THE TRO PROCESS EXPLAINED

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UT CLE
ESSENTIAL NON-COMPETE AND TRADE SECRET LAW

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On a Friday afternoon, the Vice President of Sales abruptly gives notice that she is resigning from the company. The day before, without much fanfare, a sales representative quit. By the end of Friday two more sales representatives resign. Over the weekend, the company learns from LinkedIn and Facebook that all four of these employees are working for the company's arch competitor in the marketplace. All four employees had non-compete, non-solicitation and non-disclosure agreements. At 7:30 A.M. Monday morning, the company makes an urgent call to counsel, stating that these employees must be stopped immediately because they are going to violate their non-compete terms, solicit clients, and inevitably use the company's confidential information to divert sales to their new company...

On Wednesday of the next week day the local business section includes the following report:

<u>ABC Sues Executive Who Went To Work For Competitor</u>

The ABC Company filed suit in a State District Court in Austin yesterday seeking to prevent a former vice president of sales from using knowledge gained about ABC's business and customers while employed with a competing company in a similar capacity.

In the suit, ABC said that Maggie Smith recently resigned as vice president of sales with 10 years of experience with ABC. Before she left, Smith served on the senior executive leadership team with the heads of research and development. She now works for XYZ, a competitor of ABC.

"In short, Ms. Smith became inexorably and intimately knowledgeable about ABC's business model, including its client relationships, fee structures, marketing strategies and products under development." complaint said.

ABC alleges that because of Smith's extensive knowledge of its business and clients, she would be able to point out flaws or gaps in the company's business model and programs that no one outside the company would be privy to.

ABC included a copy of the agreement, signed by Smith, that would restrict her post-ABC employment with competitors for a period of one year and prevent her from using its confidential information or soliciting its clients. XYZ is a competitor of ABC in several areas of business. ABC alleges that Smith breached the terms of the agreement by accepting employment with XYZ and performing work for the competing company that is similar to the work she most recently performed for ABC. The company is seeking a temporary restraining order and preliminary injunction requiring Smith to abide by the terms of the agreement, including restricting her from performing services for XYZ that compete directly with ABC, soliciting clients of ABC that she had contact with while employed by ABC, soliciting ABC employees, poaching ABC suppliers and disclosing confidential or proprietary information she learned at ABC.

…And so it begins!

The above scenario – typical in employment cases – was summarized from an actual *Law360.com* report on August 31, 2016, with the names changed to protect the innocent! This storyline has been told many times within many business sectors, involving a never ending cast of characters. But, the fact patterns and allegations are routine. Many, if not most, non-compete litigation matters are initiated in the court systems with a lawsuit and an application for a Temporary Restraining Order ("TRO"). The moving party will be asking the court to exercise its equitable powers to command the defendant to do or not do some acts. As in the example above, a company will be asking the court to order the former employees not to work in competitive capacities, not to disclose confidential information or contact clients, and to preserve all records.

TRO's typically occur at the very inception of the suit – prior to any formal answer, discovery, or other process. By its nature, a TRO involves a need for quick action from a court. The purpose of a TRO is simply to preserve the status quo of the subject matter of the litigation until a preliminary hearing can be had on the application for a Temporary Injunction. *Cannan v. Green Oaks Apt, Ltd.*, 758 S.W. 2d 753 (Tex.1988). A primary function of injunctive relief is to restrain motion and to enforce inaction. *Qwest Commc'ns Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex.2000). Thus, the TRO does not reach the ultimate merits of the suit. Of course, to the litigants, it feels more like winning or losing the war, than a judicial effort at preservation.

Based on the need for immediate effective action to preserve the status quo, courts are empowered to conduct *ex parte* hearings and render orders. TRO's are considered an extraordinary action for a court and the applications and procedures are strict.

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