers on behalf of his new employer. In such a case, the court would most likely grant the preliminary injunction your client is seeking. Such a balancing of harms analysis is not appropriate when ruling on a TRO motion because that hearing is a summary proceeding at which no evidence other than the complaint should be considered.

Expedited discovery

Regardless of whether you prevail on your TRO motion, you or your opposing counsel may seek expedited discovery. Thus, it is wise to consider how quickly you

would like the preliminary injunction to occur even before you have a TRO ruling.

It is not unusual for a party to bring a proposed preliminary injunction scheduling order to the TRO hearing. You might even want to have your client begin gathering documents relevant to the preliminary injunction hearing as soon as you decide to seek a TRO. Trial judges commonly expect parties to answer interrogatories, exchange documents, take depositions, and begin presenting evidence at a preliminary injunction hearing, all within weeks after the court rules on a TRO motion.

The risks of seeking a TRO and preliminary injunction

A party seeking a TRO or preliminary injunction often must assume some risk if its motion is granted. The Code of Civil Procedure provides as follows:

The court in its discretion, may before entering a restraining order or a preliminary injunction, require the applicant to give bond in such sum, upon such condition and with such security as may be deemed proper by the court, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.³³

The Code also provides that where a TRO or preliminary injunction is dissolved prior to final disposition of the action, the party against whom the injunction was entered may seek damages from the court for an injurious injunction.³⁴ Thus, your client should be prepared to post, and possibly lose, a bond if a court wrongfully grants an injunction.³⁵

Conclusion

By way of a TRO and preliminary injunction, the judicial process contains a means by which your client can seek immediate relief when faced with an emergency. Indeed, parties can often obtain a TRO ruling a day or two after they concurrently file a verified complaint and an emergency motion for a TRO and preliminary injunction.

The TRO will normally last until a preliminary injunction hearing is held. At a preliminary injunction hearing, a party can obtain relief that will protect its interests until the conclusion of a trial. However, before embarking on the effort, you should be prepared to clear the hurdles to obtaining emergency relief. ■

30. See *Hough* at 688, 560 NE2d at 15; *Stocker Hinge* at 541-42, 447 NE2d at 291 (TRO should not be refused merely because the court may not be absolutely certain the plaintiff has the right he claims).

31. *Lo v Provena Covenant Med Ctr*, 342 Ill App 3d 975, 987, 796 NE2d 607, 617 (4th D 2003) (citing *Buzz Barton* at 382, 483 NE2d at 1275); but see *Geiger v Hinsdale Elem School D 181*, 349 Ill App 3d 243, 248, 810 NE2d 637, 642 (2d D 2004) (concluding that issuance of TRO was improper where student was unlikely to succeed on the merits); *American Fed of State, County, and Mun Employees, Council 31 v Ryan*, 332 Ill App 3d 965, 968, 773 NE2d 1196, 1198 (1st D 2002) (finding denial of TRO proper where plaintiffs failed to demonstrate both the existence of a protectable right and a likelihood of success on the merits).

32. *Keefe-Shea Joint Venture v City of Evanston*, 332 Ill App 3d 163, 169, 773 NE2d 1155, 1160 (1st D 2002); *Delta Med* at 788, 772 NE2d at 779; *Save the Prairie Society* at 871, 752 NE2d at 531-32 (determining that on balance plaintiff's interests stood in greater need of protection pending a decision on the merits); *Center for Sight of Cent Illinois I, SC v Deranian*, 305 Ill App 3d 909, 914, 712 NE2d 417, 421 (4th D 1999); *Hough* at 684, 560 NE2d at 13; *Charles P. Young Co v Leuser*, 137 Ill App 3d 1044, 1051-52, 485 NE2d 541, 546 (1st D 1985) (concluding that individuals not party to the action would be unfairly injured if the injunction issued).

33. 735 ILCS 5/11-103.

34. 735 ILCS 5/11-110.

35. See *Stocker Hinge* at 542-46, 447 NE2d at 291-293.

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Vol. 93 #10, October 2005.
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