Ethical Considerations

When Applying for TROs

By Bradley C. Guin

I. Introduction

Temporary restraining orders, or TROs, serve as vital emergency measures in litigation, empowering courts to swiftly halt conduct that threatens immediate and irreparable harm. Given their urgent nature, TROs operate with streamlined procedures that bypass many of the usual Constitutionally and statutorily mandated procedural requirements. This streamlining allows courts to sometimes issue TROs ex parte—without notice to the opposing party—when circumstances demand immediate action.

However, the expedited nature of TROs does not excuse compliance with ethical obligations. In fact, an attorney applying for a TRO on behalf of a client may be subject to heightened ethical obligations given the ex parte nature of the proceedings.1 This article (II) first examines the procedure governing TROs and (III) then explores some of the ethical considerations implicated by the TRO application process.

II. TRO Application Procedure

"Standard" TROs are governed by La. Code Civ. Proc. art. 3603.[2] There are other types of TRO's that are contained in different parts of the law; however, this article is limited to those which are present in La. Code Civ. Proc. art. 3603. The general rule is that a TRO cannot be granted without notice to the adverse party.[3] However, Article 3603(A) permits a TRO to be granted without notice if the following two conditions are met: (1) it clearly appears from specific facts shown by a verified petition, supporting affidavit, or affirmation that immediate and irreparable harm will result to the applicant before the adverse party or his attorney can be heard in opposition; and (2) the applicant's attorney certifies to the court in writing the efforts that have been made to give notice or the reasons why notice should not be required.[4]

The attorney certification requirement was added in 1985 "due to abuses in obtaining" TROs.[5] Hence, the change was intended "to reduce the practice of issuing ex parte restraining orders without notice of any kind, and to permit the conduct of some type of adversary proceeding before, rather than after, the issuance of injunctive relief."[6] And, more recently, the article was amended yet again to drive home the point that a TRO can be granted without notice "only if the applicant or his attorney has certified in writing [1] that notice has been given to the adverse party or his attorney, [2] that efforts were made to give notice, or [3] that reason exists as to why notice should not be required."[7]

The "specific facts of immediate irreparable harm" and "attorney certification" requirements of Article 3603 are conjunctive conditions, meaning that both must be satisfied before a TRO can be granted without notice.[8] The fulfillment of only one condition is not sufficient to permit the issuance of a TRO without notice. Thus, a TRO application that contains sufficient factual allegations of immediate irreparable harm but lacks the attorney certification is defective and cannot support the issuance of an ex parte TRO. And vice versa: a TRO application that contains the attorney certification but lacks specific factual allegations is also defective. Further, it must be emphasized that irreparable harm alone is insufficient to satisfy the first condition. Instead, the irreparable harm must be "immediate."[9]

III. Ethical Considerations When Applying for TROs

The ex parte TRO application process is a unique procedure. Typically, to obtain a substantive court order, a party is required to try their case either by a contradictory motion or a trial on the merits. Article 3603 dispenses with this requirement, and for good reason: ordinary proceedings, and their accompanying delays, are ill-equipped to deal with the exigencies of emergency litigation. That said, there are important ethical considerations involved when applying for an ex parte TRO, including (A) the "ex parte communication" rules of Rule 3.5 of the Louisiana Rules of Professional Conduct, (B) the "candor towards the tribunal" rules of Rule 3.3, and (C) the duty of competence imposed by Rule 1.1.

A. Ex parte TRO applications must follow Article 3603 to avoid prohibited communications.

Starting with the basics, Rule 3.5(b) prohibits ex parte communications between an attorney and a judge "during the proceeding unless authorized to do so by law or court order."[10] This rule sets forth the general rule that ex parte communications are prohibited. But what, exactly, is an "ex parte communication"? Generally speaking, an ex parte communication is "[a] communication between counsel or a party and the court when opposing counsel or party is not present."[11] The prohibition of ex parte communications covers both oral and written communications.[12] Behind the rule lies an important justification: "Improper ex parte communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. Such communications threaten not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice."[13]

Rule 3.5(b), however, provides limited exceptions for ex parte communications that are authorized by (1) law or (2) court order. Outside of those two exceptions, though, an attorney should refrain from engaging in ex parte communications with a judge during the proceeding.

The first exception—ex parte communications "authorized . . . by law"—can be relevant when applying for a TRO. Article 3603 authorizes the issuance of

Sidebar/Ex Parte TRO Checklist

☐ **Form of Application**
The application must be in the form of a verified petition or a petition with a supporting affidavit (the verification or affidavit can be made by the plaintiff, the plaintiff's attorney, or the plaintiff's agent).

☐ **Substance of Application**
The application must (1) contain specific factual allegations showing that immediate irreparable harm will occur before the defendant or the defendant's attorney can be heard in opposition and (2) disclose all material facts, adverse or not.

☐ **Attorney Certification**
The applicant's attorney must certify in writing (1) what efforts were made to give notice to the defendant or (2) why notice should not be required.

an ex parte TRO when certain conditions are met.[14] By implication, the code article thus authorizes ex parte communications between a lawyer and the judge. But, again, the two conditions (specific facts of immediate irreparable harm and attorney certification) must be satisfied to trigger the exception.

The importance of satisfying both conditions *prior to* the filing of the TRO application cannot be overstated. Indeed, "a lawyer's failure to follow the applicable rules regarding efforts to notify all parties about seeking a temporary restraining order renders the proceeding an unethical ex parte communication."[15] While there is a dearth of Louisiana caselaw on this issue, two cases from Indiana—whose professional conduct rules largely mirror Louisiana's own—are illustrative of this principle and may inform how a Louisiana court or the disciplinary board would rule.[16]

In *In re Wilder*,[17] the plaintiff's attorney delivered a copy of a TRO application to the defendant's attorney and, shortly thereafter, filed the TRO application and met with the judge, who granted the TRO.[18] Based on this conduct, the court found that the plaintiff's attorney violated Professional Rules 3.5 and 8.4(f).

First, the court found that the attorney violated Rule 3.5 by communicating ex parte with a judge when not permitted by law to do so.[19] Although Indiana law permitted a TRO to be granted without notice, the plaintiff's lawyer was required to comply with certain requirements, much like Louisiana law.[20] Namely, he was required to give meaningful notice of the application to the defendant.[21] Sending a copy of the application to the defendant's attorney at the same time as, or shortly before, meeting with the judge was not "meaningful notice."[22] Plus, the plaintiff's attorney did not take the steps necessary to obtain an ex parte TRO without notice.[23] He did not show that immediate and irreparable harm was imminent, and he failed to certify in writing what efforts he made to give notice to the defendant or why such notice should not be required.[24] Because the attorney failed to follow the statutory requirements for obtaining an ex parte TRO, he was not authorized by law to engage in ex parte communications with the court.

Second, the court also found that the attorney violated Rule 8.4(f) by assisting the judge who issued the TRO in conduct that violated the Code of Judicial Conduct, i.e., the granting of an ex parte TRO without obtaining a written certification from the plaintiff's attorney about notification efforts.[25] (It is worth mentioning that the judge was also found guilty of misconduct and suspended from the bench.)[26] For this misconduct, the attorney was suspended from the practice of law.[27]

In another case, *In re Anonymous*,[28] the plaintiff's attorney sought an ex parte TRO but failed to contact the opposing party, failed to certify to the judge what efforts he made to give appropriate notice, and failed to certify the reasons why notice should not be required.[29] While at the courthouse, the attorney spoke to the judge and obtained an ex parte TRO.[30] Only after the TRO was issued did the attorney notify the opposing counsel of the emergency proceeding or the fact that the court had already entered a TRO.[31]

The court found that this conduct violated the professional rules prohibiting ex parte communications.[32] The court observed that the law permits the issuance of an ex parte TRO, but only if proper safeguards—i.e., a showing of immediate irreparable harm and the attorney certification requirement—are followed.[33] "Failure to follow the . . . safeguards," the court explained, "renders a proceeding in which proper notice has not been given to the opposing party an impermissible ex parte communication by the attorney, and, as such, is prohibited under . . . Rule

3.5(b)."[34] For this misconduct, the attorney was privately reprimanded.[35]

B. Attorneys for ex parte TRO applicants owe special candor obligations.

You've satisfied the first two hurdles of Article 3603(A) by submitting an ex parte TRO application with sufficient factual support and the attorney certification. But that's not the end of the road. When an ex parte TRO is sought, an attorney is also bound by Rule 3.3(d) of the Louisiana Rules of Professional Conduct, which states: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, *whether or not the facts are adverse*."[36]

This special candor obligation can place an attorney for an ex parte TRO applicant in uncharted waters. "Ordinarily, an advocate has the limited responsibility of presenting on side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party."[37] But, obviously, in an ex parte proceeding, "there is no balance of presentation by opposing advocates."[38] The special candor obligation of Rule 3.3(d) aims to correct that balance by requiring the lawyer to disclose all material facts—even those adverse to the attorney's own client—to assist the tribunal in reaching a "substantially just result."[39]

The Louisiana Supreme Court reaffirmed this "special duty" of candor in the ex parte context in *Louisiana State Bar Association v. White*.[40] In that case, the plaintiff's attorney took a default judgment against the defendants in the amount of $4,011.44 but intentionally withheld from the court the material fact that the balance due was $2,000 less than this amount due to a prior partial payment.[41] Given the ex parte nature of the default judgment proceeding, the Supreme Court explained that the attorney owed an "expanded duty to inform the court of all material facts known to the lawyer, even those adverse to the client's position."[42] The Court also observed that courts routinely set aside ex parte judgments obtained in violation of this special duty of candor obligation.[43] For this (and other) misconduct, the attorney was suspended from the practice of law.[44]

The same principles apply to ex parte TRO proceedings, too. Given the drastic nature of injunctive relief, an attorney for an ex parte TRO applicant should be mindful of fulfilling this "special" and "expanded" duty of candor and of apprising the court of all material facts, even those that may cut against their client's case. Of course, this special candor obligation must be tempered against the attorney's duty of loyalty to their client.[45] While this is a delicate balance, it would be inaccurate to say that an attorney violates the duty of loyalty owed to the client by complying with Rule 3.3(d) and disclosing all material facts in pursuit of an ex parte TRO. Failure to do so, of course, would be a violation of the Rules of Professional Conduct in itself and subject any wrongfully obtained ex parte TRO to vacatur.[46]

C. Failure to adhere to Article 3603 may subject your client to damages and attorney's fees.

Speaking of vacatur, one final practice note: If a TRO is wrongfully issued—for example, if a court issues an ex parte TRO that fails to comply with Article 3603's pleading and certification requirements—your client may be on the hook for damages caused by the wrongfully issued TRO, including attorney's fees,

under La. Code Civ. Proc. art. 3608.

The Louisiana Supreme Court has explained that Article 3608 "broadly permits" an award of damages for the wrongful issuance of a TRO on a motion to dissolve or after the preliminary injunction is tried on the merits.[47] Further, a defendant is not required to prove bad faith or malice on the party of the plaintiff to be entitled to wrongful-TRO-issuance damages.[48] Rather, damages may be awarded if the TRO was incorrectly issued or the result of a mistake.[49]

In advising a client and facilitating an ex parte TRO application, an attorney should be mindful of Rule 1.1's duty to provide competent representation to a client.[50] This duty "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[51] Diligently following Article 3603's requirements arguably fulfills this obligation, while lowering the risk that the client will be subject to wrongful-TRO-issuance damages.

IV. Conclusion

The streamlined nature of TRO proceedings, while necessary for addressing emergent threats of immediate and irreparable harm, does not diminish an attorney's ethical obligations. To the contrary, it enhances them. When seeking an ex parte TRO, attorneys must carefully navigate both procedural requirements and ethical duties. Article 3603's dual requirements of (1) specific facts showing immediate and irreparable harm and (2) attorney certification regarding notice are not mere procedural formalities. They serve as the gateway to legitimate ex parte communications with the court and to protect against abuse of the TRO process.

Moreover, attorneys seeking ex parte TROs should consider special candor obligations under Rule 3.3(d) that go beyond normal advocacy duties. In the absence of adversarial presentation, they must proactively disclose all material facts—even adverse ones—to enable the court to make a fully informed decision. This heightened duty of candor, combined with strict compliance with Article 3603, helps preserve the integrity of TRO proceedings while ensuring they remain available as vital tools for emergency relief.

Finally, attorneys should be mindful of the overarching obligation to provide competent representation to their clients. When preparing an ex parte TRO application, an attorney should, therefore, adhere to Article 3603's pleading and certification requirements.

FOOTNOTES

1. See Barbara A. Glesner, The Ethics of Emergency Lawyering, 5 GEO. J. LEGAL ETHICS 317, 318 (1991) (observing that emergency lawyering "places an attorney at an increased risk of sanction or liability").

2. The scope of this article is limited to TROs under Article 3603. This article does not cover the requirements for (or ethical standards related to) TROs under other state statutes or Fed. R. Civ. P. 65(b). See, e.g., La. Code Civ. Proc. art. 3603.1 (TROs in domestic abuse cases); La. R.S. 46:2135 (TROs under the Louisiana Domestic Abuse Assis-tance Statute); La. R.S. 9:2232 (TROs under the Louisiana Trust Code); La. R.S. 23:844 (TROs in labor disputes).

3. *See* La. C.C.P. art. 3603, cmt. (2023).

4. La. C.C.P. art. art. 3603(A).

5. FRANK L. MARAIST, ET AL., *Louisiana Lawyering*, in 21 LOUISIANA CIVIL LAW TREATISE § 20.1 (March 2024 update).

6. La. C.C.P. art. 3603, cmt. (b) (1985).

7. La. C.C.P. art. art. 3603, cmt. (2023).

8. *See id*. (stating that "all of the following" conditions must "occur" prior to granting a TRO without notice).

9. La. C.C.P. art. art. 3603(A)(1).

10. La. R. Prof'l Conduct 3.5(b).

11. *Ex Parte Communication*, Black's Law Dictionary (12th ed. 2024). See also MARAIST, ET AL., *supra* note 4 (defining ex parte communication as a ""communication with a judge outside the presence of or without notice to all parties about the case's substance or merits, or about procedural matters that could create a strategic or tactical advantage").

12. *Id*.

13. *In re Anonymous*, 729 N.E. 2d 566, 569 (Ind. 2000) (cleaned up).

14. La. C.C.P. art. 3603(A).

15. Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1392–93 (2000).

16. See *Minge v. Weeks*, 629 So. 2d 545, 547 (La. App. 1 Cir. 1993) (explaining that cases from other jurisdiction may be persuasive authority if they were derived from the American Bar Association Code of Professional Responsibility); *Schmidt v. Gregorio*, 705 So. 2d 742, 743 (La. App. 2 Cir. 1993) (finding caselaw from other jurisdictions interpreting model rules to be persuasive authority). See also *In re Simon*, 04-2947, pp. 8–9 (La. 6/29/05), 913 So. 2d 816, 822. *Compare* La. R. Prof'l Conduct 3.5, *with* Ind. R. Prof'l Conduct 3.5.

17. 764 N.E. 2d 617 (Ind. 2002).

18. *Id*. at 620.

19. *Id*. at 620–21.

20. *Id*. at 620.

21. *Id*. at 621.

22. *Id*.

23. *Id*.

24. *Id*.

25. *Id*.

26. *Id*.

27. *Id*.

28. 729 N.E. 2d 566 (Ind. 2000).

29. *Id*. at 567.

30. *Id*.

31. *Id*.

32. *Id*. at 568.

33. *Id*.

34. *Id*.

35. *Id*. at 569.

36. La. R. Prof'l Conduct r. 3.3(d) (emphasis added).

37. A.B.A. Model R. Prof'l Conduct r. 3.3, cmt. 14.

38. *Id*.

39. *Id*.

40. 539 So. 2d 1216 (La. 1989).

41. *Id*. at 1220.

42. *Id*. (citations omitted).

43. *Id*. (citations omitted).

44. *Id*. at 1221.

45. *See Taylor v. Babin*, 08-2063, p. (La. App. 1 Cir. 5/8/09), 13 So. 3d 633, 639, *writ denied*, 09-1285 (La. 9/25/09), 18 So. 3d 76 (stating that an attorney "owes undivided loyalty to the interests [of his client] professionally entrusted to him").

46. *See generally White*, 539 So. 2d at 1220 (citations omitted).

47. *Hewitt v. Lafayette City-Par. Consol. Gov't*, 16-0629, pp. 2–3 (La. 5/27/16), 193 So. 3d 149, 151.

48. *Arco Oil & Gas Co., Div. of Atl. Richfield Co. v. DeShazer*, 98-1487, p. 4 (La. 1/20/99), 728 So. 2d 841, 844 (cita-tion omitted).

49. *Id.* (citation omitted).

50. La. Prof'l R. Conduct r. 1.1(a).

51. *Id*.

Bradley C. Guin is a shareholder in the Baton Rouge office of Roedel Parsons Blache Fontana Piontek & Pisano, A L.C. Primarily an appellate and complex commercial litigator, Brad's practice focuses on writs and appeals, commercial disputes, and government contract disputes. He also maintains a robust public sector practice and regularly represents governmental bodies. (bguin@roedelparsons.com)