

TROs AND PRELIMINARY INJUNCTIONS¹

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I. INTRODUCTION

Under Mass. R. Civ. P. 65 (a) and Fed. R. Civ. P. 65 (b) a party may be entitled to a temporary restraining order, with or without notice to the other party, under emergency circumstances. Under Mass. R. Civ. P. 65(b) and Fed. R. Civ. P. 65(a), only upon notice to the other party, the moving party may be entitled to a preliminary injunction, provided that the court is satisfied certain requirements for such relief are met. Attorneys may initiate requests for both forms of injunctive relief by filing a verified complaint or a complaint accompanied by an affidavit setting forth the factual basis upon which the court should grant the relief requested. Preliminary relief is usually in the form of a restraint on the other party's activities although sometimes the court will issue an "affirmative injunction," mandating specific action. While there are standards to be memorized in seeking injunctive relief, cases in which injunctions have been granted (or denied) are very fact-specific. It is critical to marshal all the facts that weigh in favor of your client's request for injunctive relief and to address the facts that favor the defendant. Remember also to advise clients seeking injunctive relief that they may have to post a bond to ensure against any damages to which the other side may be entitled if the court finds at a later date that the injunction should not have been issued.

¹ These materials update and supplement materials originally prepared by R.K. Gad, III of Ropes & Gray and Marcus E. Cohn of Peabody & Brown. The materials previously were updated by Dennis Duggan, Jr. of Peabody & Brown, supplemented again by Michele D. Miller and Anne Depew of Hale & Dorr in 1994, and revised in 1995 by R.K. Gad, III, Marcus E. Cohen and Jessica Block and further revised in 1996 and 1997 by Jessica Block. Materials from the seminar, Federal Civil Litigation in the First Circuit, prepared by R.K. Gad, III and Anthony M. Moccia of Eckert Seamans, Cherin & Mellot, also are included.

A. Temporary Restraining Orders

1. *Ex Parte* Temporary Restraining Orders.

Both Mass. R. Civ. P. 65(a) and Fed. R. Civ. P. 65(b) provide for two kinds of TROs: *ex parte* TROs and TRO's with notice to the other party. Attorneys should be aware of the difference between the state and federal rules. Under the state rule, an *ex parte* TRO may be granted if the moving party demonstrates that "immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." The federal rule requires, in addition to showing that irreparable harm will result before the adverse party may be heard, written certification from the applicant's attorney of "the efforts, if any, which have been made to give notice and the reasons supporting the claim that notice should not be required." These rules both raise high standards. *Ex parte* TRO's, while sometimes obtained, are not favored by the courts.

An *ex parte* TRO has a very short life span (usually 10 days) and when the applicant seeks continued protection in the form of a preliminary injunction he must start from scratch, bearing the burden of persuasion unassisted by the fact that a TRO was earlier issued. The victim of an *ex parte* TRO may move to have it quashed or modified on two days' notice.

As a matter of tactics, *ex parte* TROs should be sought only rarely. It is the unusual case in which there is not enough time to notify the other side (and this is especially true where the application grows out of a dispute of some standing and you know the identity of counsel for the opposition). Bear in mind that when you sign a motion for an *ex parte* TRO you are certifying that there is good ground to support it under Mass. R. Civ. P. 11, which means there is a defensible basis for asserting that the very high standard of Rule 65(a) has been met. Under Fed. R. Civ. P. 11, an attorney's signature constitutes certification, *inter alia*, that the allegations have or are

likely to have evidentiary support and that the pleading is not presented for improper purposes. Courts are becoming increasingly willing to sanction attorneys for improper Rule 11 certificates. In addition, it cannot help your subsequent application for a preliminary injunction for the judge to have denied your *ex parte* application for a TRO only days beforehand; most of the time, seeking an *ex parte* TRO is simply burdening your ultimate application for preliminary relief needlessly. Often, particularly in state courts, the judge may deny the request for an *ex parte* TRO but will agree to issue a short order of notice for a hearing on the preliminary injunction.

As a matter of tactics, the victim of an *ex parte* TRO should think carefully about exercising the right conferred by Rule 65(a) to move to have it vacated on short notice. The movant will bear the burden on such a motion, whereas if you waited out the balance of the ten days (most of which has already run by this time by the time you receive the papers), the other side will have the burden. If you lose the motion to vacate, the judge is going to be hard pressed to consider the matter *tabula rasa* when the plaintiff comes in for a preliminary injunction.

2. TRO'S With Notice. Mass. R. Civ. P. 65(a) and Fed. R. Civ. P. 65(b) contemplate TROs with notice to the adverse party but do not set forth specific standards for granting them, their life span, or what happens when someone wants a preliminary injunction thereafter, or any other basis for distinguishing between non-*ex parte* TROs from preliminary injunctions. Some judges, reluctant to grant relief *ex parte* require the applicant's counsel to telephone opposing counsel from the courthouse.

3. Short Order of Notice: Prompt, emergency relief also can be accomplished by asking the Court for a short order of notice on your application for a preliminary injunction. These notices are routinely granted by judges and/or their clerks.

B. Preliminary Injunctions

1. The Standards for Granting Preliminary Injunctive Relief. The seminal case that defines the preliminary injunction standard is *Packaging Industries, Inc. v. Cheney*, 380 Mass. 609 (1980). Lawyers should memorize the basic criteria for granting of preliminary injunctive relief set forth in that decision and be prepared to support (or refute) each requirement for relief with specific facts. The decision to grant or deny injunctive relief is discretionary with the trial judge, provided the lower court applies the correct legal standard. The purpose of injunctive relief is to preserve the status quo pending final relief and prevent irreparable harm -- “not simply to punish past misdeeds or set an example.” *American Board of Psychiatry & Neurology v. Johnson-Powell*, 129 F.3d 1, 5 (1st Cir. 1998).

(a) **Does the plaintiff have a substantial likelihood of prevailing the merits of the underlying claim?** Plaintiff has to convince the Court not only that it is likely to succeed at trial but also that the particular injunctive relief it seeks is appropriate. The fact that the plaintiff may prevail in a tort action for a million dollars does not mean that he should be awarded a preliminary injunction requiring the defendant to begin putting all of his money in the bank so as to be better able to pay the probable judgment, for equitable relief is not typically available in a tort action for damages. However, if plaintiff can show that he will succeed on a claim for damages, he may be entitled to an injunction preventing defendant from transferring, concealing or otherwise disposing of assets while his case is pending. *Boston Athletic Association v. International Marathons, Inc.* 392 Mass. 356, 362 (1984). There must be some nexus between the success that the plaintiff is likely to achieve and the preliminary relief that is sought. For example, if the plaintiff claims to be the purchaser of a particular parcel of real estate and seeks to enjoin its

sale to a third party, or if a former employee is about to pirate trade secrets, injunctive relief may be appropriate. In federal court, the burden of showing probability of success varies depending on the corresponding harm to the party opposing the injunction. *A-Copy, Inc. v. Michaelson*, 599 F.2d 450, 451 (1st Cir. 1978). A moving party must make a stronger showing of the likelihood of success as the seriousness of the harm to the opposing party increases. *Id.*, cited with approval in *Converse Contr. Co., Inc. v. Mass. Bay Transp. Auth.*, 899 F. Supp. 753, 760 (D. Mass. 1995). Even if the likelihood of success on the merits is strong, injunctive relief is not always appropriate. *American Board of Psychiatry & Neurology*, 129 F. 3d at 4 (it was proper to deny an injunction even though defendant infringed on plaintiff's copyright where there was little likelihood of future infringement, and thus no loss of profits, goodwill or reputation)

(b) **Will the plaintiff suffer irreparable harm if the preliminary relief is not granted?** The key word is *irreparable*. Anything that can be repaired by the payment of money is not irreparable. *Norfolk County Hospital v. Commonwealth*, 25 Mass. App. Ct. 586, 593, *review denied*, 402 Mass. 1104 (1988); *Westinghouse Broadcasting Co. v. New England Patriots Football Club, Inc.*, 10 Mass. App. Ct. 70, 72 (1980). *K-mart Corp. v. Oriental Plaza*, 875 F.2d. 907, 914 (1st Cir. 1989). *Sierra Club v. Larson*, 769 F. Supp. 420 (D. Mass. 1991), *aff'd, review denied* 2 F.3d 462 (1st Cir. 1993). The majority of the asserted harms advanced in support of motions for preliminary injunctive relief are not irreparable either. Temporary loss of income, the possibility of emotional distress, loss of prestige of a potential adverse employment action, for instance, does not constitute irreparable injury. *DeNovellis v.* 135 F. 3d 58, 63-4 (1st Cir. 1998). Examples of truly irreparable injury: a threatened forfeiture of a property interest securing a non-recourse note, inevitable disclosure of trade secrets and confidential information by a former employee who has been hired by a competitor or a threat by a shareholder in a close corporation to transfer his stock and nullify the

company's beneficial tax status. An argument that sometimes works is that damages, such as loss of good will, will be extraordinarily difficult to compute.

Note that in cases asserting an interest in real property where the plaintiff fears a pre-adjudication sale, the availability of the notice of *lis pendens* remedy substantially undercuts the possibility of irreparable injury. *Carabetta Enterprises, Inc. v. Schena*, 25 Mass. App. Ct. 389, 391 (1988).

Although employment discrimination cases are not usually appropriate for injunctive relief, preliminary relief may be appropriate in the right circumstances. Recently in *Ralph v. Lucent Technologies, Inc.* 135 F. 3d 166, 170 (1st Cir. 1998), the First Circuit affirmed a preliminary injunction affirmatively requiring defendant to allow a disability discrimination plaintiff to return to work on a provisional basis. The court found that the plaintiff's disability would worsen the longer he was out of work and that the harassment he suffered at defendant employed played a significant role in his breakdown.

The Attorney General is not required to demonstrate irreparable harm when seeking preliminary injunctive relief against violation of a statute. *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984); *Commonwealth v. Wellesley Toyota, Co.*, 18 Mass. App. Ct. 733, 737 (1984), *United States v. D'Annolfo*, 474 F. Supp. 220, 222 (D. Mass. 1979). This exception does not apply where the "public" plaintiff brings an action for other than statutory enforcement. *Metropolitan District Commission v. Codex*, 395 Mass. 522, 526 (1985). Query the requirement where some other public plaintiff sues to enforce a statutory or regulatory obligation. See *Roxse Homes Limited Partnership v. Roxse Homes*, 399 Mass 401, 403 n.3 (1987). It has been said that "when the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief." *EEOC v. Astra, USA, Inc.*, 94 F. 3d 738 (1st Cir. 1996) (upholding injunction

preventing employer from enforcing settlement agreements that prohibited settling employees from aiding the EEOC in its investigation of discrimination charges).

(c) Can it be said that the defendant will not be substantially harmed if the preliminary relief is granted?

Under the state rule (*see Cheney*), the court balances the harm to the opposing party against the harm to the moving party. *See Goulding V. Cook*, 422 Mass. 276 (1996) (“Courts will not enjoin encroachments [on property] where the burden on a defendant would be very great.”) *Cf. Doe v. Attorney General*, 425 Mass. 217 (1997). (Court upheld injunction prohibiting disclosure of plaintiff’s sex offender registry information, holding that there was no remedial purpose in making this information publicly available). The federal courts usually require a showing that the defendant will not be substantially harmed and appears to treat harm to the parties in the same way, balancing one against the other. *United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987); *Fiba Leasing, Inc. v. Airdyne Industries, Inc.* 826 F. Supp. 38, 39 (D. Mass 1993).

(d) Is the public interest at stake? This fourth question often is overlooked by private litigants and, for that matter, often is not relevant in private disputes. Where the requested preliminary injunction could adversely affect the rights of people not parties to the action, however, this can be a powerful weapon in the hands of the person opposing preliminary relief. Consider, for instance, how effectively it was used to secure the *grant* of a preliminary injunction in *Jet-Line Services, Inc. v. Selectmen of Stoughton*, 25 Mass. App. Ct. 645 (1988). Even in the private arena, litigants should advance a public interest argument where appropriate. For instance, in *Shipley Co. v. Kozlowski*, 926 F. Supp. 28, 30 (1996), a noncompetitor case, the court, in granting a preliminary injunction to the former employer, held “it is in society’s best interest to recognize and enforce agreements which

were voluntarily entered into and accepted. Allowing an individual to disregard such a promise would result in behavior which should not be condoned or encouraged."

In Massachusetts, weakness in movant's showing as to one element may be offset by strength on another element. *See Cheney*, 380 Mass. at 616-18 & n.12. *Cf. Hamilton Watch Co. v. Benrus Watch Co., Inc.*, 206 F.2d 738 (2d Cir. 1953). The First Circuit has stated that a showing of likelihood of success on the merits is a "*sine qua non*" of granting preliminary injunctive relief. *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993). The court may deny an injunction based on the absence of any of the four factors. *Reebok International Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (1st Cir. 1994). Appellate review of trial court orders on preliminary injunction applications tends to be more *de novo* in the state courts, *Cheney*, 380 Mass. at 615-16 (section C *infra*), while in the First Circuit, appellate review is more confined. *Bellotti*, 641 F.2d at 1009. The Court of Appeals "review[s] a district court's denial of a motion for preliminary injunction only for 'abuse of discretion' or 'clear error' of fact or related law." *AFL-CIO Laundry & Dry Cleaning v. AFL-CIO Laundry*, 70 F.3d 717, 718 (1st Cir. 1995) (citations omitted).

2. Relevant Cases. Cases that anyone hoping to practice in this area should be familiar with include:

Packaging Industries Group, Inc. v. Cheney,
380 Mass. 609 (1980).

Commonwealth v. County of Suffolk,
383 Mass. 286 (1981).

*Westinghouse Broadcasting Co., Inc. v. New
England Patriots Football Club, Inc.*,
10 Mass. App. Ct. 70 (1980).
Edwin R. Sage Co. v. Foley,
12 Mass. App. Ct. 20 (1981),
*further appellate review
denied*, 1981 Adv. Sh. 1909.

Commonwealth of Mass. CRINC,
392 Mass. 79 (1984).

Town of Brookline v. Goldstein,
388 Mass. 443 (1983).

*Boston Athletic Ass'n. v. International
Marathons, Inc.*,
392 Mass. 356 (1984).

*Demoulas Supermarkets, Inc. v. Peter's
Market Basket, Inc.*,
5 Mass. App. Ct. 750 (1977).

Charger Investments, Inc. v. Revere,
9 Mass. App. Ct. 872 (1980).

Planned Parenthood v. Bellotti,
641 F.2d 1006 (1st Cir. 1987).

Lancor v. Lebanon Housing Authority,
760 F.2d 361 (1st Cir. 1985).

Aoude v. Mobil Oil Corp.,
862 F.2d 890 (1st Cir. 1988);
892 F.2d 1115, 1120 (1st Cir. 1989).

Narragansett Indian Tribe v. Guilbert,
934 F.2d 4 (1st Cir. 1991).

DeNovellas v. Shalala,
135 F. 3d 58 (1st Cir 1998)

The cases cited above are a sampling of cases that have reached the appellate level. However, most preliminary injunction orders, which are interlocutory in nature, are not appealed. Practitioners should pay close attention to Superior Court and federal district court decisions to find out the quantum of evidence needed to succeed on an application for a preliminary injunction and to discern particular trends among judges. Two articles published in Massachusetts Lawyers Weekly -- Cohen, "*Are Non-Compete Agreements Being Upheld?*" (April 8, 1996) and Case,

"Recent Developments in Non-Compete Litigation"
(July 15, 1996) -- provide good overviews of factors considered by the lower courts this year.

3. Availability of Injunctive Relief in the Federal Courts. Although the same basic concepts apply as in state court, you should note that (i) Fed. R. Civ. P. 65 reads differently from Mass. R. Civ. P. 65; (ii) the likelihood of an evidentiary hearing in the District Court is much higher than that in the state courts; and (iii) there are significant differences in the standards for granting injunctions and for reviewing lower court orders. Interlocutory orders on injunctions are appealable to the Court of Appeals as of right under 28 U.S.C. § 1292(a)(1). For an instructive discussion on what is and what is not the denial of an interlocutory injunction, see *Plymouth County Nuclear Information Committee, Inc. v. Boston Edison Company*, 655 F.2d 15 (1st Cir. 1981).

4. Drafting the Order of Injunction. In the first instance, the moving party is responsible for drafting the form of injunction when she drafts her prayer or motion for the injunction. It is good practice to prepare a draft order specifying the relief you are seeking. The order must identify the following.

(a) **Persons Enjoined.** The persons to be enjoined should be identified as specifically as possible. Query the effect of enjoining a non-natural person; a corporation cannot be sent to jail. Query also the effect of adding, after a list of three or four people described by name or office, something to the effect of "and the agents, servants, officers, directors, attorneys and employees of them or of any of them." Are these intended to be persons enjoined? How do you propose to serve them? If what you are trying to do is "catch" the doing of things by the named people indirectly via such persons, isn't it preferable to say so directly?

(b) **Actions Prohibited.** An injunction must be able to permit the person enjoined to determine what it is he is prohibited from doing with reasonable specificity, without resort to lawyers or clarifying

orders from the court, and without spending half a century pondering the question. In this respect, it must be drafted with all of the care of a criminal statute, for it will be interpreted as strictly. Wholly apart from legal considerations, no judge is going to send someone to prison for contempt of an order if the prohibited nature of what the person did was ambiguous.

(c) **Don't Overreach.** The average requested injunction overreaches horribly. Sometimes the judge will edit your request down to something reasonable; other times he will simply deny your request with the aside that you should have done the editing before coming into court. It is, ultimately, the Court's duty not to exceed the minimum restraint consistent with the demonstrated circumstances. See *Brookline v. Goldstein*, 388 Mass. 443, 451 (1983).

5. Mandatory v. Prohibitory Injunction. An injunction may be framed in terms commanding affirmative action, as opposed to prohibiting action. It is an unwritten rule, however, that Courts will hesitate before granting mandatory relief in the form of a preliminary injunction, and this makes sense when you consider that (i) the primary purpose of a *preliminary* injunction is to preserve, not alter the *status quo ante*, and (ii) that granting a mandatory injunction generally requires that the Court decide the ultimate merits of the case to a far greater extent than does granting a prohibitive preliminary injunction. Courts should not grant, and tend not to grant, preliminary injunctions that bestow upon a party all of the relief he might obtain after succeeding at trial on the merits. *E.g., Automatic Radio Mfg. Co. v. Ford Motor Co.*, 272 F. Supp. 744, 749 (D. Mass. 1967), *aff'd* 390 F.2d 113, *cert. denied*, 391 U.S. 914 (1968); *Matter of McKnight*, 406 Mass. 787, 792 & n.4 (1990). Whenever possible, frame your request in prohibitive terms. (The *McKnight* decision contains an instructive discussion of the structure of injunctions in cases involving alleged failures by public agencies to do their duties.) However, when necessary, affirmative relief may be appropriate. See

discussion, *supra* of *Ralph v. Lucent Technologies*, 135 F. 3d 166 (1st Cir. 1998)

6. Requirement of a Bond. Rule 65(c) makes the imposition of a bond the ordinary rule, and excusing of the bond an exception, although the reverse seems to occur in practice. The bond is the only way in which a person improperly enjoined can later recover his damages by reason of the improper injunction: he cannot sue the Court (which is immune) and he cannot sue the injunction-applicant (in the absence of the bond), because the responsibility was that of the Court. *See W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983). The bond is *both* the applicant's undertaking to ensure against any damage *and* a surety's undertaking to stand behind that obligation; you should press for a bond even if it is without surety.

The potential damages for which the bond should be set are "the costs (usually not including attorney's fees) and pecuniary injury that may accrue during the period of the injunction which ultimately . . . as found to have been wrongly issued." *O'Day v. Theran*, 7 Mass. App. Ct. 622, 625 (1979). The trial judge could condition the grant of a preliminary injunction on an undertaking to pay the costs of successfully appealing the injunction. *International Ass'n of Machinists and Aerospace Workers v. Eastern Airlines, Inc.*, 925 F.2d 6, 10 (1st Cir. 1991). The court also could require the nonmoving party to post security upon the denial of a motion for preliminary injunction. *Zebrowski v. Hanna*, 973 F.2d 1001, 1004 (1st Cir. 1992).

As a matter of tactics, many people opposing injunction sometimes demur pressing the requirement of a bond, perhaps on the assumption that the making of such an argument will signal weakness to the Court on the underlying issue of whether the injunction should enter. Properly done, however, the argument on the bond can fit nicely with your argument on the third point of the basic standards (harm to the

defendant if the injunction issues). Indeed you may be able to defeat the issuance of an injunction if the moving party is unable to secure the injunction bond. Should you elect not to argue the bond requirement, you may well be held to have waived it on any appeal.

7. Consolidation of Hearing on the Merits with Hearing on Preliminary Injunction. The Court may consolidate the request for preliminary relief and the merits, *see* Mass. R. Civ. P. 65(b)(2) and Fed. R. Civ. P. 65 (a)(2), which is particularly useful if the facts are not disputed (*see Rent Control Board of Cambridge v. 375 Associates Limited Partnership*, 396 Mass. 696, 698 (1986)) as well if the facts are complex and require extensive discovery and evaluation of evidence before the court can decide whether injunctive relief is warranted. Note, *inter alia*, that in this situation specific findings of fact are required, which tends toward less hasty, more considered decisions. (Mass. R. Civ. P. 52, which differs from Fed. R. Civ. P. 52, requires findings of fact in decisions on the merits but does not require them in rulings on motions for preliminary injunction.) The federal court judge must make specific conclusions about contested matters. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1227-28 (1st Cir. 1994).

8. Final Adjudication on the Merits: A preliminary injunction may lapse when final judgment enters. *The Judge Rotenberg Educational Center, Inc. v. Commission of the Dept. of Mental Retardation*, 424 Mass. 471 (1997). Any appeal from the granting of the preliminary injunction after entry of final judgment is moot. *Id.*

C. Appellate Review.

1. Procedure. An order granting, denying, modifying, or continuing a preliminary injunction is interlocutory. By virtue of G.L. ch. 231, § 118, ¶ 1, however, it is appealable as of right. Such an appeal is taken by filing a notice of appeal in the lower court,

and the appeal comes on in the ordinary course before the Full Bench of the appropriate appellate court. Such a "plenary" appeal, however, will not ordinarily be expedited, *Demoulas Super Markets, Inc. v. Peter's Market Basket, Inc.*, 5 Mass. App. Ct. 750, 754 (1977); you should (if you want appellate review before the whole matter has become practically moot) either move for a stay under Mass. R. App. P. 6 or file a petition in the Single Justice Session under § 118, ¶ 2, or do both.

Because it fits within the generic class of interlocutory orders, an injunction order is also subject to *discretionary* appellate review under G.L. ch. 231, § 118, ¶ 2. A petition for such review is filed in the Single Justice session of the appropriate appellate court. The Single Justice may do any of three things: (i) he may decide that the matter is not worthy of interlocutory appellate review, (ii) he may decide that the matter warrants interlocutory appellate review and refer it to the Full Bench (with or without some interlocutory relief pending that review), or (iii) he may decide that the matter warrants interlocutory appellate review and grant that review himself (by affirming, reversing or modifying the trial court order). (*E.g.*, *Swift v. American Mutual Insurance Co.*, 399 Mass. 373, 375 (1987) (option (ii)); *Rhode Island Hospital Trust National Bank v. Post*, 27 Mass. App. Ct. 1207 (1989) (option ii); *Gibbs Ford, Inc. v. United Truck Leasing Corp.*, 399 Mass. 8, 10 (1987) (option (iii).) No review of Option (i) lies to the Full Bench. (*But see Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 706 (1990), where a party aggrieved by an exercise of Option (i) by a single justice of the Appeals Court sought and obtained review by a Single Justice of the Supreme Judicial Court under G.L. ch. 211, § 3, following which the other side sought and obtained review of the action of the second single justice both by appealing his action and seeking review under G.L. ch. 211, § 3.) An exercise of Option (iii) is appealable as of right by the disappointed party, by filing of a notice of appeal, at

least if the order is a reversal or modification. An election of (ii) is reviewable by the Full Bench when the merits of the matter comes on before it. *Leavitt v. Mizner*, 404 Mass. 81 (1989) (affirming a single justice's grant of leave to take an interlocutory appeal of the denial of summary judgment). *Cf. JBL Construction Co. v. Lincoln Homes Corp.*, 9 Mass. App. Ct. 250, 252 (1980).

It would seem that prevailing practice when appealing a preliminary injunction is to file both a plenary appeal under G.L. ch. 231, § 118, ¶2, and a petition for interlocutory review under G.L. ch. 231, § 118, ¶ 1. *See, e.g., Helmes v. Commonwealth*, 406 Mass. 873, 874 (1990); *Inspector of Buildings of Salem v. Salem State College*, 28 Mass. App. Ct. 92, 93 (1989), *review denied*, 406 Mass. 1103 (1990). Presumably, the paragraph 1 petition serves a function akin to the appellate motion for a stay (or injunction) pending appeal under Mass. R. App. P. 6. *Cf. Rhode Island Hospital Trust National Bank v. Post*, 27 Mass. App. Ct. 1207 (1989). In *Doe v. Attorney General* 425 Mass. 210 (1997) the Supreme Judicial Court transferred an appeal under G.L. c. 231, §118 concerning an injunction prohibiting prosecution of a juvenile who failed to register as a sex offender. The Court vacated the injunction making clear that in appeal, "[w]e deal solely with a question of law. If the basis on which the preliminary injunction was issued is wrong as a matter of law, the preliminary injunction cannot be sustained." *Id.* at 212, citing *T&D Video, Inc. v. Revere*, 423 Mass. 577, 580 (1996).

On the subject of permissive interlocutory appeals, the question often arises whether such appeals are "mandatory," by which is meant whether the failure to take a *permitted* interlocutory appeal precludes one from seeking appellate relief of the same order when final judgment has been entered (assuming under the circumstances that the interlocutory order has not become moot by final judgment time). The answer is a qualified "No,"

meaning that the failure to take a permissive interlocutory appeal within 30 days of the interlocutory order does not bar subsequent appellate review when the final judgment comes up (though it most likely does bar seeking *interlocutory* appellate review of that order prior to final judgment but subsequent to running of the 30-day period). *Thibbetts v. Crowley*, 405 Mass. 222, 225 n.5 (June 22, 1989) ("[interlocutory] appeals are not mandatory, nor are they favored").

An order granting or denying a temporary restraining order is not within the class of orders described in ch. 231, § 118, ¶ 2. *Royal Dynasty, Inc. v. Chin*, 37 Mass. App. Ct. 171 (1994).

Further Appellate Review. On October 20, 1995, SJC Rule 2.21 was enacted. That rule allows a party denied relief from an interlocutory ruling by the single justice to appeal directly to the full bench if the single justice does not report her denial of relief to the full court.

2. Standard of Review. Because preliminary injunction motions are typically heard on documentary evidence in the Superior Court, the appellate courts do not feel bound to refrain from viewing the "evidence" afresh. On the other hand, whether or not to grant any preliminary injunction is unavoidably a matter of discretion with the trial court. *See Foreign Auto Import, Inc. v. Renault Northeast, Inc.*, 367 Mass. 464 (1975). These two precepts obviously tend in different directions on the issue of the standard of review; one decision offers this attempt to harmonize: "We take a fresh look at the affidavits, but, in assessing whether a judge erred in granting or denying a request for preliminary injunctive relief, we must look to the same factors properly considered by the judge in the first instance Where, as here an order was predicated solely on documentary evidence we may draw our own conclusions from the record." *French v. Vandkjaer*, 14 Mass. App. Ct. 980 (1982), quoting *Cheney*.

Another statement of the standard: "Our task here is to decide whether the [trial] court applied the proper legal standards and whether there was reasonable support for its evaluation of factual questions." *Biotti v. Selectmen of Manchester*, 25 Mass. App. Ct. 637, 640 (1988). In *Carrabetta Enterprises, Inc. v. Schena*, 25 Mass. App. Ct. 389, 392 (1988), the Appeals Court was moved to observe that "an appeal . . . from the grant or denial of a preliminary injunction rarely proves successful". But in fact, the appellate courts have demonstrated a willingness to scrutinize, reverse and revise preliminary injunctions. *E.g.*, *Town of Brookline v. Goldstein*, 388 Mass. 443 (1983) (injunction reversed in part and modified in part), *Shiple v. Cobb*, Appeal Court Docket No. 93-J-779 (November 10, 1993, Decision of Single Justice modifying scope of injunction). *See also Care and Protection of Edith*, 421 Mass. 703 (1996) (Full bench of Supreme Judicial Court vacating injunction granted by district court and affirmed by a Single Justice.)

The tactical moral is obvious: if defending what the trial court did below (particularly if the requested preliminary injunction was denied), stress the court's discretion. If seeking reversal of what happened below, stress a *de novo* consideration of the papers (and the facts demonstrated thereby), leaving the appellate court with the view that only one outcome makes sense.

Note that a Single Justice considering whether to grant or deny interlocutory relief under G.L. (1988 ed.) ch. 231, § 118, ¶ 1 has plenary authority to act. He need not, before reaching a conclusion contrary to the trial court, determine that the trial court committed either legal error or an abuse of discretion. *Demoulas v. Demoulas Super Markets, Inc.*, 33 Mass. App. Ct. 939, 940 (1992); *Jet-Line Services, Inc. v. Selectmen of Stoughton*, 25 Mass. App. Ct. 645, 646 (1988). Where an appellate court reviews a Single Justice order, "[w]e review the single justice's order in the same manner as if it were an identical order by the trial judge considering the matter in the first

instance." *Highland Tap of Boston, Inc. v. Boston*, 26 Mass. App. Ct. 239, 240 (1988), *appeal dismissed*, 33 Mass. App. Ct. (1992). The sum of these propositions (that the full bench is bound by the exercise of discretion below, even where "below" is the single justice, but the single justice is not similarly bound) is not intuitively obvious; it most likely derives from a patchwork of statutes affecting interlocutory appeals and interlocutory appellate remedies that, hopefully, will someday be rationalized, streamlined and modernized.)

3 Federal Standard. At the Court of Appeals, rulings of law will be reviewed *de novo*; findings of fact will be tested by the clearly erroneous standard (in federal district court, the court must render findings of fact when ruling upon a motion for a preliminary injunction); and exercise of discretion will be tested by the "abuse" standard. *Weaver v. Henderson*, 984 F.2d 11-13 (1st Cir. 1993). *Associated Builders and Contractors of Massachusetts/Rhode Island v. Massachusetts Water Resources Authority*, 935 F.2d 345, 350 (1st Cir. 1991) *cert. denied* 112 S. Ct. 1935 (1992). The Court gives great deference to the district court's decision after evaluation of the evidence. *Anthony v. Sundlum*, 952 F.2d. 603, 605 n2 (1st Cir. 1991); *Feinstein v. Space Ventures, Inc.* 989 F.2d 49 (1st Cir. 1993).

4. Effect of Judgment on Review. Easy to lose sight of, particularly after full appellate trappings, is that appellate review of an interlocutory order remains an interlocutory step in the litigation process. In the usual case, a trial court's preliminary rulings of law and findings of fact (primarily on the question of likelihood of success) are exactly that: preliminary. They do not preclude the trial court from reaching different legal or factual conclusions after a trial on the merits. In the usual case, the same thing is true of rulings and findings (or rulings on findings) at the appellate level. See and consider Judge Kass's observations in *Inspector of Buildings of Salem v. Salem State College*, 28 Mass. App. Ct. 92, 94 (1989).

D. Contempt.

Violating the terms of an injunction is a contempt of court, for which the penalties are severe, swift, and generally best avoided. Indeed, violating even an improperly entered (and subsequently reversed) injunction is a contempt. (Reversal of the underlying injunction bars any *civil* contempt remedies for a pre-reversal violation, but it does not bar any *criminal* contempt remedies.) Moreover, being in contempt of an injunction order may well deny one the right to appeal that order. *See Cohen v. Murphy*, 368 Mass. 144, 146 (1975). Moral: if you think that an injunction entered against your client is unfair, try to have it fixed on appeal, but tell your client to obey it in the meantime.

A proceeding seeking *civil* contempt remedies is not governed by Mass. R. Civ. P. 65.3. In the past, it was widely believed that a proceeding for *criminal* contempt could be commenced only by the appropriate District Attorney; now it appears that a civil litigant may commence and prosecute proceeding for criminal contempt as well. *See Furtado v. Furtado*, 380 Mass. 137, 147 (1980). *See also* Mass. R. Crim. P. 44. For a discussion of the difference between civil and criminal contempt, *see Town of Stow v. Marinelli*, 352 Mass. 738, 744-45 (1967).

II. PRELIMINARY INJUNCTION TACTICS.

Though not written anywhere, there is a fifth standard on granting preliminary injunctions which is, how quickly the matter can be tried. If you are seeking injunctive relief and the court begins to sound like it is considering an order for speedy trial, don't fight the matter too hard: the court is probably having doubts about granting the injunction, and your choices

may well be no injunction and a speedy trial or no injunction period. Take what you can get.

If you are opposing an injunction and the judge begins talking about a speedy trial, don't launch into a detailed laundry list of all the things that have to be done before the case can be tried. Your success at list-writing is likely to win your client the wrong end of an injunction. Indeed, in an appropriate case you can suggest the syllogism by reference to Mass. R. Civ. P. 65(d). In most (if not all) situations, it is better to spend late nights getting ready for a prompt trial than it is to suffer a preliminary injunction against you. (Particularly if the duration of that suffering will be measured by the length of time it takes to get a case to trial in the Superior Court.)

The bottom line on injunction tactics is to be practical. Even if persuaded that a preliminary injunction of some sort is warranted, the Court in most cases wants to grant the minimum order that will preserve the *status quo* until the merits of the matter can be finally disposed of. Push for too much and you may well come up with nothing. Don't overreach.

As noted above, seeking *ex parte* relief is a tactic fraught with risks for the movant. The standards are higher; the judicial reluctance will be greater; and what may ultimately be lost is both the *ex parte* motion and the non-*ex parte* one that follows later.

For similar reasons, a plaintiff should think hard about seeking preliminary injunctive relief at all. Doing so forces the Court to a preliminary assessment of the merits of your case, before you have the advantage of discovery and trial, and without the opportunity for the studied reflection and legal thinking (both by you and by the Court) that ought ultimately to bear on the case before it is finally disposed of. Simple logic says that the likelihood of a plaintiff's prevailing at the preliminary stage is lower than his likelihood of prevailing ultimately. But if the

motion is made and lost, your case will lose its momentum, your adversary will lose whatever interest he had in settling, and you may find the first battle to have been the war itself. The question to ask yourself is this: "Does the client *need* the injunction in order to protect his rights *pendente lite*?"