

REPORT BY THE LITIGATION COMMITTEE

**REQUESTING A TEMPORARY RESTRAINING ORDER IN
NEW YORK COUNTY'S COMMERCIAL DIVISION OF THE SUPREME COURT:
A PRACTICAL CHECKLIST¹**

The emergency nature of the relief sought in the form of a temporary restraining order (TRO) necessarily means that a practitioner is under time pressure to get the application for relief in front of a judge without unnecessary delays due to failure to present a complete application, failure to observe the proper filing procedure, or both. This memorandum provides the statutory source for TRO relief, a checklist for the Commercial Division of New York County of the papers needed to make the TRO application, a review of the documents to be filed electronically and in hard copy, the requirements regarding notice of the application to the adverse party or its counsel, the procedure for making a TRO application when the Court is closed, and a party's options to vacate, modify, or appeal a TRO.

A. The Statutory Basis for a TRO

Parties may seek relief from the court in the form of a TRO (pending a hearing on a motion for a preliminary injunction) "where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR 6301, 6313.

Common situations in which a party might seek a TRO include: enforcement of covenants not to compete, shareholder or other governance votes, and FINRA arbitrations. By statute, TROs will not be granted in actions arising from a labor dispute (as defined in Labor Law section 807), or to restrain the performance of statutory duties of a public officer, board, or municipal corporation of the state. CPLR 6313(a).

¹ This memorandum focuses on the Commercial Division in New York County. While there may be some overlap with the procedures governing Commercial Divisions in other counties, the practitioner is advised to contact the applicable commercial division support office. The website for the overall New York State Commercial Division is: <http://www.nycourts.gov/courts/comdiv/>.

B. The TRO Application: a Checklist²

Often, a TRO application is made at the same time a legal action is commenced. In such a case, the practitioner must prepare the case initiating documents (summons and complaint) and a request for judicial intervention and assignment to the Commercial Division,³ in addition to the TRO application.

If a case is not already pending at the time of the TRO application, then prepare—but wait to file simultaneously with the TRO application—the following:

- (1) Summons
- (2) Complaint

If a case is already pending, but no judge has been assigned as of the time of the TRO application, then prepare—but wait to file simultaneously with the TRO application—the following:

- (3) Request for Judicial Intervention (RJI)⁴
- (4) Commercial Division RJI Addendum⁵

For the TRO application itself, prepare the following documents⁶:

- (5) Order to show cause (OSC)⁷ that recites the following information⁸

² This checklist is based on the Committee’s review of the applicable statutes, court rules, IAS Parts Rules, practitioners’ guides, conversations with local practitioners, and inquiries made to New York County Commercial Division personnel. This checklist is only a guide, and practitioners should consult all current laws and rules to determine the best course of action in a particular matter.

³ The jurisdiction of the Commercial Division is set forth in NYCRR 202.70(a)–(c).

⁴ Form UCS-840 at <http://www.nycourts.gov/forms/rji/index.shtml>.

⁵ Form UCS-840C at <http://www.nycourts.gov/forms/rji/index.shtml>.

⁶ Multiple rules govern the format of papers submitted to the Commercial Division. See NYCRR 202.5; NYCRR 202.70(g) Rules 6, 16, & 17; see also the Individual Practices applicable to the relevant IAS part and its judge, if known at the time of the application.

⁷ An order to show cause is a way to present to a judge the reasons why the court should order relief to a party. The order to show cause is an alternative to the notice of motion and is different from it. An order to show cause can shorten the time within which the parties come into court to be heard. Therefore, it is often used in emergency situations where a stay of the proceedings is required, or some other immediate result is sought. A judge must sign an order to show cause (which means that a judge may decline to sign it too). Orders to show cause allow the judge to set the procedural terms, such as when it will be heard in court, how it will be served on the opposing party and any conditions or requirements to obtain a stay of enforcement of an order or a judgment pending the hearing. See, e.g., <https://www.nycourts.gov/courts/nyc/housing/osc.shtml>. A sample order to show cause, which includes a request for a TRO, may be found at https://www.nycourts.gov/courts/6jd/forms/SRForms/oshow_tro.pdf.

⁸ CPLR 2214(a), (d); NYCRR 202.70(g) Rules 19 & 20.

- a list of the supporting papers upon which the motion is based;
 - a statement of the relief demanded that clearly differentiates the relief request on a temporary basis (pending the hearing of the OSC) from that requested in the form of a preliminary injunction (which relief may take multiple forms and may be stated in the alternative) and the grounds therefor;
 - a summary of the grounds for relief;
 - blanks for fixing the time and date of a hearing on the motion for a preliminary injunction (i.e., the return date);
 - blanks for fixing the date, time, and method of service for making any opposition to the motion for a preliminary injunction;
 - a provision for a bond, if any, and a blank for fixing of the amount of bond; and
 - a blank for fixing the date, time, and method for service of any TRO issued by the Court.
- (6) Memorandum of law addressing all legal issues presented by the application⁹
 - (7) Affidavit and/or attorney affirmation:
 - detailing notice or efforts to effect notice of the time, date, and place that the application will be made to the court and the date, time, and method of such notification, or

showing why notice should not be given because “there will be significant prejudice by reason of giving notice;”¹⁰

and
 - describing the facts supporting the existence of immediate and irreparable injury, loss, or damages and that there is genuine urgency for determination of the issue;¹¹

⁹ See, e.g., CPLR 6301, 6312, 6313.

¹⁰ 22 NYCRR 202.7(f); NYCRR 202.70(g) Rule 20.

¹¹ NYCRR 202.70(g) Rule 19.

and

- stating whether the request for relief is the first request, or, if not, the result of “any prior motion for similar relief” and “the new facts, if any, that were not previously shown.”¹²
- (8) Affidavit(s) from the client, or other person with personal knowledge, attesting to facts that support the application and attaching as exhibits any supporting documents
- (9) Litigation backs (for the hard copy to be presented to the court)

C. Notifying the Affected Parties of the Intended TRO Application

As described above in connection with the attorney affirmation or affidavit, a party applying for a TRO must provide the affected parties and their counsel, if known, with advance notice, except in exceptional circumstances, by email or telephone of the time and date that it will make its application at the New York County Courthouse, Commercial Division Support Office, 60 Centre Street, Room 119A, New York, NY 10007, Phone: 646-386-3020.

The advance notice provided must be “sufficient to permit them an opportunity to appear and contest the application.”¹³ “Sufficient” notice is not defined in the rule. However, one practice guide advises that, although sufficiency will vary from case to case, notice likely will be sufficient if given by 5:00 p.m. the day before the application and no less than six hours prior to the time of application.¹⁴ Note that no additional proof of service is required at this stage: the facts supporting that notice of the emergency application was given are included in the attorney affirmation submitted in support of the TRO. See Section B(7), above.

Notice is not required where “there will be significant prejudice by reason of giving notice”.¹⁵ However, as a matter of practice, applications for TROs made without notice are seldom granted.¹⁶ If notice is not given, the applying party must explain by attorney affirmation or affidavit the “significant prejudice” that would otherwise occur.

¹² CPLR 2217(b).

¹³ NYCRR 202.70(g) Rule 20.

¹⁴ Robert Haig, Commercial Litigation in N.Y. State Courts, vol. 2 (Thomson Reuters 3d ed. 2010), p. 85-86.

¹⁵ NYCRR 202.70(g) Rule 20.

¹⁶ See Practices for Part 3, Motion Practice Rule 5 (“Absent compelling circumstances, all parties must be present when injunctive relief is sought.”); Practices for Part 48, Motion Practice Rule 2 (“An OSC providing for temporary injunctive relief pending hearing of the OSC shall be made on notice unless an affirmation or affidavit sufficiently demonstrates that giving such notice would result in ‘significant prejudice’ to the movant.”) (citations omitted); Practices for Part 39, Motion Practice Rule 3 (“Orders to Show Cause with requests for temporary restraining orders, including requests for a temporary stay of an action, will generally not be heard ex parte.”) (citations omitted); Practices for Part 45, Rule 5 (“Applications for temporary injunctive relief pending the hearing of the OSC shall be on notice unless the movant can demonstrate significant prejudice.”) (citation omitted).

D. E-filing the TRO Application Before Going Into Court

Before going into Court, counsel for the party seeking the TRO must file its documents electronically with the New York State Courts Electronic Filing (NYSCEF) System,¹⁷ pay the indicated fees, and print a copy of the NYSCEF Confirmation Notice generated upon e-filing for each document that is uploaded.

Practice tip: If an action is not yet pending, a party may save processing time by filing the case initiation documents and the TRO application in the same e-filing transaction. This is because the Court may take up to 24 hours to assign an index number to a new case. If the case initiation documents are filed in a separate transaction, then a party may have to wait to e-file its TRO application papers if the assignment of an index number is not immediate.

If no action is already pending at the time of the TRO application, a party applying for a TRO must e-file a (1) Summons and (2) Complaint.

If no judge has been assigned at the time of the application, then a party must e-file a (3) Request for Judicial Intervention with (4) Commercial Division RJI Addendum.

All parties applying for a TRO must e-file an (5) order to show cause, (6) memorandum of law, (7) attorney affirmation and, as applicable, (8) client or other affidavit(s).

E. Presenting the TRO Application to the Commercial Division Support Office¹⁸

After the components of the application have been prepared and e-filed and notice given (if appropriate), then counsel for the moving party should personally present the application to the Commercial Division Support Office in Room 119A. If notice of the application was made, then arrive at the Support Office at the time provided in the notice to the affected parties and counsel—or up to forty minutes beforehand to commence processing of the application.¹⁹ (The

¹⁷ E-filing is mandatory in all Commercial Division cases commenced on or after February 19, 2013 in Supreme Court, Civil Branch, New York County. Cases must be initiated electronically and fees must be paid by credit or bankcard, except as otherwise specified in the rules and protocols. See NYCRR 202.5-bb; Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised May 7, 2015) at <https://www.nycourts.gov/courts/1jd/suptctmanh/EF-Protocol-0515.pdf>. (E-filing is generally required in other Commercial Division counties as well.) This memorandum assumes the reader's fluency in the NYSCEF system. For a court-prepared user's guide to the system, see <https://iappscontent.courts.state.ny.us/NYSCEF/live/training/userManual.pdf>. (The User Manual was being updated at the time this article was completed.)

¹⁸ TROs in non-Commercial Division cases are handled by the Ex Parte Office, 60 Centre Street, Room 315, which follows a different procedure.

¹⁹ The Commercial Division Support Office must review the application and process it prior to handing it up for hearing by a judge. Although the office processes emergency applications as quickly as possible, practitioners have found it may take up to forty minutes for the review and processing of the application for hand off to a judge depending on the workload of the Office. Processing delays may occur too for applications submitted immediately when the office opens in the morning.

application will not be sent before a judge until all noticed parties arrive, or it becomes clear that one or more has failed to arrive.)

Counsel for the moving party should bring the following documents to the Courthouse at the time of the application:

- If no action has been commenced at the time of the application: one copy of the summons and complaint;
- If no judge has been assigned at the time of the application: two copies of the RJI and Commercial Division Addendum;
- One original of the documents comprising the TRO application;
- One copy of the documents comprising the TRO application;
- One copy per e-filed document of the Confirmation Notice generated by the NYSCEF system,²⁰ affixed to the back of the last page of each document, facing outward; and
- One copy of the electronically generated receipt for the filing fee(s).

Although some of the IAS Parts in the Commercial Division are paperless, it is recommended to err on the side of caution and present the hard copy sets specified above to the Commercial Division Support Office for processing.

F. Presenting a TRO Application When the Courthouse Is Closed

When the courthouse is closed, such as in the evening, on weekends and during holidays, a party wishing to apply for a TRO must call the central office at 800-430-8457 to advise that it wishes to make an emergency application outside normal court hours.²¹ A party also may send an email with this message to emergency@nycourts.gov; however, there may be a delay in processing due to communication by email rather than by telephone.

A staff member of the Unified Court System's Division of Technology will take down the essential information, including the names and telephone numbers of the attorneys and the county and then pass on the information and request to the Administrative Judge or to the designated back up. The staff member does not screen any calls.

²⁰ The "Confirmation Notice" can be found via a link in the e-mail confirmation, or by logging into the user's NYSCEF account and viewing the documents filed in the case. Note that NYSCEF also sends an e-mail confirmation of filing to the filer: this is not the "Confirmation Notice" required by the court.

²¹ Memorandum from Ann Pfau, Chief Administrative Judge of the N.Y. Unified Court System, Notice to the Bar - Emergency Applications Outside Normal Court Hours, October 10, 2008, at <http://www.nycourts.gov/courts/1jd/supctmanh/kmbt35020081128114523.pdf>.

The Administrative Judge or designated back up will review the information and make any further arrangements, including where and when to apply for the TRO.

Practice tip: If a party must apply for a TRO when the courthouse is closed, no case has been commenced, and that party is under an extreme time emergency such that it cannot prepare a summons and complaint in time to submit with the TRO application, the party should request in its proposed order that the Court apply the savings clause of CPLR 304(a). To do so, the party should include the following language in its proposed order:

Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action.²²

Whether the Court will apply this savings clause to hear a TRO application in this circumstance is completely at its discretion.

G. Options to Vacate, Modify, or Appeal a TRO

A party seeking to vacate, modify, or appeal a trial court's grant or denial of a TRO has two options. Both options provide a way for litigants to seek review of an order granting or denying a TRO, which is not appealable as of right, because it is typically brought by OSC, not by notice of motion. (Only an order that decides a motion made by a formal notice of motion is appealable as of right.²³ An aggrieved party, however, can make a motion for leave to appeal from a TRO.²⁴)

CPLR 5704 provides the more expeditious of the two options. It allows the Appellate Division, or a single justice thereof, by a motion, to directly review an ex parte order, such as a TRO, and to decide whether to vacate or modify it. Indeed, "CPLR 5704(a) provides one of the few occasions in which taking an appeal is unnecessary to obtain Appellate Division review of a lower court order."²⁵ CPLR 5704(a) distinguishes between ex parte orders which have been granted and those that have been denied in the court below.²⁶ Where a party challenges the grant of a TRO, a single justice or a full bench of the Appellate Division may vacate or modify the order. Where a party challenges the denial of a TRO, only a full bench may grant or deny the order denied by the court below.

²² CPLR 304(a); Bundy Smith & Hall, TRO Applications When the Courthouse Is Closed, 10/30/2008 N.Y.L.J. 3, col. 1; CPLR 304.

²³ CPLR 5701(a)(2).

²⁴ In the Appellate Division, First Department, a purported appeal from an ex parte order may be treated as a motion for leave to appeal under CPLR 5701(c), where judicial economy of the equities favor appellate review. 4A HON. FRANCIS T. MURPHY, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, APPEALS TO THE APPELLATE DIVISION 107 (Robert L. Haig ed., 3d ed. 2010).

²⁵ *Id.* at 106.

²⁶ *Id.*

CPLR 5701(a)(3) provides a second option. The party challenging the grant or denial of a TRO may move in the original court by a motion on notice to vacate or modify the TRO. The resulting order on that motion is appealable. The party then appeals the order through the regular First Department, Appellate Division appeal process. Further, while the appeal is pending, a party may move to modify or limit the existing TRO, and any preliminary injunction that may subsequently issue, in cases specified in CPLR 6301.

In addition to these two options, an aggrieved party may also apply to the Appellate Division for interim or emergency relief pending determination of a CPLR 5704(a) motion, a motion for leave to appeal, or pending appeal.²⁷

Practice tip: As a practical matter, practitioners do not use the CPLR 5701(a)(3) mechanism due to the time involved to pursue it. The grant or denial of the relief sought in the TRO (which necessarily addresses issues of believed immediate irreparable harm) would likely be moot by the time a grievance is resolved under this provision and any subsequent appeal.

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²⁷ The Appellate Division, First Department’s form of “Summary Statement on Application for Expedited Service and/or Interim Relief” is available at <http://www.nycourts.gov/courts/ADI/Practice&Procedures/forms/Form1.pdf>. See also First Department, Appellate Division, Rule of Procedure 600.2(a)(7).