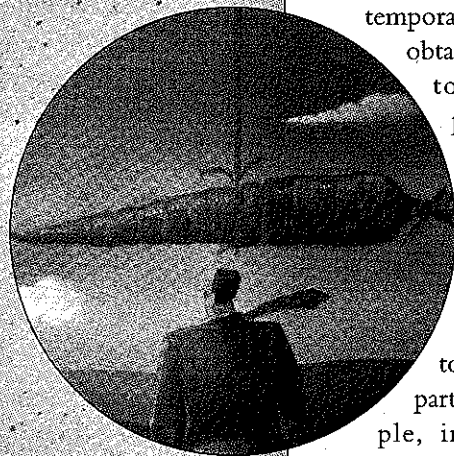


Sure AND Swift RELIEF

Tactical pretrial strategies for securing a TRO

BY JILL HERSH



Temporary restraining orders (TROs) are obtained to protect:

- ONE** A client's physical or emotional safety;
- TWO** The physical or emotional safety of a client's children;
- THREE** The marital estate; or
- FOUR** A client's economic stability.

TROs are obtained before the hearing on an ex-parte basis, with or without notice to the other side.

Assessment

In working with clients, we continually assess their immediate and long-term needs. When necessary, temporary restraining orders are obtained prior to a hearing to provide immediate protection of our client's physical, emotional, or economic well-being.

The types of TROs that should be obtained in each jurisdiction will vary according to the procedures of that particular venue. For example, in California, certain restraining orders automatically go into effect upon filing of the summons that goes with the petition for dissolution or legal separation. Those restraining orders remain in effect throughout the proceeding and enjoin dissipation of assets, alterations of any insurance, and flight with the children. Therefore, unless you need the TRO to be more limiting or specific, none is necessary for those purposes in jurisdictions that have automatic TROs. In all other jurisdictions, TROs must be considered.

In an emergency situation, counsel's first task is to determine what TRO is needed. Is there imminent danger justifying an immediate order for any of the following?

ONE Protection of the client's emotional or physical safety:

- General prohibition on contact and a range of abusive behavior;
- Exclusion of the other party from the family residence;
- Prohibition on coming within a certain distance of your client at home and at work; or
- Registering a restraining order with the local police department.

TWO Protection of the emotional or physical safety of the client's children:

- Interim exclusive custody order;
- Prohibition on violence or verbal abuse to or in the presence of the children;
- Prohibition on coming within a certain distance of the children at school, work, or day-care;
- Prohibition on taking the children to any specified place or out of a particular geographical area;
- Prohibition against interfering with a particular schedule or activity of the children's;
- Exclusion from the family residence;
- Registering a restraining order with the local police department.

THREE Protection of the marital estate:

- Prohibition on using certain accounts;
- Prohibition on spending assets,

whether alleged to be marital or separate, except for the necessities of life;

- Notification prior to any business transaction involving marital assets or liabilities;
- Prohibition on borrowing against any marital or separate assets;
- Changing insurance policies, including beneficiary designations;
- Changing beneficiary designations on any financial accounts, including retirement or deferred income accounts;
- Changing an asset's title from one party's name to joint ownership.

FOUR Protection of your client's economic stability:

- Prohibition on withholding payments on certain accounts or for rent, mortgage, or insurance;
- Prohibition on changing any automatic deposit procedures that provide funds for the family's support.

The nature of restraining orders is limited only by your client's need and what the law allows.

Unlike some other jurisdictions, California has standard language for physical restraints, which is two-pronged. First, it prevents threatening behavior by stating the following:

Respondent shall not contact, molest, attack, strike, threaten, sexually or otherwise assault, batter, telephone, stalk, or otherwise disturb the peace of the other party.

Second, the standard language prevents any contact by stating the following:

Respondent must stay at least 100 yards away from the other party and the following places: Petitioner's residence (address optional), Petitioner's place of work (address optional), the children's school (address optional), other....

Both provisions should be considered in any instance of psychological or physical danger. In cases in which visitation of minors will continue,

added language could read:

Respondent may make contact relating to pickup and delivery of children pursuant to a court order for visitation or by stipulation of the parties arrived at during mediation.

Keep in mind that in some states, TROs are only interim relief. In those states, a request for relief must withstand scrutiny at a hearing to determine if temporary relief should be continued long-term. Nevertheless, temporary restraining orders are immediate and effective.

A TRO can immediately alleviate worry and restore some feeling of power to the victim or potential victim. For example, service of an appropriate order on a minor's school can effectively empower the school to refuse the release of a child to a restrained parent. Such an order might read:

Defendant/Respondent John Doe is restrained from coming within 100 yards of the minor, Kathy Smith, at her residence, day-care, or school.

or

Defendant/Respondent John Doe is restrained from contacting, corresponding with, or otherwise having any communication with the minor child at her home, day-care, or school. He may not remove the child from school or day-care for any reason. He may not be provided with any information regarding the child or anyone related to or providing any care of the child.

Of course, when the restraining order seeks to control the actions of a third party, such as a school, it may be wise to join the school as a claimant so that the court can directly control the conduct of the school. This will depend on the jurisdiction and the willingness of the school to enforce TROs.

The procedure for obtaining a TRO will vary by jurisdiction. After assessing your client's needs, deter-

mine the procedure necessary to obtain the required relief. Refer to local statutes and court rules for guidance. In addition, telephone the clerks of judges who administer the TRO relief for other invaluable information and assistance.

It is vital to know what options exist for bringing the restraining order before the court. Find out:

- Which court will hear the request for temporary relief;
- Whether the same court will hear the follow-up request for permanent relief;
- Whether the matter must be listed on a particular calendar;
- On which days and at what times that calendar is heard;
- Whether the court requires speaking motions or prefers arguments based on offers of proof; and
- Whether a time limit on the hearing will constrain the presentation of certain evidence.

In California, the Domestic Violence Prevention Act makes the family law court available to anyone who has a family, has cohabited, or has a prior dating relationship. The same restraints on personal conduct that are available to divorcing parties are available to these parties. However, the parties need not be married or seeking a divorce to avail themselves of this relief.

Unmarried couples

In California, same-sex couples, married couples, and siblings may use the same system of pleadings to obtain protection from the courts. If restraints on property are needed, options for relief through the family court are more limited. Restraining orders through a dissolution process may be the only available route. For unmarried people seeking property restraints, the most likely venue may well be the civil courts and property restraints that issue in conjunction with civil actions regarding property.

By definition, ex-parte TROs are obtained prior to a hearing. Some

PRACTICE POINTERS

With regard to physical restraining orders, as a judge pro tempore preparing for hearings on the civil domestic violence calendar, I am persuaded by **corroborating evidence** such as police reports, hospital records, and photographs. However, mere allegations that can be supported by such evidence will probably be sufficient to obtain the TRO. It is at the full hearing, when the defendant/respondent may appear and contest the allegations, that corroborating evidence will be most important in obtaining permanent relief.

In other words, an ex-parte application has no opposing evidence, so allegations alone may seem more persuasive. A full hearing may be an adversary proceeding, requiring more persuasive or corroborating evidence to verify the party's position and prove the court has sufficient basis for its ruling.

In one of my cases, the threat of an offshore transfer required an immediate ex-parte temporary restraining order to freeze depository accounts containing many millions of dollars. I did not know what to expect of the court because there was little history of granting a TRO of this magnitude, and the fact situation was unusual. To maximize our chances, I evaluated the minimum relief acceptable and the maximum relief desirable. We presented **alternative restraining orders** to the judge to increase our chances of obtaining at least one of the proposed temporary restraining orders.

In fact, the court selected the least limiting temporary restraining order and inserted even more expansive language, although it is questionable whether the order would have been enforceable across the full breadth of its intended scope.

An excerpt from the client's declaration is available on the *Family Advocate* web page as is language from the alternative restraining orders presented for signature. (See <http://www.abanet.org/family/advocate/latest/>.)

We presented restraining orders preventing movement of assets from California, the United States, and without limitation to any geographical area. Sua sponte, the court added "anywhere in the world" to the physical location of assets that could not be moved, thus theoretically freezing assets beyond our request and reach. The court's version is also available as a proposed alternative order (see web page).

When a **financial institution must be served** with a copy of the restraining order, be sure you know where and who to serve. (Note that those individuals are identified on the sample orders also on the web page.)

courts will require an appearance before the issuing judge, whereas others will hear the ex-parte request in chambers. Still others will hear the request in open court. Some courts will not allow any appearance and will require that papers be

submitted and retrieved. Again, consult local customs, rules of court, and court personnel.

All courts probably will require notice to the other side of an application for ex-parte relief. The required notice will vary by court.

Even in California, one county may have a four-hour notice rule, whereas another will require 24-hours' notice.

The notice requirement also may vary according to the stage of the proceeding. For example, notice may be unnecessary if there has been no service of process, the TRO is obtained in conjunction with the initial filing of a dissolution, no contact has been made with the opposing party, or there is no knowledge of opposing party's counsel.

All courts make exceptions when notification could trigger the type of conduct that the TRO seeks to restrain.

Drafting the pleadings

After determining the procedure and notice requirements, it is time to draft the pleadings. At least two declarations are necessary: The primary declaration, your client's, and the second declaration, yours. Additional declarations may be helpful as long as they do not delay the TRO.

The client's declaration will contain facts that justify the requested relief. Depending on the relief, different burdens will exist. For example, in California, it is easier to obtain a TRO on conduct in general than to exclude the other party from the family residence pending a hearing. Refer to current law and customs to determine the degree of showing necessary for your application to be granted.

Under any circumstances, your client must declare facts to support the claim that protection must be afforded prior to any hearing on the requested relief. If your client is reporting instances of child abuse or neglect, consider whether to report the abuse to child protective services, and by whom. Be sure of your client's version of the facts before advising him or her to make a report or have another witness make a report. Aside from being improper, a

false report will have serious repercussions for your client.

Whether you should provide corroborating evidence in addition to your client's declarations or affidavits depends largely on the timing of the application and the relief requested. From a tactical point of view, it may be better to proceed to the TRO with available evidence and provide additional evidence at the time of the full hearing. However, before electing to leave additional evidence out of your initial pleadings, be sure that it is not needed to obtain the TRO and that the evidence ultimately will be heard and in admissible form.

When your client has been battered, seek immediate relief. Although Emergency Protective Orders (EPOs) obtained by the police will not be addressed in this article, practitioners should know whether an EPO has been granted and its duration and circumstances. Submit a copy of it to the court as soon as possible.

Obtain photographs of injuries, hospital or doctor's records, and police reports. Do not unduly delay the relief by waiting for demonstrative evidence that is not readily available. If you are sure it will be forthcoming, indicate its future availability in the pleadings. If this type of direct evidence is not available at the time of the TRO, it usually will be reviewed by a judge at the hearing.

Declarations by a percipient witness also will be helpful. Consult local evidentiary and pleading rules regarding admissibility of declared hearsay or arguments based on such offers of proof, as an objection may be overcome if the witness is available to testify.

If a client reports the other parent's threat to harm or abduct the children, seek immediate relief. The fastest available evidence is your client's declaration. Although desirable, corroborating declarations of witnesses may delay the process and

jeopardize the children. Therefore, obtain additional declarations for presentation or submission on a supplemental basis before the bilateral hearing.

Use of assets

With regard to restraints on the use of assets or a change of insurance, a different showing will be needed. In addition to evidence that the other party may harm the estate or the status quo, show how your client has attempted to prevent harm and why those actions are not sufficient. For example, if you are seeking to freeze a particular account, describe the account, whose name or names are on it, and whether the bank has been contacted and has declined to freeze or change the account to prevent its invasion. A pattern of one party's unilateral decisions about money also may be relevant.

Also helpful would be a declaration of an account manager or banker personally familiar with (1) the other party's attempts to access or change an account, or (2) the policy precluding a freeze in the absence of a court order. However, such a person may hesitate to provide the information because it could alienate business.

Your declaration will be necessary to establish that notice requirements have been met in scheduling and obtaining the ex-parte TRO. For example, if notice were given, the date and time of notice and to whom should be averred. On the other hand, if notice were not given but should have been under ordinary circumstances, you will need to allege the facts justifying failure to give notice and cite any local rule or statute that excuses notice under the circumstances.

Your declaration may be needed on the issue of attorney's fees. Consult local rules and statutes to determine what you must allege to support a request for attorney's fees.

Whether you will need a memo-

randum of points and authorities will depend on how unusual the relief being sought is or whether you believe the court will need reassurance of its power. We submitted points and authorities to the court along with the declarations. We attempted to anticipate any questions the court might have about its authority to restrain assets of this magnitude at inception of the dissolution by ex-parte application.

The pleadings also attempted to explain the gravity of consequences that would flow from a lack of restraint on the accounts and the inability, through any other means, to secure the accounts for later adjudication.

After determining the type of relief, required procedures, and justifying facts, a decision must be made regarding the timing of service and the related motion or order to show cause establishing the date of the bilateral hearing. Decide whether you want an order shortening time so that service need not precede the motion by, e.g., two weeks. For example, in California, restraints on physical conduct are frequently granted when locating the other party for service is difficult. Therefore, the time between service and hearing is shortened to make more time available for finding and serving the opposing party.

Consult local rules and statutes governing service procedures prior to the hearing to find out whether the court will require a bilateral hearing within a fixed time after entry of a TRO.

Temporary restraining orders are a swift and effective means of protecting your client in a wide range of circumstances. A clear understanding of all procedural requirements and potential pitfalls will expedite a successful request that affords immediate relief. ■

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