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Preliminary Injunctions--Tips for Getting Them Granted

by Paul D. Supnik

1. *Develop a theme and go for the jugular.*
The Court has limited time to review your case. The facts and law should be developed in a concise manner to make the Court comfortable that your position is on solid ground. Make sure that the theme goes to the jugular to compel the court to join your position.

2. *Make sure that the facts support your legal contentions with admissible evidence.*
The declarations accompanying the motion for preliminary injunction should have enough factual basis to back up your contentions. That usually means that the declarations must have enough detail and foundational material so that the evidence set forth in the declaration consists of admissible evidence which is both credible and plausible.

3. *Tell the court why the preliminary injunction is truly needed.*
Obviously, if the matter has been in dispute for a lengthy period of time, there is some question as to whether a preliminary injunction is warranted or not. However, there may be situations even where there has been a lengthy delay where a change of circumstances may suddenly warrant the request for preliminary injunction. Typical examples may be a significant increase in the extent of manufacturing or sales activities or a forthcoming trade show with a markedly different marketing campaign. These facts need to be brought to the attention of the Court.

4. *Does the request for preliminary injunction truly warrant the Court's intervention?*
Courts have limited resources, limited power and must use their power wisely and judiciously. Preliminary injunctions may and still be under certain circumstances be considered extraordinary remedies and the exercise of that power should not be squandered upon trivial matters which may have a tendency to in some way impugn the integrity or importance of the court. For that reason if a public interest can be shown, that will significantly increase the likelihood of the court wishing to grant the preliminary injunction if at all possible. For example, in trademark infringement actions in which the health or safety of the consumer is at issue, there is a significant public interest and reason for the court to support the issuance of a preliminary injunction, over and above the interest of private parties.

5. *What is the urgency?*
Do not ask for a temporary restraining order if it is not warranted. A temporary restraining order can be appropriated in some cases if the parties have acted quickly, but the "knee jerk" approach to seeking a temporary restraining order in connection with every preliminary injunction motion is frowned upon by the courts. First, the temporary restraining order has a tendency to use up valuable judicial time and if it is unlikely that the court will grant the order, there is an attitude on the part of the judiciary that the attorney is wasting the time of the court. As a result, it is important to look and weigh the reasonableness of seeking a temporary restraining order along with an order to show cause re preliminary injunction. Thus, for example, if discussions where knowledge has existed for six months, it may be a rare situation where a temporary restraining order is still warranted.

6. *Determining the documents to file*
If a temporary restraining order is appropriate, the paperwork might include a proposed temporary restraining order, an order to show cause re preliminary injunction and a proposed preliminary injunction. If no temporary restraining order is sought, the two approaches to obtaining a preliminary injunction hearing are by filing either a motion for preliminary injunction which can be served along with the summons and a complaint or by obtaining an order to show cause re preliminary injunction. Don't forget to consider Local Rule 7.4.1 in the Central District of California which states:

7.4.1 (7-7.4.1) PRE-FILING CONFERENCE OF COUNSEL - In all cases not listed as exempt in Local Rule 6.10,
and except in connection with discovery motions (which are governed by Local Rule 7.15), and except in
connection with applications for temporary restraining orders, counsel contemplating the filing of any
motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of
the contemplated motion and any potential resolution. If the proposed motion is one which under the
F.R.Civ.P. must be filed within a specified period of time (e.g., a motion to dismiss pursuant to F.R.Civ.P.
12(b), or a new trial motion pursuant to F.R.Civ.P. 59(a)), then this conference shall take place at least five (5)
days prior to the last day for filing the motion; otherwise, the conference shall

take place at least twenty (20) days prior to the filing of the motion. If the parties are unable to reach a
resolution which eliminates the necessity for a hearing, counsel for the moving party shall include in the
notice of motion a statement to the following effect:

"This motion is made following the conference of counsel pursuant to Local Rule 7.4.1 which took place on
(date)."

7. *Will the Court "feel good" about granting a preliminary injunction?*
In order to obtain a preliminary injunction, it is important to convince the Court both that the facts and law are in your favor. But there is also a subtle factor in determining whether or not after granting a preliminary injunction motion if the Court will feel good about its decision. That might be affected by a number of factors including how the court will perceive that you will act in relationship to the motion, whether you have indeed provided the court adequate support both in law and fact and whether the court has good instincts about the bona fide use of your case.

8. *Don't squander your credibility with the trivial.*
The court has limited time to consider the issues. Don't waste the court's time with small matters.

9. *Do not forget about the bond.*
While obtaining a preliminary injunction or temporary restraining order, is a significant achievement in itself, it is useless unless your client can obtain a bond so that the order may be enforced. This usually means preparation in advance to make sure that a bond is available for your client at such time as the court decides that it will grant preliminary relief.

The way to handle this is by contacting a bonding company at the outset. The bonding company will charge a premium for a bond. The bond is typically like an insurance policy in which it charges a percentage such as 1% or 2% on the face value of the bond for each period of one year. A premium of one year is collected with the bond. Depending upon the financial statement of your client, a bond may or may not be written on signature. This generally means that your client will have to often complete a financial statement showing its ability to respond to damages in the event that the Court forecloses on the amount of the bond which turns out to be improvidently granted. Although your client may be reluctant to do so, it is important for it to have early communication with the bonding company so that the bond can be written immediately after the preliminary injunction is ordered. If your client happens to be a very large company, the bonding company may be satisfied without a necessity of formal paper work, but that may not be true for smaller companies and individuals and in some situations, the bonding company may not even agree to bond the company except on deposit of actual funds, CDs, or other marketable securities.

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