

PREPARATION AND READINESS FOR A TRO MOTION

Kevin B. Duff*
Marion B. Adler

In cases involving motions for temporary restraining orders or similar expedited relief, preparation and being proactive are especially important. In many such cases, especially those involving disputes among competitors – *e.g.*, to enjoin a competitor to rename its business or product because of trademark infringement, to prevent a departing employee from starting up or joining a competitive business, or to prevent a customer from entering into a procurement contract with the competitor – if the plaintiff wins the TRO motion, it has a tremendous strategic advantage, and will often be able to force an advantageous settlement shortly thereafter. So too, the defendant that can defeat a TRO or preliminary injunction may find that in “winning the battle,” it has “won the war,” as the plaintiff may have only planned to finance the litigation through that preliminary stage.

The nature of TRO litigation limits the amount of preparation and planning you can do to improve your position and win your case. While business goals that have a long-term focus may remain in the context of emergency litigation, the actions and strategy of TRO litigation require immediate focus and implementation. Controlling the momentum of the case and winning the early battles often have a significant impact on the results in TRO cases. Considering in advance how you will react and how you will handle your next business emergency may be the difference that enables you to seize the momentum, gain the upper hand, and win your next TRO matter.

Plaintiff

The overall goal of the plaintiff initiating a motion for a temporary restraining order or similar type of expedited proceeding is to be ready to hit the ground running. The entire game plan should be thought through in advance, with all reasonable contingencies anticipated before suit is filed so that the plaintiff can pursue a blitzkrieg attack before the defendant has a chance to adequately react.

At the outset, the plaintiff should simultaneously file and serve all relevant papers, which typically include:

* Kevin B. Duff and Marion B. Adler are both partners in the commercial litigation law firm of Rachlis Durham Duff & Adler, 542 South Dearborn Street, Suite 1310, Chicago, Illinois 60605; telephone: 312-733-3950; e-mail: kduff@rddl原因.net and madler@rddl原因.net.

This paper was presented in a slightly different form at the PriceWaterhouse Coopers General Counsels' Forum, held in June 2001 in Chicago, Illinois.

©JUNE 2001. ALL RIGHTS RESERVED.

- Verified Complaint, with Summons for each defendant
- Motion for TRO
- Memorandum and Supporting Affidavits (or Declarations) to TRO Motion
- Draft TRO (in some jurisdictions this should be prepared but not filed)
- Motion for Leave to Take Expedited Discovery
- Discovery Requests relevant to Preliminary Injunction Motion
- All necessary appearance forms and filing fees

Meeting the Standard: Before even filing the motion for TRO, the first step of course is considering whether the plaintiff can meet the heavy standard applied to such motions. Although different courts express the standard in slightly different ways, the basic elements that the plaintiff must establish on the motion are that the plaintiff:

- has a clearly ascertainable right that needs protection;
- will suffer irreparable harm if injunctive relief is not granted;
- has inadequate remedies at law;
- is likely to succeed on the merits; and
- the balance of hardships weighs in the plaintiff's favor.¹

Naming Defendants: In a case where the identity of all of the defendants is not known, it may be necessary to name John Does in the caption of the complaint, submit a John Doe affidavit, and attempt service by publication. 735 ILCS 5/2-206 & 2-413. Where there may be a question regarding whether service will have been achieved by the time of the first appearance before the court, it is advisable for counsel to prepare an affidavit regarding the nature of and efforts to provide notice. On the other hand, unless such John Doe defendants are “necessary parties,” you should consider filing the complaint without them, so that the TRO proceedings can move forward without delays as to notice and service. There is almost always an opportunity to amend the complaint and add those defendants later. To the extent that the John Doe defendants are in privity with or “active concert or participation” with the named defendants, they will be prohibited from engaging in any conduct that is covered by the TRO, provided they receive notice of the order.² It may be wise to obtain the TRO first and then worry about getting notice to them later.

¹See *Kanter & Eisenberg v. Madison Assocs.*, 116 Ill. 2d 506, 510, 508 N.E.2d 1053, 1055 (1987); *Tierney v. Village of Schaumburg*, 182 Ill. App. 3d 1055, 1059-60, 538 N.E.2d 904, 907 (1st Dist. 1989). *Accord Stocker Hinge Mfg. Co. v. Darnel Indus.*, 94 Ill. 2d 535, 541-42, 447 N.E.2d 288, 291 (1983) (“Temporary restraining orders are appropriate whenever necessary to preserve the status quo pending a preliminary injunction or a full hearing on the merits.”).

²See, e.g., *Lindland v. United States of America Wrestling Ass’n*, 227 F.3d 1000, 1006-07 (7th Cir. 2000) (affirming order enjoining non-party US Olympic Committee from circumventing injunction issued against the defendant) (the authors were both counsel to the plaintiff-appellee in this matter).

Selecting the Spokesperson Witness: One of the most important decisions the plaintiff must make is determining who to use as the spokesperson for the merits of your case. This person will execute the affidavit or declaration supporting the motion for TRO and will be the chief witness at any evidentiary hearings during the expedited proceedings. It is essential that this person be knowledgeable, reliable, credible and convincing. This person will typically work most closely with your lawyers to educate them in the early stages of the case and will become the person who sits at counsel's table in the courtroom to provide support to counsel, to humanize the plaintiff (or defendant, as these considerations are equally applicable to both sides), and to be available to take the witness stand when needed.

Agreed TROs: If you are the plaintiff, from the first contact with your adversary you should consider the possibility that your adversary may be willing to enter into an agreed TRO. Some defendants, particularly those that either are caught off guard by the expedited proceedings or lack the resources to fight at full force, may be willing to consider such an arrangement. The beauty of an agreed TRO, from a plaintiff's perspective, is that an agreed TRO is not appealable unless its terms provide otherwise.

Expedited Discovery: If at all possible, the written discovery requests should be prepared and attached to the motion for expedited discovery. Not only will this help you to demonstrate to the court the need for discovery, if the motion is granted, it will be harder for the defendant to later argue that the discovery that was served was improper, unduly burdensome, or cannot be answered in such a short time frame. In an expedited proceeding, requests for production and depositions are typically the most useful discovery tools. Interrogatories are useful for learning information such as identities of witnesses, but usually will not discover more substantive information that can more effectively be gathered through depositions. In drafting the discovery, remember that, if you are seeking to require expedited discovery, you should be selective in the discovery that you seek, and only request that which is needed for the preliminary injunction phase of the litigation.

Timing and Logistics: The motion for a TRO should usually be filed at the earliest date possible. The nature of the relief sought presupposes the need to get into court as quickly as possible and obtain immediate relief. If the plaintiff can be criticized for not acting quickly enough, a defendant may be able to defeat the motion for TRO by asserting a laches or similar defense, *i.e.*, that the plaintiff slept on its rights and if a TRO was necessary the plaintiff would have acted more quickly. On the other hand, unless the activity to be restrained is of such an extraordinary magnitude that waiting even a few days is too long, the plaintiff should try to avoid filing for a TRO on a Thursday afternoon or Friday, as there is some risk that the motion then will not be heard until the following week, giving the defendant the benefit of the weekend to prepare – unless the court is one that is likely to hear a motion only hours after it is filed or the threatened activity so severe that an emergency hearing over the weekend is possible.

Knowing the Court's Practices is Critical: Plaintiff's counsel needs to understand the procedures and practices of the Court. How are cases assigned to particular judges and how do litigants get emergency motions scheduled before that judge? What is the likelihood that the court will hear the motion on the day it is filed, or wait until the next day? Typically a young lawyer should accompany the

docket clerk when the filing is made, so that the lawyer can speak directly to the judge's clerk, without delay, once the judicial assignment is made to ensure that the motion is set for hearing as soon as possible. As in many things in life, a face-to-face communication early on can be an important stepping stone to getting off on the right foot. This is especially true in large court systems, like the Circuit Court of Cook County or the Northern District of Illinois, where the individual lawyers may not be known to many of the judges and their clerks. In a court system in a small city or rural area, where local counsel is well known to the court staff, telephone communication might suffice.

Giving Notice and Ex Parte TROs: In most situations, the plaintiff should strive to give notice to the defendant, rather than going in on an ex parte TRO motion even where under the applicable rules an ex parte motion would be permitted. Under both the federal and Illinois procedures, an ex parte TRO cannot be issued for a period of more than 10 days. See Fed. R. Civ. Pro. 65(b); 735 ILCS 5/11-101.³ So, if an ex parte TRO is issued, the plaintiff will find itself back in court within 10 days, seeking to extend the TRO and essentially having to reargue its merits in the face of an opponent who has had a week or more to prepare for the hearing. The plaintiff is far better off initially giving the defendant notice of a few hours before presenting the TRO. The defendant will have had only minimal time to prepare for the hearing, and the TRO will typically be issued for the period through when the preliminary injunction motion is scheduled. The defendant still can move to dissolve the TRO, after it was issued, but this puts the burden on the defendant both to prepare the papers and persuade the court that it erred in its initial ruling.

Bond: If the TRO is entered, the plaintiff is typically going to be required to post a bond as security for any damage to the defendant should it be determined that the TRO was improvidently granted. Under the federal rules, the court must require security "in such sum as the court deems proper, 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." Fed. R. Civ. Pro. 65(c). In practice, the Seventh Circuit has instructed the District Courts to err on the side of requiring a higher bond than is needed. Under the Illinois state rule, the court "*in its discretion*" may require a bond. The plaintiff therefore needs to be prepared to present to the court a cogent valuation of what those damages would be. The plaintiff also needs to be prepared from a logistical standpoint of having lined up an insurance or bonding company to issue the bond promptly. Typically the TRO does not take effect until the bond has been posted with the court.

Choice of Forum: As in any case where a party is the plaintiff, care should be taken to file in a court that has jurisdiction over the subject matter and persons, and, where there are multiple available forums, to select the one that is likely to be most advantageous. Considerations that should weigh into choice of forum:

³ It is a not uncommon misperception that a TRO cannot exceed 10 days regardless of whether notice was given to the defendant. This is a misreading of both the federal and Illinois procedure.

- Jurisdictional issues are thresholds that must be crossed before any other ruling on the merits. If a challenge to jurisdiction is raised, the court as a technical matter must resolve it before addressing the TRO motion. Therefore, if there is any likelihood that the defendant can raise a meritorious jurisdictional challenge, or one that has sufficient facial plausibility to derail prompt consideration of the TRO motion, efforts should be used to select a different forum where jurisdiction would not be at issue so as to avoid delay in presenting the TRO motion.
- On the other hand, if you anticipate a jurisdictional challenge for which there is a valid and fairly simple response, proceed in the court of choice but be prepared to meet and head off the jurisdictional issue. For example, in a contractual dispute with an out-of-state party, where the contract has a choice of forum/ consent to jurisdiction clause, anticipate and point that out in a footnote in the TRO brief, citing to relevant local authority as to the presumed validity and enforceability of such clauses.⁴
- If there is a choice available between a state or federal forum, consider the risks that, if the plaintiff files in state court, the defendant may immediately seek to remove to federal court, thereby delaying the consideration of the TRO motion. Or, if the TRO has already issued by the state court judge, the defendant may be able to get a federal judge to reconsider and dissolve the TRO. Recall, however, that for cases arising in diversity jurisdiction, a defendant may not remove to federal court if the defendant is a citizen of the state in which suit was filed. 28 U.S.C. § 1441 (b). In addition, John Doe parties cannot be named in a federal diversity action because the inability to determine their citizenship destroys diversity. *E.g., Home Savings of America v. American Nat'l Bank & Trust*, 762 F. Supp. 240, 241 (N.D. Ill. 1991).
- Assuming jurisdiction in multiple locales, consider the relative physical proximity of the plaintiff and defendant to the courthouse. Not only do the usual assumptions about home town advantage apply, there are special considerations when a dispute arises on an expedited basis. If jurisdiction exists in a locale far from the defendant's home-base, the inconveniences, expense, and delays in securing defense counsel on short notice admitted in that jurisdiction can be of considerable strategic importance.

⁴*See, e.g., Yamada Corp. v. Yasuda Fire & Marine Ins. Co.*, 305 Ill. App. 3d 362, 367, 712 N.E.2d 926, 930 (2d Dist. 1999) (“A forum-selection clause in a contract is prima facie valid and should be enforced unless the opposing party shows the enforcement would contravene the strong public policy of the state in which the case is brought.”).

- If there are multiple jurisdictions whose law might be deemed to apply, some of which are more favorable than others, try to file suit in the jurisdiction with the most favorable law.⁵ As a practical matter, courts tend to favor the law of the forum regardless of what the formal choice-of-law rules dictate. Because of the plasticity of choice-of-law jurisprudence, the court usually has a fair amount of discretion in which jurisdiction's substantive law to apply in the absence of a contractual choice-of-law provision. Especially in state court, judges are most likely to select the law of their own state. This is less true of federal courts.

Standards for Issuance of TRO: It is also important that the plaintiff be familiar with the differing standard for issuance of the TRO and the type of proof that will be admitted. On a motion for a TRO, all material facts typically must be supported by "evidence," which takes the form of a verified complaint, and supporting affidavits or declarations, accompanied by authenticated exhibits. Ordinarily, during the TRO hearing, the defendant is not allowed to contradict any evidence offered by the plaintiff, and the court is not likely to resolve any issues of fact that are so supported by the plaintiff. Accordingly, the court usually does not hear oral testimony during the TRO hearing. Nonetheless, it may be wise to have a knowledgeable witness on behalf of the plaintiff present during the hearing – to respond to and offer evidence on any issue that might have been overlooked in the written papers, and simply to convey to the court that the plaintiff takes the motion quite seriously. At the preliminary injunction stage, the court will hear evidence on contested, material issues, and weigh that evidence in deciding whether to issue the injunction.

Defendant

As the potential target of a motion for TRO or similar expedited proceeding, the main goal of the defendant is to anticipate the actions that the plaintiff is likely to take and be ready to respond to or preempt them. A corollary to this is to be tenacious about swinging momentum to the defendant.

⁵ For example, different states may be more or less inclined to enforce contractual restrictive covenant agreements, with California, for example, a locale that is particularly hostile to such agreements. An employer that is located in a state more receptive to such agreements, like Illinois, would be well-advised to sue in Illinois even where the former employee is located in California. The wise employer will have, in advance, already inserted into the employment contract provisions for the employee's consent to jurisdiction in Illinois and a choice-of-law provision that Illinois law applies so as to avoid a dispute as to jurisdiction or choice-of-law. In the absence of such a contractual consent to jurisdiction, there are risks that personal jurisdiction will be lacking in the employer's home state, even where the employee traveled to the state in negotiating employment. *See Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 554 N.E.2d 671 (1st Dist. 1990) (even where employees had traveled to Illinois as part of their negotiations of their employment contracts, Illinois court lacked minimum contacts, and hence personal jurisdiction, over dispute to enforce restrictive covenants where the covenants had not been the subject of any of the negotiation within Illinois).

Preemptive Suits: In this latter regard, the maxim that the “best defense is a good offense” may apply. If the plaintiff has sent a “cease and desist” letter or otherwise signaled a serious intent to pursue litigation, the targeted defendant may conclude that it is wise to file a preemptive declaratory judgment action first, especially if the plaintiff’s presumed choice of forum could work a serious disadvantage to the defendant. (See above, page 5.) But, even where choice of forum is not an issue, the targeted defendant that instead files a preemptive declaratory judgment action may shift the strategic advantage. By filing its papers first, the targeted defendant is able to frame the issues for the court in terms that are to the “defendant’s” advantage, and have a greater influence on the timing and context in which the dispute proceeds.

When filing a preemptive suit, however, the declaratory plaintiff must be prepared to anticipate and defend against the argument that the suit is not ripe for litigation.⁶ Of course, the party who makes such an ripeness argument, to fend off the declaratory suit, may find it awkward to almost immediately thereafter initiate suit for a TRO where it must argue an imminent risk of irreparable injury warranting imposition of injunctive relief. Another advantage of filing a preemptive suit is that, depending upon the skills of the court as a mediator, the targeted defendant that instead initiates a declaratory action may be able to enlist the court to assist in an early settlement of the dispute when negotiations among the parties are not progressing satisfactorily.⁷

Preparing in Advance of the Suit: Even when a preemptive suit is not filed, the targeted defendant needs to be proactive in anticipating and preparing for litigation. Outside counsel should be enlisted and educated early. Draft papers in opposition to the suit should be prepared in advance, as should the requests for expedited discovery needed to defend against the preliminary injunction phase.

⁶ See, e.g., *BP Chemicals Ltd. v. Union Carbide Corp.*, 4 F.3d 975, 978 (Fed. Cir. 1993) (a declaratory judgment action concerning a patent is only ripe where there has been “(1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity”).

⁷ One disadvantage that may arise from filing a preemptive suit relates to defending claims for which there is insurance coverage. Where a policyholder initiates a preemptive declaratory suit that is defensive in nature, it is not unusual for the insurer to disclaim coverage for the litigation expense, on the grounds that the policy contains a “duty to defend” suits and the declaratory suit is being prosecuted by the policyholder, not “defended.” Some courts have recognized, however, that where the suit is defensive in nature, the policy’s “defense” obligation is nonetheless triggered. See *Potomac Elec. Pwr. Co. v. Calif. Union Ins. Co.*, 777 F. Supp. 980, 984 (D.D.C. 1991) (if expenses incurred in preemptive declaratory judgment action were reasonably related to defense of covered claim, then legal fees with respect to that declaratory action should be reimbursed by insurers who owed duty to defend).

Briefs Opposing the TRO Motion: Although the court may be required to accept all of the plaintiff's evidentiary submissions as true for purposes of resolving the TRO motion, it is far from a foregone conclusion that the TRO will issue. In weighing the issues of likelihood of success on the merits, irreparable injury, the availability of an adequate remedy at law, and the balance of hardships, there are issues of law and precedent that may assist the defendant in defeating the motion, for which written briefing to the court may be essential. For example, in a case that one of the authors defended, the plaintiff argued that the parties had entered into an oral modification of an integrated, written agreement and that, under the terms of that oral modification, the plaintiff had a likelihood of success on the merits; what the plaintiff overlooked was that the contract had an explicit choice-of-law provision for the application of New York law, which is particularly hostile to oral modifications to integrated, written agreements. By briefing the Illinois court on that choice of law provision and the applicable New York law -- which was an issue that one could not expect an Illinois state court judge to otherwise know -- the author was able to persuade the court that the plaintiff had absolutely no likelihood of success on the merits regardless of the evidence submitted on the purported oral modification, resulting in a defeat of the motion.⁸

Whether to Agree to TRO: One issue that the defendant must always consider is whether to agree to the TRO, as the court will often pressure the defendant to do so -- thereby obviating any risk to the court that it will be overturned on appeal. As a general rule, the defendant should hesitate to agree to entry of a TRO. There may be circumstances in which an agreed TRO might make sense, however. In a case that one of the authors handled, the defendant entered into an agreed TRO that provided that the restrained activity could be resumed unilaterally by the defendant on two business days' notice to the plaintiff. This had the advantage of still giving the defendant the opportunity, on relatively short notice, to move toward consummating the restrained transaction, stealing the momentum from the plaintiff, and shifting the court's focus to the issue that the defendant wanted to push, which was that the plaintiff lacked standing to pursue the suit. Especially if the entry of a TRO is virtually inevitable -- as it often is given the limited ability that a defendant has to challenge the factual assumptions of the motion -- the defendant may want to agree to the motion, so as to be in a position to negotiate more limited restraints, and to condition its agreement with a request to the court that the preliminary injunction hearing be conducted as soon as possible.

In another case prosecuted by the authors, the defendant agreed to the TRO and then found itself hamstrung when it subsequently realized that it could neither appeal the TRO nor continue with its competing business during the pendency of the TRO. This situation was a driving factor in the subsequent settlement of the dispute.

⁸ In this example, the briefing and victory only occurred at the preliminary injunction phase. The defendant and defense counsel only had 45 minutes advance notice of the TRO motion, which the court granted.

Bond: Even where, under the applicable standards and the tendency of courts to grant TRO motions, the defendant is likely to be unable to defeat the motion, advance planning should at a minimum focus on the amount of bond that will be sought. A surprising number of defense counsel are so focused on defeating the motion for TRO that, when it does issue, they completely forget to seek a bond or are so ill-prepared for the court's inquiry that defense counsel merely offers a weak, unsupported proposal without evidentiary support. The defendant is generally better situated than the plaintiff to provide the court with relevant information as to what damages it will sustain if the TRO proves to have been improvidently granted. By preparing an affidavit or declaration in support of a significant bond, and bringing a witness to the hearing who can amplify on those concerns, the defendant can maximize the probability that the court will require a bond that is sufficiently significant to protect the defendant. Depending upon the financial state of the plaintiff, the imposition of a sizable bond may impede the plaintiff's interest in pursuing the matter. Even for the plaintiff who has the financial wherewithal to post the bond, if the plaintiff is forced to give a sizable portion of its assets as security to the bonding company, that may impel the plaintiff to seek an early and more modest negotiated resolution of the dispute. Given existing precedent, defendants in the Seventh Circuit should be able to secure a bond that is more than adequate.⁹

Derailing the TRO motion: As suggested above, the defendant should always be considering strategic steps that can steal the momentum from the plaintiff. The first is carefully scrutinizing the papers filed by the plaintiff to determine if they comply with the procedural requirements of the court in which they were filed. Requiring the plaintiff to go back and correct its papers may buy you time and may affect the impression the court has of the plaintiff (be mindful of your judge and whether the defect is insubstantial, however, as this strategy could backfire). Nevertheless, ask some basic questions, like whether the plaintiff sued the correct entity or failed to join a necessary and indispensable party, whether the plaintiff has sued in the right court, whether the court has jurisdiction over the matter and the parties, or if the dispute is ripe and the plaintiff has standing. Also consider pleading defects that could be the subject of a motion to dismiss. Diverting the court's attention and the energies of your adversary to such a motion, could be just the move to give you the upper hand in the case.

Expedited Discovery: If there is a motion for expedited discovery or to require an expedited response to the complaint, defeat it or extend it for as long as possible. Defeating the plaintiff's effort to obtain expedited discovery can have many benefits, not the least of which is setting the foundation for one of the defendant's most important arguments – if the plaintiff cannot show a need for expedited discovery, then there is also likely no need for a TRO.

⁹ Because the federal courts have less discretion than Illinois state courts in the amount of bond that they require and are required to make sure the bond is sufficient security, a defendant who desires to require a large bond may prefer to be in federal court. *See, e.g., Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir.) (“When setting the amount of security, district courts should err on the high side.”), *cert. denied*, 121 S. Ct. 276 (2000).

Lightning Appeals and Stays

In cases involving TROs, the pace may actually be faster at the appellate level. If you considering an appeal of the entry or denial of a TRO, think fast because you may have to act faster than you may suppose to preserve your appeal. In Illinois, an appellant only has *two days* to file a notice of an appeal of the entry or denial of a TRO, along with a petition stating the relief sought and grounds therefor, a memorandum of law in support of the petition, and the supporting record for the appeal! See Ill. S. Ct. Rule 307(d); *Friedman v. Thorson*, 707 N.E.2d 624 (1999); *Harper v. Missouri Pac. R.R. Co.*, 264 Ill. App. 3d 238, 636 N.E.2d 1192, 1196 (1994). By contrast, an appellant has 30 days to appeal the entry or denial of an injunction.

Where a TRO has been entered on an ex parte basis, and the defendant, having subsequently received notice of the TRO, moves to dissolve or modify the TRO, the defendant should nevertheless be prepared to file a notice of appeal within the time prescribed by applicable rule (*i.e.*, two days in Illinois) of the entry of the ex parte TRO. In the event that the trial court denies or fails to consider such a subsequent motion, the jurisdictional requirement of filing the notice of appeal within a certain time frame will not change. *E.g.*, *Harper*, 636 N.E.2d at 1198. In Illinois, a defendant that has been served with an ex parte TRO will have two days from the date of service to file an appeal. *Id.* at 1199.

There are also practical reasons why it may be necessary to move with lightning speed on appeal. For instance, if a TRO was sought but denied at the trial court in order to prevent some imminent action, e.g., scrambling or dissipation of assets, once the trial court denies the TRO, you face the prospect of your adversary taking an irreversible step that could moot the appeal. In such a case, it may be necessary to have a notice of appeal and a motion to preserve the status quo pending appeal prepared and ready to be filed so that, in the event the trial court denies the TRO, you can have the notice of appeal and motion to preserve the status quo filed and served on your adversary within minutes of the denial of the TRO. In a case where a TRO was sought to prevent a corporate acquisition and scrambling of assets from going forward in which one of the authors was involved, the lawyers for the plaintiff raced to file a notice of appeal and a motion to stay in the appellate court, while the lawyers for the defendant worked their cell phones in an effort to cause the acquisition to close, all within minutes after the trial court had dissolved an ex parte TRO.

In Illinois State court, the procedure for a stay pending appeal is governed by Ill. S. Ct. Rule 305; *see also Stacke v. Bates*, 138 Ill. 2d 295, 562 N.E.2d 192 (1990) (discussing the criteria for evaluating a motion to stay pending appeal). You may be able to avoid racing to the appellate court under these circumstances if you can get language staying the feared actions included in the trial court's order denying the TRO, although trial courts are typically loathe to grant such relief.

Making sure that your litigation team has TRO experience both at the trial court and appellate court levels is the first step you can take to preparing for and putting out the fires that come with emergency and expedited litigation.