

TO: The Administrative Board of the Courts

FROM: Commercial and Federal Litigation Section of the New York State Bar Association

DATE: November 28, 2016

RE: Proposed Amendment to Rule 20 of the Rules of the Commercial Division Regarding Applications for Temporary Restraining Orders

The Commercial and Federal Litigation Section of the New York State Bar Association (“*Section*”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated November 1, 2016 (“*Memorandum*”), proposing an amendment to Rule 20 of the Rules of the Commercial Division, 22 NYCRR § 202.70[g], to require litigants seeking Temporary Restraining Orders to provide advance copies of all papers supporting such application to their adversaries (the “*Proposal*”). The Proposal is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Section agrees with the Subcommittee on Procedural Rules to Promote Efficient Case Resolution of the Commercial Division Advisory Council (the “Advisory Council”) that the first sentence of Rule 20 requires amendment to clarify that the failure to give notice, in the absence of “significant prejudice,” will only prevent the issuance of an *ex parte* application for a Temporary Restraining Order (“TRO”).

The Section further agrees with the Advisory Council that the second sentence of Rule 20 should be amended to clarify the scope of the notice required to be given to adversaries in advance of an application for a TRO. However, the Section believes that the amendment suggested by the Advisory Council does not remedy all of the concerns identified by the Advisory Council, particularly the issue of the timing of such notice.

II. SUMMARY OF PROPOSAL

The Proposal seeks to revise Rule 20 in two respects: 1) to correct the first sentence of Rule 20, which currently “suggests that a TRO will not be issued unless there will be prejudice by giving notice, which is not what is intended” (Memorandum, Ex. A at 3); and 2) to amend the second sentence of Rule 20, which as currently drafted requires “notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application[,]” but is “silent on whether the moving party must provide copies of papers in support of its TRO at the time that notice is provided” (Memorandum, Ex. A at 2). Specifically, the Advisory Council proposes that Rule 20 of the Rules of the Commercial Division be amended to include the following new text identified in bold/italic font:

“Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant must give notice, *including copies of all supporting papers*, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.”

The motivation for the amendment to the first sentence of Rule 20 is self-evident, to correct the suggestion that a TRO will not issue in the absence of evidence that a party will be prejudiced by giving notice, which suggests that a TRO will not issue when sufficient notice is given to opposing parties.

The motivation for the amendment to the second sentence of Rule 20 is described as an effort to provide “meaningful” and “adequate notice” that would allow an opposing party the ability to oppose an application for a TRO effectively. The Advisory Council “recognize[d] that there may be circumstances where it is impracticable for a moving party to provide supporting papers to its adversary prior to submitting them to Commercial Division Motion Support Office due to time exigencies,” but stated its belief “that the moving papers should be provided to the opposing party *prior* to the time that they are submitted to the assigned Judge” (Memorandum, Ex. A at 2).

III. RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL

The necessity of amendment to the first sentence of Rule 20 is self-evident, and the Section supports the Proposal as drafted.

The Section further agrees that the second sentence of Rule 20 is ambiguous as to the scope of the notice required to be given to adversaries to permit them an opportunity to effectively appear and contest an application for a TRO. Therefore, the Section supports the amendment of the second sentence of Rule 20 to address the scope of notice, requiring that such notice include copies of all supporting papers.

However, the Section also agrees that the timing of such notice is an important consideration that is not adequately addressed in Rule 20 as drafted, or in the amendment proposed by the Advisory Council. The Advisory Council identified the need, in the absence of a showing of “significant prejudice by reason of giving notice,” for the papers in support of an application for a TRO to be provided “*prior* to the time that they are submitted to the assigned Judge” (Memorandum, Ex. A at 2). The amendment as proposed by the Advisory Council is ambiguous, requiring only that the supporting papers be provided “to the opposing parties sufficient to permit them an opportunity to appear and contest the application” (Memorandum, Ex. A at 3).

The Section therefore proposes that the second sentence of Rule 20 be amended to reflect this additional timing consideration identified by the Advisory Council, in order to be consistent with the language of the proposal that would provide for review of supporting papers before they are submitted to the assigned judge, as follows:

“The applicant must give notice, *including copies of all supporting papers*, to the opposing parties *prior to the time that such supporting papers are submitted to the court or clerk* sufficient to permit them an opportunity to appear and contest the application.”

The Section feels that this proposed amendment encompasses both of the concerns identified by the Advisory Council, scope of notice and timing. However, the Section would recommend endorsing the amendment to the second sentence of Rule 20 as proposed by the Advisory Council, even without additional language related to the timing of such notice.

EXHIBIT A



MEMORANDUM

November 1, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Amendment of the Rules of the Commercial Division Relating to Applications for Temporary Restraining Orders

=====

The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 20 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 20 [“Temporary Restraining Orders”]) proffered by the Commercial Division Advisory Council, to require advocates seeking temporary restraining orders to provide adversaries with advance copies of papers supporting the application. The proposed amendment is as follows:

Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant must give notice, **including copies of all supporting papers**, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

As set forth in the Council’s supporting memorandum (Exh. A), the proposal is designed to make clear that, under current practice in the Commercial Division – and in the absence of a showing of significant prejudice – the “opportunity to appear and contest the application” for a TRO should include the chance to review supporting papers before they are submitted to the assigned judge.

=====

Persons wishing to comment on the proposed amendment should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than January 10, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

Memorandum

To: Commercial Division Advisory Council
From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution
Date: August 10, 2016
Re: Proposed Amendments to Rule 20 of the Commercial Division Rules

INTRODUCTION

The Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the “Subcommittee”) has given consideration to amendments to Rule 20 of the Commercial Division Rules, which is the rule regarding temporary restraining orders (“TROs”) in the Commercial Division. This memorandum provides background on TRO motion practice. It then sets forth a proposed amendment for consideration by the Council that would impose a requirement that papers in support of the TRO be served on the opposing party before the papers are presented to the assigned Justice. In addition, a minor amendment is proposed to make a correction to the first sentence of the rule.

TEMPORARY RESTRAINING ORDERS IN NEW YORK STATE COURT

The New York Civil Practice Law and Rules permit TROs to be issued without notice to the opposing party. CPLR § 6313(a) (“If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice.”). Historically, New York courts would grant TROs without notice, such that the first time a party restrained even learned of a pending lawsuit and the relief granted was when it was served with the TRO that already had been entered by the Court. “Unlike the former general practice under the CPLR, whereby [TROs] were usually obtained *ex parte*,” the modern practice, and the practice adopted in the Commercial Division, is for notice to be provided to the opposing party prior to issuance of a TRO, unless prejudice can be shown by the provision of such notice. Brian M. Cogan & Alan M. Klinger, 4 *N.Y. Prac., Com. Litig. in New York State Courts* § 35:24 (Robert L. Haig ed., 4th ed. 2015). Commercial Division Rule 20 currently provides as follows: “Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not

be issued. The applicant must give notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application.”¹

Rule 20, however, is silent on whether the moving party must provide copies of papers in support of its TRO at the time that notice is provided. To oppose a TRO effectively, a party must be given adequate notice. Oftentimes notice is only meaningful if the opposing party is provided the underlying papers describing the basis for seeking a TRO. While the Subcommittee recognizes that there may be circumstances where it is impracticable for a moving party to provide supporting papers to its adversary prior to submitting them to Commercial Division Motion Support Office due to time exigencies, the Subcommittee believes that the moving papers should be provided to the opposing party *prior* to the time that they are submitted to the assigned Justice.

The Individual Rules of Commercial Division Justice Kornreich contain a requirement that opposing counsel be provided with copies of motion papers in support of a TRO:

... Absent good cause (e.g., where ex parte relief is absolutely necessary), the court will not sign an ex parte order to show cause, regardless of whether a TRO is sought, unless opposing counsel is notified beforehand and provided a copy of the papers. Compliance with the requirement must be confirmed in an attorney affirmation accompanied by proof (e.g., mail to opposing counsel). ... (emphasis supplied)

Similarly, in the U.S. District Court for the Southern District of New York, the individual rules of Judge Laura Taylor Swain provide that papers in support of a TRO must be supplied to the opposing party prior to presenting them to the Court. Her individual rule provides:

Unless application for ex parte temporary injunctive relief is made in accordance with Fed. R. Civ. P. 65(b)(1), the applicant must provide a copy of the proposed Order to Show Cause and all supporting papers to the opposing

¹ Similarly, the Uniform Civil Rules for the Supreme Court and the County Court contains notice requirements: “Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.” 22 NYCRR § 202.7(f).

party before presenting the application to Chambers.
(emphasis supplied)

In addition, a minor correction to the first sentence of the rule is proposed. The first sentence presently states that “[u]nless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued.” Thus, as written, the rule suggests that a TRO will not be issued unless there will be prejudice by giving notice, which is not what is intended. Thus, the subcommittee proposes that the words “*ex parte*” be added to the end of the sentence.

PROPOSED AMENDMENTS

Given this background, the following are proposed amendments to Commercial Division Rule 20 for the Council to consider:

Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant must give notice, **including copies of all supporting papers**, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.