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ENFORCING A NON-COMPETE

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**\*150** Your biggest and best client is the Acme Widget Company. Acme’s leading salesperson is John Smith. John is an “at-will” employee, not hired for a particular term. His sales territory consists of Dallas and Tarrant Counties.

You drafted John’s employment agreement. It has a covenant not to compete: For five years after leaving Acme, John will not sell widgets to any of Acme’s present or future customers anywhere in the State of Texas. The agreement also has a nondisclosure covenant: John will not disclose to others or misuse for his own benefit confidential or proprietary Acme information. Last, the agreement has a covenant that John will not solicit other employees to leave Acme.

On Monday morning, Acme’s president storms into your office in a panic. John quit his job at Acme to set up a competing company--the Beta Widget Company. Now he is stealing Acme’s customers and employees. Three of Acme’s customers have pulled their accounts and moved to Beta. Others customers are likely to follow. Four Acme salespeople have quit and gone to work for Beta. The president’s words to you are blunt: “John’s employment agreement says that he cannot steal our customers or our employees. You wrote the agreement, now you enforce it. I want Beta shut down immediately!”

This article is designed to help the Texas lawyer faced with situations like the one described. After discussing the Texas statutory and case law concerning covenants not to compete (non-competes), this article walks the reader through the process of enforcing a non-compete, from initial factual investigation and legal evaluation through preparation of the paperwork required to file suit, obtaining a temporary restraining order, expedited discovery, the hearing on your application for temporary injunction, and preparation for trial.

## I. The Statute

Sections 15.50 through 15.52 of the Texas Business and Commerce Code govern the validity and enforceability of covenants not to compete.<sup>1</sup> To be valid and enforceable, a covenant not to compete must meet two basic statutory requirements. First, the covenant must be “ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.”<sup>2</sup> Second, the covenant must contain “limitations as to time, geographical area, and scope of activity to be restrained that **\*151** are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.”<sup>3</sup>

If a covenant not to compete meets both statutory requirements, it may be enforced by injunction, an award of damages, or both.<sup>4</sup> If the covenant is ancillary to an otherwise enforceable agreement but is overbroad as to time, geographical area, or scope of activity, the trial court, at least upon proper request, *must* reform the covenant to make it reasonable.<sup>5</sup> If the covenant must be reformed because it is overbroad, damages incurred before reformation are not recoverable, but the reformed covenant may be enforced by injunction.<sup>6</sup>

Before September 1, 1993, section 15.51(c) provided that the court must reform an overbroad covenant “*at the request of the promisee.*”<sup>7</sup> Under this rule, several Texas courts held that the failure to request reformation at the trial court level waived the right to reformation.<sup>8</sup> The September 1, 1993 statutory amendments eliminated the phrase “at the request of the promisee” from **\*152** section 15.51(c).<sup>9</sup> This may have eliminated the requirement that you must request reformation at the trial court

level. Nonetheless, until the law in this area is clarified, if you seek to enforce an overbroad covenant, you should still ask the trial court to reform it in a way that makes it reasonable.

Once the trial court has been requested to reform a covenant not to compete to make it reasonable, the court must do so.<sup>10</sup> The trial court's failure to reform an overbroad covenant when requested to do so is error.<sup>11</sup>

## II. Case Law

The statutory requirements do not stand alone. Texas courts have elaborated upon those requirements and have addressed other issues that affect the enforceability of covenants not to compete.

### A. Employment-At-Will

Covenants not to compete are typically ancillary to the sale of a business, a settlement agreement, or an employment agreement. If an employment agreement is for a definite term, it is an "otherwise enforceable agreement" and will support a non-compete. On the other hand, it has long been the law in Texas that an employment-at-will relationship is not an "otherwise enforceable agreement" because it can be terminated by either the employer or the employee at any time and \*153 for any reason.<sup>12</sup> It follows that a covenant not to compete that is ancillary only to an employment-at-will relationship is invalid.<sup>13</sup>

In 1993, the Texas Legislature tried to change this rule by adding to the statute language that referred to "at-will" employment relationships.<sup>14</sup> The legislative history clearly indicates that this language was added for the purpose of making non-competes in employment-at-will relationships fully enforceable.<sup>15</sup> The Texas Supreme Court, however, was not persuaded. In *Light v. Centel Cellular Co. of Texas*,<sup>16</sup> the court reaffirmed the rule that an employment-at-will relationship--without more--does not constitute an "otherwise enforceable agreement" that will support a non-compete.<sup>17</sup>

Even in an at-will employment relationship, the employer and employee often make promises and assume obligations. According to the *Light* court, if such a promise or obligation is dependent upon continued employment, it is not an "otherwise enforceable agreement" because the promisor can avoid the obligation by terminating employment.<sup>18</sup> The promise or obligation will constitute an "otherwise \*154 enforceable agreement," only if it is not dependent upon continued employment and is supported by consideration.<sup>19</sup> Even then, the promise or obligation will support the non-compete only if the relationship between the two covenants satisfies the following two-part test announced by the *Light* court for determining whether one is "ancillary" to the other:

[F]or a covenant not to compete to be ancillary to an otherwise enforceable agreement between employer and employee:

(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and

(2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.<sup>20</sup>

The *Light* court gave one example of an "otherwise enforceable agreement" that will support a non-compete in an at-will employment relationship: a covenant by the employee not to disclose confidential or proprietary information of the employer in consideration for the employer's actually providing the employee with such information.<sup>21</sup> According to the *Light* court, such a nondisclosure covenant is fully enforceable, and the relationship between that covenant and a covenant not to compete is such that the non-compete is "ancillary" to the non-disclosure covenant.<sup>22</sup>

In the wake of *Light*, therefore, three things--and only three things--are clear. An employment-at-will relationship is not an "otherwise enforceable agreement" and--without more--will not support a non-compete. Also, in the employment-at-will situation, a promise or obligation that is dependent on continued employment is not an "otherwise enforceable agreement." On the other hand, a covenant of an employee not to disclose confidential information of the employer--at least when the employer actually provides such information to the employee--is an "otherwise enforceable agreement" to which a covenant not to compete is "ancillary." Answers to the question of what other promises or obligations in an employment-at-will

relationship will constitute an “otherwise enforceable agreement” that will support a non-compete must await future decisions by the courts.

## **B. Limitations as to Time, Geographical Area, and Scope of Activity**

Decisions regarding the enforceability of covenants not to compete are highly dependent upon the facts of the particular case. A reasonable limitation with respect to time, geographical area, or scope of activity in one case may be an unreasonable \*155 limitation in another case. The ultimate requirement is that the particular limitation “not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.”<sup>23</sup>

Texas courts usually uphold time limitations of one or two years. Limitations of three to five years generally are upheld in the sale of a business, but the decisions conflict on whether a three to five year limitation is reasonable in an employment situation.<sup>24</sup>

The geographical limitation in a covenant not to compete must be definite. An indefinite description of the geographical area renders the covenant unenforceable as written, although it may be reformed and then enforced by injunction.<sup>25</sup> For a covenant ancillary to an employment agreement, numerous Texas courts have held \*156 that a reasonable area is the territory in which the employee worked while employed.<sup>26</sup> Therefore, if you are seeking to enforce a covenant not to compete ancillary to an employment agreement, and the employee worked a particular territory (for example, a salesperson with an assigned territory), any effort to enforce the covenant in a larger area is likely to run afoul of these cases. Beyond these few well-settled rules, what constitutes a reasonable geographical area will depend upon the facts of the specific case.<sup>27</sup>

There are two general types of scope of activity limitations: those that prohibit the employee from soliciting the employer’s customers, and those that prohibit the employee from engaging in any competitive business. With respect to customer \*157 solicitation, “reasonable” limitations are valid and enforceable.<sup>28</sup> This is because a legitimate purpose of a covenant not to compete is to prevent “employees or departing partners from using the business contacts and rapport established during the relationship of representing [a] firm to take the firm’s customers with him.”<sup>29</sup> However, some customer solicitation limitations are considered overbroad, unreasonable, and, therefore, unenforceable, at least without reformation. In *Peat Marwick Main & Co. v. Haass*, the Texas Supreme Court held a covenant not to compete overbroad and unenforceable.<sup>30</sup> The covenant prohibited a former partner of an accounting firm from soliciting or doing business for clients acquired by the firm after the partner left, or with whom the partner had no contact while at the firm.<sup>31</sup> For a scope of activity limitation of this type to be reasonable, there must be “a connection between the personal involvement of the former firm member [and] the client.”<sup>32</sup> Therefore, a covenant against soliciting customers should be limited to customers with whom the employee had contact during the period of employment; absent such a limitation, the covenant is overbroad.

The second, and broader, scope of activity limitation is one that prohibits any competitive activity. Texas courts generally uphold such limitations when the employer is engaged in only a single type of business.<sup>33</sup> On the other hand, when an employer engages in a number of different types of business, such a limitation may be unreasonable unless it is limited to the specific type of business in which the employee worked while employed by the employer.<sup>34</sup>

## **\*158 C. Consideration**

“[A]n agreement not to compete, like any other contract, must be supported by consideration.”<sup>35</sup> Before September 1, 1993, if a covenant not to compete was executed on a date other than the date of the agreement to which it was ancillary, the covenant had to be supported by “independent valuable consideration.”<sup>36</sup> The September 1, 1993 statutory amendments abolished this requirement. Accordingly, the usual rules concerning legal consideration apply.

If a covenant not to compete is contained in another agreement, such as an employment agreement, a settlement agreement, or an agreement for the sale of a business, it is only necessary to show that the entire agreement is supported by legal consideration. It is not necessary to show separate, independent consideration for the covenant not to compete.<sup>37</sup> Moreover, the consideration requirement is not hard to satisfy. Several Texas courts have held that special training or knowledge provided by the employer to the employee may constitute sufficient consideration to support a non-compete.<sup>38</sup>

## **D. Requirements for Injunctive Relief**

If your case qualifies for both state and federal court jurisdiction, you will almost certainly want to file suit in state court simply because temporary restraining orders and temporary injunctions are easier to obtain. To obtain a temporary restraining order or temporary injunction in state court, you must show a probable right of recovery, probable injury in the interim, and no adequate legal remedy.<sup>39</sup> \*159 But, several Texas courts have held that the legal remedy of damages is inadequate if *either* the damages are incapable of calculation or the defendant is incapable of responding in damages.<sup>40</sup>

### **III. Enforcement**

#### **A. Before Filing Suit**

##### **1. Determine Whether the Covenant Is Ancillary to an “Otherwise Enforceable Agreement”**

As discussed in part I, the first statutory requirement for a valid non-compete is that it be “ancillary to or part of an otherwise enforceable agreement.”<sup>41</sup> This is easy to establish if the covenant not to compete is part of an agreement for the sale of a business, a settlement agreement, or a term employment agreement.

Your case--*Acme Widget Company v. John Smith*--is more problematic because Smith was an at-will employee of Acme. In the *Light* case, the Texas Supreme Court reaffirmed that an at-will employment relationship is not an “otherwise enforceable agreement.”<sup>42</sup> The *Light* court also stated, however, that if an employer gives an employee confidential company information in exchange for a covenant by the employee not to disclose that information, the covenant not to disclose is an “otherwise enforceable agreement” to which a non-compete is “ancillary.”<sup>43</sup>

The John Smith employment agreement contains a covenant by Smith not to disclose confidential or proprietary Acme information. Check with Acme to confirm that Smith actually received confidential Acme information, such as a customer list or pricing information. If so, the covenant not to disclose will qualify as an “otherwise enforceable agreement” that will support the non-compete. If not, find out if there are any other agreements between Smith and Acme that are supported by consideration and that meet the two-part *Light* test for whether a non-compete is ancillary to another covenant.

##### **\*160 2. Determine Whether the Limitations as to Time, Geographical Area, and Scope of Activity Are Reasonable or Whether They Need to Be Reformed**

Familiarize yourself with Texas law on whether particular limitations as to time, geographical area, or scope of activity are reasonable. Then, carefully counsel your client to determine whether the limitations in the covenant not to compete are reasonable; that is, whether they do not impose a greater restraint than is necessary to protect the goodwill or other business interest of your client. Advise your client of the risks associated with seeking to enforce an overbroad limitation.<sup>44</sup> If you determine that any of these three limitations in the covenant are overbroad, ask the trial court to reform the limitations to a point where they are reasonable.

All three of the limitations in the non-compete in the John Smith employment agreement--five years, the state of Texas, and no solicitation of any present or future customer--are likely overbroad. In an employment agreement, a five year time limitation is hard to sustain. Request reformation to two or three years. The geographical limitation of the state of Texas is probably unreasonable because it is broader than Smith’s sales territory. Request reformation to his sales territory of Dallas and Tarrant Counties. The scope limitation is probably unreasonable because it applies to “future customers” of Acme with whom Smith had no contact while at Acme. Request reformation to limit the covenant to Acme customers with whom Smith had contact while at Acme.

##### **3. Determine Whether Other Claims Exist**

Conduct whatever factual and legal investigation is necessary to determine whether Acme has any claims against Smith in addition to a claim on his covenant not to compete. Such claims might include any of the following:

### **a) Misuse of Trade Secrets**

A trade secret is generally defined as confidential information of a business that provides the business with a competitive advantage.<sup>45</sup> One who acquires knowledge of a trade secret in a confidential relationship, such as an employment relationship, breaches that confidence and incurs legal liability by disclosing the \*161 trade secret or using it for his or her own benefit. Types of information that may constitute trade secrets include formulas, manufacturing techniques, customer lists, pricing information, cost information, and the identity of suppliers. As part of your factual investigation, find out if there is any evidence that John Smith is using Acme trade secrets in his new business at Beta Widget Company.

### **b) Breach of a Nondisclosure Covenant**

The Smith employment agreement contains a provision that prohibits Smith from disclosing or misusing confidential or proprietary information of Acme. Subject to other legal rules concerning the enforcement of contracts, nondisclosure covenants of this type are enforceable.<sup>46</sup> Depending on how these covenants define confidential information, they may provide significantly broader protection than is provided by the common-law doctrine prohibiting misappropriation of trade secrets.

A nondisclosure covenant is not subject to sections 15.50 through 15.52 of the Texas Business and Commerce Code. You need not show that it contains reasonable limitations as to time, geographical area, or scope.<sup>47</sup> Moreover, even when a covenant not to compete is unenforceable, a nondisclosure covenant in the same agreement may be severed and enforced, provided that it is supported by consideration and the intent of the parties is not frustrated by such enforcement.<sup>48</sup>

### **c) Breach of a Covenant Not to Solicit Other Employees**

The Smith employment agreement also contains a covenant that Smith will not solicit other Acme employees to leave the company. Subject to other legal rules concerning contracts, such a covenant should be enforceable. Confirm that Smith violated his agreement by soliciting the four salespeople who left Acme to work for Beta. If he did, you should be able to recover any damages you can prove, and you probably are entitled to an injunction against Beta to prevent future violations.

### **d) Breach of Duty of Loyalty**

Every employee owes his or her employer a duty of loyalty. “[T]here is an implied obligation on the part of an employee to do no act which has a tendency to injure the employer’s business or financial interest.”<sup>49</sup> Find out when John Smith \*162 incorporated Beta Widget Company, when he first solicited other Acme salespeople to leave the company, and when he first discussed with Acme customers the prospect of taking their accounts to a new business to be formed by Smith. If Smith engaged in any of these activities before terminating his employment, Acme may have a cause of action against him for breach of this implied duty of loyalty.

## **4. Investigate**

Conduct a thorough factual investigation to confirm Smith’s breach of the covenant not to compete and to begin developing the evidence that you will need at the temporary injunction hearing. Review Smith’s personnel file and other relevant documents from Acme. Interview Acme’s president and any other company employees who may have relevant knowledge. Do the same with respect to third parties. The former Acme customers that Smith stole may also be willing to talk to you.

## **5. Make Arrangements for Bond**

Whether in state or federal court, Acme will need to post a bond to obtain either a temporary restraining order or a temporary (in federal court, preliminary) injunction.<sup>50</sup> Obtaining a bond takes time, so start the process as early as possible.

## **6. Counsel Your Client**

Make sure that Acme is aware of the legal rules governing the validity and enforceability of a covenant not to compete and the rules that govern obtaining a temporary restraining order and temporary or preliminary injunction. Counsel the company on its potential liability if things go wrong.<sup>51</sup> Acme will likely want an estimate of the fees and expenses that will be generated through each stage of the proceedings.

## **7. Decide Where to File**

If you have a choice between state and federal court, you will probably want to file in state court where it is easier to obtain temporary restraining orders and temporary injunctions.

With respect to venue in state court, if the primary relief sought is an injunction, you must file suit in the county in which the defendant is “domiciled” if \*163 there is a single defendant.<sup>52</sup> If there are multiple defendants, you can file suit where any of them are “domiciled.”<sup>53</sup> In federal court, the normal venue rules apply.

## **B. What to File**

### **1. The Petition or Complaint<sup>54</sup>**

In both state and federal court, an application for a temporary restraining order must be verified.<sup>55</sup> All allegations necessary to obtain the temporary restraining order must be verified, and the verification must be based upon personal knowledge. If there is not someone who can sign a verification based upon personal knowledge with respect to each of the allegations, including the allegation that the employee has violated or intends to violate the non-compete, do not apply for a temporary restraining order.

It is important to interview the person signing the verification to confirm that he does, in fact, have personal knowledge of the verified allegations. The person who signs the verification likely will be deposed before the hearing on the application for temporary or preliminary injunction. It will not help your case if your witness has to admit that he has only hearsay knowledge concerning some of the verified allegations.

Be sure to comply with all required certifications. For example, Federal Rule of Civil Procedure 65(b) requires that you certify to the court “in writing” the efforts you have made to notify the opposing party about the application for temporary restraining order. Many state courts have local rules that require certain certifications.<sup>56</sup>

If the non-compete that you are attempting to enforce contains an overbroad limitation as to time, geographical area, or scope of activity, be sure to request reformation of the overbroad limitation. As discussed in part III.A.2, above, in your case--*Acme Widget Company v. John Smith*--you should request in your petition that the limitations in the Smith covenant not to compete be reformed to two years, \*164 Dallas and Tarrant Counties, and a proscription that Smith refrain from soliciting those customers of Acme with whom he had contact while employed at Acme.

### **2. Order Granting Application for Temporary Restraining Order<sup>57</sup>**

The federal and state rules prescribe what this order must contain.<sup>58</sup> Among other things, the order must set the amount of the bond and a date and time for the hearing on the application for temporary or preliminary injunction.

### **3. Motion and Order for Expedited Discovery**

If you want to take any discovery before the hearing on the application for a temporary or preliminary injunction, you must move for expedited discovery. You will almost certainly want to depose John Smith before the hearing. You may also want to depose the Acme salespeople and customers that Smith solicited. You will want to obtain relevant documents from Smith before the hearing. The order should be specific, allowing you to take the depositions and obtain the documents that you need on three to five days notice.

### **4. Deposition Notices and Document Request**

The deposition notices should contain blanks for the date and time of the defendant’s depositions. After the hearing on your

application for a temporary restraining order, you can fill in the dates and times in the notices. You must schedule these depositions for dates in advance of the temporary injunction hearing while allowing the defendants the notice required by the order allowing expedited discovery. In state court, accompany the deposition notices with a subpoena *duces tecum*. In federal court, file a separate document request under Rule 34. In either case, the document request should be short and to the point.

### **5. Bond<sup>59</sup>**

Before filing suit, you may be able to obtain a bond signed and completed by the surety and pre-approved up to a particular amount (with the actual amount of the bond left blank). In this situation, if the court grants your application for a temporary restraining order and sets the bond at an amount within the pre-approved limit, you can fill in the blank, file the bond immediately, and promptly obtain a writ of injunction.

### **\*165 6. Writ of Injunction<sup>60</sup>**

This is the document that the clerk's office completes and with which the defendant is served. District clerks in urban counties, such as Dallas County, typically have forms for the writ of injunction. In rural counties, the clerk may not have such a form, so you will need to provide one. Check with the clerk's office before you file suit.

### **7. Order Authorizing Service of Process**

In state court, have the judge complete an order under Rule 103, thus allowing the defendants to be served by any disinterested adult.<sup>61</sup>

## **C. Hearing on the Application for Temporary Restraining Order**

After you have completed all of the paperwork and obtained checks for all of the applicable fees (filing, citation, issuance of writ, service), it is time to go to court. First, visit the district clerk's office and file your case. Then find the judge to whose court you have been assigned. Present your application for a temporary restraining order and motion for expedited discovery to him. Be brief, but persuasive. Anticipate questions. Be prepared to discuss the appropriate amount of the bond. Be sure that the judge signs all of your orders: the order granting the application for a temporary restraining order, the order allowing expedited discovery, and the order authorizing service of process by any disinterested adult.

Return to the district clerk's office. File the required bond and have the clerk prepare citation and the writ of injunction. Then, arrange with your process server for service upon the defendants of citation and the writ of injunction, together with copies of the petition or complaint, all orders signed by the court, the deposition notices, and any document request. Start preparing for the temporary injunction hearing.

## **D. Expedited Discovery**

The most important discovery you take will be the deposition of the defendant--John Smith. You need a game plan. Here is a short list of objectives for this key deposition.

Have Smith authenticate his employment agreement which contains the covenants you are seeking to enforce. Explore the circumstances surrounding his execution of the agreement. Did he read the agreement before signing it? If so, then ask the appropriate follow-up questions: "You understood what you signed, right? \*166 ... You did not have any objections to the agreement, did you? ... Specifically, you read the covenant not to compete, understood it, and agreed to it, right?" If Smith did not read the agreement before signing it, the appropriate follow-up questions are: "You could have read the agreement if you wanted to, right? ... No one stopped you from reading it? ... You are not claiming that you are not bound by the agreement because you decided not to read it? ... Put another way, you understood that you would be bound by the agreement even though you chose not to read it, right?" Find out if Smith intends to claim fraud in the inducement, coercion, or any other defenses to the execution of the agreement.

Confirm that Smith received some type of consideration for the employment agreement that contains the non-compete. Remember, under Texas law it is enough that Acme provided him with special training or knowledge.

Have Smith admit to facts that will establish that he violated the non-compete and that, absent the temporary restraining order



and a temporary injunction, he will continue to do so. Confirm that he is developing business at Beta by using personal contacts with customers that he developed while on the Acme payroll.

Have Smith confirm that he is unable to pay a significant damages award. If so, the legal remedy of damages is inadequate.

Try to develop facts that will support a claim for misappropriation of trade secrets or for breach of Smith's covenant not to disclose confidential Acme information. Is Smith using any confidential Acme information at his new business such as a customer list, any information about manufacturing or marketing techniques, price information, cost information, or information concerning the identity of suppliers? Did he take, or fail to return, any documents provided to him by Acme?

Establish the facts necessary to support a claim for breach of the duty of loyalty that an employee owes his employer or for breach of Smith's covenant not to solicit other Acme employees to leave the company. What steps did Smith take to establish his new business before he left Acme? When did he incorporate Beta Widget Company? Did he solicit other Acme salespeople and customers to leave Acme while he was still employed by the company? With respect to the four Acme salespeople who left to go to work for Beta, confirm that Smith approached them first, not vice-versa.

Find out if Smith intends to make any allegations that might support a defense of inequitable conduct or unclean hands. There are different ways to ask this question: "Do you have any criticism of the way Acme treated you? ... Do you have any complaints against Acme? ... Do you claim that Acme has done anything wrong?"

Find out if Smith contends that the limitations as to time, geographical area, or scope--as you have requested that they be reformed--are overbroad or more than is \*167 necessary to protect the goodwill or other business interest of Acme. If so, ask him what he would consider to be a reasonable limitation.

Last, find out if Smith has done anything since he was served with the writ of injunction that might constitute a violation of the temporary restraining order.

In addition to deposing Smith, you will probably want to take some third party discovery. Obtain the Beta Widget Company's corporate documents from the Texas Secretary of State. Consider deposing the Acme salespeople and customers whom Smith solicited and any other principals in the Beta Widget business. If Smith obtained financing for his new business, consider deposing (and obtaining documents from) the financial institution that provided the financing. Documents that Smith provided to the financial institution may contain admissions of his intent to solicit Acme customers.

## **E. Temporary Injunction Hearing**

At the evidentiary hearing on the application for a temporary injunction, you must be prepared to prove the matters described below. You can prove many of these matters by calling John Smith as an adverse witness. At the hearing, it is critical, however, that you have an employee of Acme--preferably the president--who is prepared to explain why enforcement of the non-compete against Smith is critical to Acme's business, and why the limitations as to time, geographical area, and scope of activity--as you have requested that they be reformed--are reasonable.

The judge may not be familiar with the law governing non-competes. Accordingly, at the temporary injunction hearing you should have a short (five to ten page) trial brief that you can present to him. The brief should outline the basic legal requirements for obtaining a temporary injunction and the legal rules governing the validity and enforceability of a covenant not to compete as applied to the facts of your case.

At the hearing, obviously, you need to authenticate the Smith employment agreement and get it into evidence. Establish that the agreement is supported by consideration--for example, that Acme provided Smith with special training or knowledge.

Prove that the covenant not to compete is ancillary to an otherwise enforceable agreement. Based on the *Light* case, you can satisfy this requirement in the John Smith case, notwithstanding the at-will nature of the employment relationship, by authenticating the employment agreement that contains his covenant not to disclose confidential information and then showing that Acme did, in fact, provide Smith with confidential information.<sup>62</sup>

\*168 Show that the limitations in the covenant as to time, geographical area, and scope of activity--as you have requested that

they be reformed--are reasonable and do not impose a restraint greater than is necessary to protect Acme's goodwill or other business interest. Again, it is important that an Acme employee--preferably its president--be prepared to so testify at the hearing.

Prove that Smith has violated his non-compete, even as reformed, by actively soliciting Acme customers in his Acme sales territory of Dallas and Tarrant Counties, and that he will continue to do so in the future absent a temporary injunction. If you are seeking a temporary injunction enforcing any other covenants in Smith's employment agreement, show that Smith has also violated those covenants.

Show that the legal remedy of damages is inadequate. In the best case, you will have established that Smith is financially unable to respond to a judgment for a significant amount of damages. If he is financially viable, however, then someone must testify that the legal remedy of damages is inadequate because it will be impossible to quantify accurately the amount of damages that Acme may incur if the Smith non-compete is not enforced. Bear in mind, however, that such testimony will make it difficult to pursue a damages claim at trial.

A trial court's decision whether, and to what extent, to enforce a covenant not to compete by temporary or preliminary injunction is highly discretionary. You need to persuade the judge that it is equitable and just that Acme receive a temporary injunction.

Put the white hat on Acme. Have the company president testify about making a substantial investment in John Smith in terms of training, education, and the like. The president trusted John Smith and shared the most sensitive company secrets with him. John Smith betrayed him. The Smith non-compete is reasonable and will not prevent Smith from earning a livelihood. Indeed, Acme has agreed to a narrowing of the non-compete to the bare minimum necessary to protect the company. Acme's future is at stake.

Put the black hat on John Smith. He agreed not to steal Acme customers and employees, and now he is doing just that. Smith is disloyal and dishonest. He could have left Acme first, then set up a competing shop. Instead, he took steps to compete--and to injure Acme--while on Acme's payroll. He concealed his disloyal activities.

## **F. After the Temporary Injunction Hearing**

Most cases that proceed through the stage of a hearing on an application for a temporary injunction settle after disposition of that application and do not proceed to trial on the merits. If your case does not settle after the temporary injunction hearing, you need to complete discovery as you would in any other case. Retain any \*169 experts that might be necessary. Conduct discovery and develop evidence regarding any other claims available to your client. If your client has a damages claim against the defendants, you will need to develop that claim and conduct appropriate discovery.

## **IV. Conclusion**

All is not lost merely because John Smith was an at-will employee. Moreover, it is not fatal that you were a little aggressive in drafting the time, area, and scope of activity limitations in the Smith employment agreement. Assuming that Acme actually provided Smith with confidential information--in exchange for Smith's agreement not to disclose such information--and if Acme is agreeable to a judicial narrowing of the overbroad limitations, you should be able to enforce the Smith non-compete by obtaining a temporary restraining order, a temporary injunction, and, following trial on the merits, a permanent injunction.

### Footnotes

<sup>a1</sup> Baker & Botts, L.L.P., Dallas, Texas.

<sup>1</sup> TEX. BUS. & COM. CODE ANN. §§ 15.50-.52 (West Supp. 1996). Section 15.52 provides that the statutory rules for validity and enforcement "are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise." *Id.* § 15.52.

2 *Id.* § 15.50.

3 *Id.* If the covenant not to compete is ancillary to an employment agreement, the employer has the burden of proving that the covenant meets the statutory requirements for enforceability. On the other hand, if the covenant is ancillary to an agreement other than an employment agreement, the party against whom the covenant is asserted has the burden of proving that the covenant is unenforceable because it does not meet the statutory requirements. *Id.* § 15.51(b).

4 *Id.* § 15.51(a).

5 *Id.* § 15.51(c).

6 *Id.* It is worth noting that an employer may incur liability for attempting to enforce an overbroad covenant not to compete. To establish this liability, the employee has the burden of showing *all* of the following:

- the covenant not to compete is ancillary to an employment agreement;
- at the time the agreement was executed, the employer knew that the limitations as to time, geographical area, or scope of activity were overbroad; and

- the employer tried to enforce the covenant to a greater extent than necessary to protect its “goodwill or other business interest.”

*Id.* § 15.51(c). Liability in this situation is limited to “the costs, including reasonable attorney’s fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.” *Id.*

Even if the employee makes the showing described above, it appears to be within the trial court’s discretion whether to assess liability on the employer. “[T]he court *may* award the promisor the costs ....” *Id.* (emphasis added). *See* *Schneider v. Acousti Eng’g Co.*, No. 01-92-00921-CV (Tex. App.-- Houston [1st Dist.] October 14, 1993, n.w.h.) (not designated for publication), 1993 Tex. App. LEXIS 2768, at \*8 (“We find that an award of attorney’s fees under section 15.51(c) is within the trial court’s discretion ....”).

7 TEX. BUS. & COM. CODE ANN. § 15.51(c), *amended by* Act of June 19, 1993, 73rd Leg., R.S., § 1, 1993 Tex. Gen. Laws 4201-02 (emphasis added).

8 *E.g.*, *Gomez v. Zamora*, 814 S.W.2d 114, 118 (Tex. App.--Corpus Christi 1991, no writ); *General Devices, Inc. v. Bacon*, 836 S.W.2d 179, 183 (Tex. App.--Dallas 1991, writ granted); *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285, 290 (Tex. App.--Corpus Christi 1990, writ denied). Merely asking for and obtaining a temporary injunction that is narrower in scope than the covenant not to compete did not preserve the right to reformation. *Gomez*, 814 S.W.2d at 119.

9 *See* Act of June 19, 1993, 73rd Leg., R.S., § 1, 1993 Tex. Gen. Laws 4201-02.

10 TEX. BUS. & COM. CODE ANN. § 15.51(c) (West Supp. 1996) (“[T]he court *shall* reform the covenant ....”) (emphasis added); *see* *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 661 (Tex. App.--Dallas 1992, no writ).

11 *B.J. Software Sys., Inc. v. Osina*, 827 S.W.2d 543, 546 (Tex. App.--Houston [1st Dist.] 1992, no writ).

12 If there are *any* limitations upon the employer’s right to terminate the employee--even if the employment agreement is not for a particular term-- the agreement is probably sufficiently enforceable to support a non-compete. In *Zep Manufacturing Co. v. Harthcock*, 824 S.W.2d 654 (Tex. App.--Dallas 1992, no writ), Harthcock’s employment agreement with Zep Manufacturing provided that Zep could terminate Harthcock if the president of the company, “in his sole discretion, determine[d] that Employee’s performance of duties hereunder [was] unsatisfactory.” *Id.* at 658.

Harthcock argued before the Dallas Court of Appeals that the covenant not to compete in his employment agreement was unenforceable because it was ancillary only to an at-will employment agreement. The Dallas Court of Appeals disagreed. Under Texas law, despite the language in the agreement about “sole discretion,” Zep could not terminate Harthcock unless it had a “bona fide dissatisfaction or cause for discharge.” *Id.* at 659. If Zep feigned dissatisfaction and dismissed Harthcock, the discharge would be wrongful. *Id.* “Texas law implies that the determination to terminate Harthcock will be made in good faith. The limitation on

Zep's right to terminate Harthcock if he satisfactorily performed his duties changed the normal employment-at-will relationship." *Id.* *Zep Mfg.*, therefore, stands for the proposition that a covenant not to compete which is ancillary to an employment agreement is enforceable, even if the employment agreement is not for a particular term, if there are limitations upon the employer's right to terminate the employee.

13 *E.g.*, *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832-33 (Tex. 1991) (*citing* *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667, 669-70 (Tex. 1990)).

14 The amendments to the statute that became effective on September 1, 1993 added the phrase "for a term *or at-will*" to section 15.51(b) of the statute, which provides that if a covenant is ancillary to an employment agreement, the employer has the burden of proving compliance with the statute. Act of June 19, 1993, 73rd Leg., R.S., § 1, 1993 Tex. Gen. Laws 4201-02 (emphasis added).

15 The Bill Analysis for the 1993 amendments stated that the new law "ensures that at-will employment contracts are covered." HOUSE COMM. ON BUSINESS AND INDUSTRY, BILL ANALYSIS, Tex. H.B. 7, 73rd Leg., R.S. (1993). The amended statute "[p]rovides that at-will personal service contracts are covered." *Id.*

16 883 S.W.2d 642 (Tex. 1994).

17 *Id.* at 644-45. The court opined that section 15.51(b) of the statute, as amended, "has no meaning, because there cannot be an '[otherwise enforceable] agreement' which 'obligate[s]' a promisor '*at-will.*' Describing something as an at-will obligation is nonsensical." *Id.* at 645 n.7.

18 *Id.* at 645 & n.5. *Accord* *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 599 (Tex. App.--Amarillo, April 25, 1995, n.w.h.).

19 *Light*, 883 S.W.2d at 644-45.

20 *Id.* at 647 (footnote omitted).

21 *Id.* at 647 & n.14.

22 *Id.*

23 TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1996). Whether a covenant not to compete is reasonable--that is, whether the limitations as to time, geographical area, and scope of activity do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee--is a question of law to be decided by the court. *See, e.g.*, *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832 (Tex. 1991); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991); *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667, 668-69 (Tex. 1990).

24 *See generally* *Property Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349, 350 (Tex. App.--El Paso 1990, writ denied) ("The courts of this state have upheld restrictions ranging from two to five years as reasonable."); *Investors Diversified Servs., Inc. v. McElroy*, 645 S.W.2d 338, 339 (Tex. App.--Corpus Christi 1982, no writ) ("two to five years have repeatedly been held to be reasonable"); *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176 (Tex. App.--Houston [1st Dist.] 1982, no writ) (employment agreement; trial court's reformation from three years to six months affirmed).

The following is a sampling of appellate decisions concerning time limitations:

*One Year.* *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 123 (5th Cir. 1993) (licensing agreement; one-year limitation "not unreasonable as a matter of law"); *Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 777 F. Supp. 1349, 1354 (N.D. Tex. 1991) (employment agreement; one-year limitation "plainly reasonable under Texas law"), *aff'd without opinion*, 948 F.2d 1286 (5th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992); *Picker Int'l, Inc. v. Blanton*, 756 F. Supp. 971, 982, 17 U.S.P.Q.2d (BNA) 1036, 1044 (N.D. Tex. 1990) (employment agreement; one-year limitation is "reasonable"); *Investors Diversified Servs., Inc. v.*

McElroy, 645 S.W.2d 338, 339 (Tex. App.--Corpus Christi 1982, no writ) (employment agreement; one-year limitation "certainly reasonable").

*Two Years.* Property Tax Assocs., Inc. v. Staffeldt, 800 S.W.2d 349, 350-51 (Tex. App.--El Paso 1990, writ denied) (employment agreement; two-year limitation upheld); Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 837, 840 (Tex. App.--Dallas 1987, writ dismissed w.o.j.) (employment agreement; twenty-four month limitation "not unreasonable").

*Three Years.* Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176 (Tex. App.-- Houston [1st Dist.] 1982, no writ) (employment agreement; trial court's reformation from three years to six months affirmed); Integrated Interiors, Inc. v. Snyder, 565 S.W.2d 350, 352 (Tex. Civ. App.--Fort Worth 1978, writ refused n.r.e.) (employment agreement; three-year limitation is "reasonable").

*Five Years.* Chandler v. Mastercraft Dental Corp. of Tex., Inc., 739 S.W.2d 460, 464-65 (Tex. App.--Fort Worth 1987, writ denied) (sale of a business; five-year limitation "reasonable").

25 Gomez v. Zamora, 814 S.W.2d 114, 117-18 (Tex. App.--Corpus Christi 1991, no writ) (holding the language "existing marketing area" and "future marketing area of the employer begun during employment" indefinite and unenforceable); Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 774 (Tex. App.--Beaumont 1992, writ denied) (holding the language "metropolitan area of the Parkdale Mall store in Beaumont, Texas" indefinite and unenforceable).

26 E.g., Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660 (Tex. App.-- Dallas 1992, no writ); Diversified Human Resources Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App.--Dallas 1988, no writ); Martin v. Linen Sys. for Hosps., Inc., 671 S.W.2d 706, 709 (Tex. App.--Houston [1st Dist.] 1984, no writ); Cross v. Chem-Air S., Inc., 648 S.W.2d 754, 757 (Tex. App.--Beaumont 1983, no writ).

27 The following is a sampling of Texas cases addressing the reasonableness of particular geographical area limitations:

*Single County Where Employer Has Base of Operations.* In Property Tax Associates, Inc. v. Staffeldt, 800 S.W.2d 349 (Tex. App.--El Paso 1990, writ denied), the covenant not to compete applied to "the existing marketing area of the employer, specifically including, but not limit [sic] to, El Paso County, Bexar County, and Dallas County, in the State of Texas or any future marketing area of the Employer begun during employment." *Id.* at 350. On appeal from a denial of a temporary injunction, the employer conceded that the covenant not to compete should be limited to El Paso County, which was the employer's only base of operations. The Court of Appeals agreed that that would be reasonable and reformed the covenant to limit it to El Paso County. *Id.* at 351-52.

*Ten-Mile Radius of Principal Business Office.* In Martin v. Linen Systems for Hospitals, Inc., 671 S.W.2d 706 (Tex. App.--Houston [1st Dist.] 1984, no writ), the covenant applied to a ten-mile radius of any business or customer of the employer, Alamo Linen Service. *Id.* at 708. The trial court reformed the covenant to limit it to a ten-mile radius of Alamo's principal business office in Houston. *Id.* The court of appeals held that the trial court did not abuse its discretion in reforming the covenant and that the covenant, as reformed, was reasonable. *Id.* at 709-10.

*Twelve-Mile Radius of Veterinary Hospital.* In Cukjati v. Burkett, 772 S.W.2d 215 (Tex. App.--Dallas 1989, no writ), the covenant not to compete in a veterinarian's employment agreement provided that the employee would not "practice veterinary medicine in Irving, Texas or within a twelve (12) mile radius of the Story Road Animal Hospital or North Irving Animal Clinic for a period of three (3) years." *Id.* at 216. Based on evidence that "most pet owners travel only a few miles to obtain pet care," the Dallas Court of Appeals held that "[c]learly, a twelve mile restriction is unreasonable and unnecessary." *Id.* at 218.

*Twenty-Mile Radius.* In Meineke Discount Muffler v. Jaynes, 999 F.2d 120 (5th Cir. 1993), the Fifth Circuit upheld as reasonable a covenant not to compete in a Meineke franchise agreement that covered a twenty-mile radius from the franchise location. *Id.* at 122-23.

*Fifty-Mile Radius.* Webb v. Hartman Newspapers, Inc., 793 S.W.2d 302, 304-05 (Tex. App.--Houston [14th Dist.] 1990, no writ) (employment agreement with Hartman Newspapers; limitation of fifty-mile radius of any Hartman newspaper overbroad, reformed to a ten-mile radius of the particular newspaper for which the employee worked); Diversified Human Resources Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 12 (Tex. App.--Dallas 1988, no writ) (employment agreement; limitation of fifty-mile radius of any city in which employer had a profit center was unreasonable and overbroad because it encompassed an area greater than the territory in which the employee worked); Integrated Interiors, Inc. v. Snyder, 565 S.W.2d 350, 352 (Tex. App.--Fort Worth 1978, writ refused n.r.e.) (limitation of fifty-mile radius of employer's place of business upheld as "reasonable").

28 See Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 777 F. Supp. 1349, 1354 (N.D. Tex. 1991) (limitation against soliciting "any of the clients of Merrill Lynch whom I served or whose names became known to me while in the employ of Merrill Lynch" upheld as reasonable), *aff'd without opinion*, 948 F.2d 1286 (5th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992); Picker Int'l v. Blanton, 756 F. Supp. 971, 982 (N.D. Tex. 1990) (limitation against servicing employer's equipment that employee serviced while with employer upheld as reasonable); Investors Diversified Servs., Inc. v. McElroy, 645 S.W.2d 338, 339 (Tex. App.--Corpus Christi 1982, no writ) (limitation against soliciting customers with whom the employee dealt or had contact during employment upheld as reasonable).

- 29 Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 387 (Tex. 1991).
- 30 *Id.* at 388.
- 31 *Id.*
- 32 *Id.* at 387.
- 33 In Property Tax Assocs. v. Staffeldt, 800 S.W.2d 349 (Tex. App.-- El Paso 1990, writ denied), the court upheld such a limitation as reasonable “since the employer [was] in only one area of business and the purpose of such a covenant [was] to prevent employees who learn a particular business and know customer clients from engaging in a competing business for a reasonable time and area.” *Id.* at 351.
- 34 In Diversified Human Resources Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8 (Tex. App.--Dallas 1988, no writ), the employee worked for Diversified, a placement agency, but recruited only data processors. *Id.* at 9. Her covenant not to compete provided that she could not work for any other placement agency within a fifty-mile radius of any city in which Diversified operated an office. *Id.* at 10. After the employee was terminated, she went to work for another placement agency, but recruited only employees for underwriting positions with insurance companies. *Id.* The court of appeals held that the scope of activity limitation was overbroad and unreasonable. *Id.* at 11-12. “We recognize that Diversified may have had a legitimate interest in restricting Levinson-Polakoff from recruiting data processors in the Dallas area for six months. However, we are not persuaded that a covenant that restrains her from placing personnel in any other nonrelated field is reasonable.” *Id.* at 11.
- 35 DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681 n.6 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991).
- 36 TEX. BUS. & COM. CODE ANN. § 15.50, *amended by* Act of June 19, 1993, 73rd Leg., R.S., § 1, 1993 Tex. Gen. Laws 4201-02.
- 37 *See* B.J. Software Sys., Inc. v. Osina, 827 S.W.2d 543, 545 (Tex. App.--Houston [1st Dist.] 1992, no writ).
- 38 *DeSantis*, 793 S.W.2d at 681 n.6; *accord, e.g.*, Martin v. Credit Protection Ass’n, Inc., 793 S.W.2d 667, 670 (Tex. 1990). *But see* Daytona Group of Tex., Inc. v. Smith, 800 S.W.2d 285, 290 (Tex. App.--Corpus Christi 1990, writ denied) (training program was not novel or unique and did not import any special knowledge, so it was not sufficient consideration).
- 39 *E.g.*, Long John Silver’s Inc. v. Martinez, 850 S.W.2d 773, 775 (Tex. App.--San Antonio 1993, writ dismissed w.o.j.); Texas Indus. Gas v. Phoenix Metallurgical Corp., 828 S.W.2d 529, 532 (Tex. App.--Houston [1st Dist.] 1992, no writ); Recon Exploration, Inc. v. Hodges, 798 S.W.2d 848, 851 (Tex. App.--Dallas 1990, no writ).  
To obtain a temporary restraining order or a preliminary injunction in federal court, an applicant must show:  
• a “substantial likelihood of success on the merits,”  
• a “substantial threat that failure to grant the injunction will result in irreparable injury,”  
• the “threatened injury outweighs any damage that the injunction may cause the opposing party,” and  
• the “injunction will not disserve the public interest.”  
*Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809, 11 U.S.P.Q.2d (BNA) 1605, 1606 (5th Cir. 1989); *accord, e.g.*, *Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 777 F. Supp. 1349, 1353 (N.D. Tex. 1991), *aff’d without opinion*, 948 F.2d 1286 (5th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992).
- 40 *E.g.*, *Texas Indus. Gas*, 828 S.W.2d at 533; *Recon Exploration*, 798 S.W.2d at 851.
- 41 TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1996).

42 Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644 (Tex. 1994, no writ).

43 *Id.* at 645 & n.6.

44 An employer can be liable for attempting to enforce a non-compete that it knows is overbroad. *See supra* note 6. In addition, a party who obtains a temporary restraining order or a temporary or preliminary injunction and then is unsuccessful in obtaining a permanent injunction at trial may be liable on the bond. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 685-86 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991). Last, a party who attempts to enforce a covenant not to compete that does not meet the requirements of section 15.50 may have liability for restraint of trade under section 15.05(a) of the Texas Business and Commerce Code if the injured party can show the necessary anti-competitive effect. *Id.* at 686-88; *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285, 291 n.4 (Tex. App.--Corpus Christi 1990, writ denied).

45 *See Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776, 117 U.S.P.Q. (BNA) 466, 467 (Tex.), *cert. denied*, 358 U.S. 898, 119 U.S.P.Q. (BNA) 501 (1958).

46 *E.g.*, *Picker Int'l, Inc. v. Blanton*, 756 F. Supp. 971, 981, 17 U.S.P.Q.2d (BNA) 1036, 1043 (N.D. Tex. 1990); *Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 471-72 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

47 *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 662-63 (Tex. App.-- Dallas 1992, no writ).

48 *Id.* at 662. *See also Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 605 n.9 (Tex. App.--Dallas 1990, no writ).

49 *Advance Ross Elecs. Corp. v. Green*, 624 S.W.2d 316, 318 (Tex. App.--Tyler 1981, writ ref'd n.r.e.), *cert. denied*, 458 U.S. 1108 (1982); *accord Turner v. Byers*, 562 S.W.2d 507, 510 (Tex. Civ. App.--El Paso 1978, writ ref'd n.r.e.).

50 TEX. R. CIV. P. 684 (West 1995); FED. R. CIV. P. 65(c).

51 *See supra* note 44.

52 TEX. CIV. PRAC. & REM. CODE ANN. § 65.023 (West 1986).

53 *Id.*

54 For a form of a petition seeking a temporary restraining order, see WILLIAM V. DORSANEO III, 2 TEXAS LITIGATION GUIDE § 50.100[2] (1995).

55 TEX. R. CIV. P. 680 (West 1995); FED. R. CIV. P. 65(b).

56 For example, Dallas County Local Rule 1.3(b) requires that you certify "in writing" that the party against whom you seek a temporary restraining order is not represented by counsel or, if the party is represented by counsel, that counsel has been notified and does not wish to attend or that diligent efforts to notify counsel have been unsuccessful. Dallas County Local Rule 1.3(c) requires that you certify to the court that the case is not subject to transfer under Local Rule 1.1(f) (it is not clear whether this certification has to be in writing). DALLAS (TEX.) CIV. DIST. CT. LOC. R. 1.3.

57 For a form for an order granting a temporary restraining order, see DORSANEO, *supra* note 54, § 50.110[2].

58     *See* FED. R. CIV. P. 65(b), (d); TEX. R. CIV. P. 680, 683 (West 1995).

59     For a bond form, see DORSANEO, *supra* note 54, § 50.102[2].

60     For a writ of injunction form, see *id.* § 50.114[2].

61     TEX. R. CIV. P. 103 (West 1995).

62     *See supra* notes 21-22 and accompanying text.