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Practice Update

Virginia Finally Adopts Uniform Standard for Temporary Restraining Orders and Preliminary Injunctions

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For nearly 250 years since it became one of the original 13 states to join the Union, the Commonwealth of Virginia has had no clear standard for issuing Temporary Restraining Orders (TROs) and Preliminary Injunctions (PIs). In June 2024, the Supreme Court of Virginia for the first time adopted a new Rule outlining the standard of issuing TROs and PIs. That Rule went into effect on August 4, 2024.

As noted, until recently Virginia courts and litigants could not turn to any state law or rule to define the standard for issuing TROs and PIs. Virginia law simply provided that "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity."[1] In 1988, a federal appeals court noted that "there is no great difference between federal and Virginia standards for preliminary injunctions."[2] This led Virginia courts to analyze applications for TROs and PIs using the applicable federal standards. However, this provided little guidance because until 2008 most federal appeals courts evaluated these applications using different standards.[3]

In 2008, the U.S. Supreme Court decided *Winter v. Natural Resources Defense Council, Inc.*, which laid

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out a uniform four-prong test for federal courts issuing TROs and PIs. An applicant must establish:

- that he is likely to succeed on the merits;
- that he is likely to suffer irreparable harm in the absence of preliminary relief;
- that the balance of equities tips in his favor; and
- that an injunction is in the public interest.[4]

Since then, most Virginia courts relied on the *Winter* test to evaluate applications for TROs and PIs.[5]

However, on June 5, 2024, the Supreme Court of Virginia adopted new Rule 3:26, governing TROs and PIs. The Rule became effective August 4, 2024, and provides that a PI may be issued only if the court finds:

1. that the movant will more likely than not suffer irreparable harm without the PI;
2. the movant has asserted a legally viable claim based on credible facts (not mere allegations) demonstrating that the underlying claim will more likely than not succeed on the merits[6];
3. the balance of hardships — the harm to the movant without the PI compared with the harm to the nonmovant with the PI — favors granting the PI; and
4. the public interest, if any, supports the issuance of a PI.[7]

Importantly, the first finding (irreparable harm) appears to be a precondition to the court even analyzing the remaining factors.[8] Additionally, a PI may be issued only if it is supported by factors (i) and (ii) and it is not contrary to the public interest in factor (iii).[9] Otherwise, these four factors appear be substantially similar to the federal *Winter* standard, under which most Virginia courts were already operating.

While not as clear-cut as the elements for a PI, a court may issue a TRO for the limited purpose of preserving the status quo between the parties pending a hearing on a motion for a PI, if the equities of a case warrant doing so and adequate notice to opposing parties has been given by the movant.[10] There are also very limited scenarios where a TRO may be issued without notice to the opposing party.[11]

The Rule makes clear that it does not supplant any varying standards for TROs or PIs that may already exist for specific cases under Virginia law.[12]

In sum, the new Rule 3:26 is not likely to cause any pivotal shift in how Virginia courts have evaluated TROs and PIs since 2008. However, Virginia courts now need to focus first on the irreparable harm element — which is an important factor under the federal standard but not quite a condition precedent to evaluation of the remaining factors. This may create small changes in how Virginia courts evaluate these applications, and it is anticipated that subsequent court cases will provide further guidance on how these requests are treated.

The foregoing is not intended to constitute legal advice, and only provides a summary of Virginia Rule 3:26. Akerman attorneys can assist with understanding the requirements for requesting injunctive relief, and with navigating the application process.

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[1] *See* Va. Code Ann. § 8.01-628.

[2] *Capital Tool & Mfg. v. Maschinefabrik Herkules*, 837 F.2d 171, 173 (4th Cir. 1988).

[3] *See Dillon v. Northam*, 105 Va. Cir. 402 (Va. Cir. Ct. 2020).

[4] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

[5] *See Dillon*, 105 Va. Cir. 402.

[6] The Rule provides that in rare cases where the movant can show *severe* irreparable harm, this factor can be deemed satisfied even if the court cannot determine that the movant will succeed on the merits. Va. Sup. Ct. R. 3:26(e).

[7] *See* Va. Sup. Ct. R. 3:26(c)-(d).

[8] *Id.*

[9] Va. Sup. Ct. R. 3:26(d).

[10] Va. Sup. Ct. R. 3:26(b).

[11] *Id.*

[12] Va. Sup. Ct. R. 3:26(a).
