TENNESSEE RULES OF CIVIL PROCEDURE
RULE 12

Presented by:

Circuit Judge Robert L. Childers
Circuit Judge John J. Maddux, Jr.

Tennessee Judicial Academy
Thursday, August 21, 2014

I. **Tennessee Rule of Civil Procedure 12: Defenses and Objections: When and How Presented: by Pleading or Motion: Motions for Judgment on the Pleadings**

A. When a complaint and summons have been properly served on a defendant, the defendant can respond in two ways. First, the defendant may file an answer. Second, before filing an answer, the defendant can make any of three motions attacking claimed defects in the complaint. These three motions include a motion to strike, a motion for a more definite statement, and a motion to dismiss. Rule 12 governs these three motions.

B. **Rule 12.01. WHEN PRESENTED.**

i. **Text of Rule 12.01:** *A defendant shall serve an answer within thirty (30) days after the service of the summons and complaint upon him. A party served with a pleading stating a cross-claim against such party shall serve an answer thereto within thirty (30) days after the service upon him or her. The plaintiff shall serve a reply to a counterclaim in the answer within thirty (30) days after service of the answer, or, if a reply is ordered by the court, within thirty (30) days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within fifteen (15) days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within fifteen (15) days after the service of the more definite statement. [As amended by order entered January 26, 1999, effective July 1, 1999.]*

ii. The filing of a pre-answer motion avoids the duty to answer until the motion is decided or withdrawn, provided that the motion is one authorized by Rule 12. Note that the term “this rule” in 12.01 does not include a motion for summary judgment filed pursuant to Rule 56. However, in Creed v. Valentine, 967 S.W.2d 325 (Tenn. Ct. App. 1997), the Eastern Section held that a motion for summary judgment filed in accordance with Rule 56 is a sufficient pleading to preclude a default judgment.

iii. When the court has denied a Rule 12 motion, 12.01 requires that the moving party file a responsive pleading within 15 days of notice of the court's action. If the motion granted is a motion for more definite statement 12.01 requires that the responsive pleading be

served within 15 days after the defendant is served with the more definite statement. The court may modify these time limits..

C. **Rule 12.02. HOW PRESENTED.**

i. **Text of Rule 12.02:** *Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing:* ***(1)*** *lack of jurisdiction over the subject matter,* ***(2)*** *lack of jurisdiction over the person,* ***(3)*** *improper venue,* ***(4)*** *insufficiency of process,* ***(5)*** *insufficiency of service of process,* ***(6)*** *failure to state a claim upon which relief can be granted,* ***(7)*** *failure to join a party under Rule 19, and* ***(8)*** *specific negative averments made pursuant to Rule 9.01. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

ii. **Rule 12.02(1)**. This rule permits a defendant to raise by pre-answer motion the defense that the court lacks jurisdiction over the subject matter. Generally speaking a defendant's failure to present the defense of lack of jurisdiction over the subject matter either by motion or by answer will not prejudice the defendant's right to raise the defense at any later stage of the proceedings.

iii. It may be necessary for the moving party to present materials outside of the pleadings and the court will consider those materials along with facts established by the pleadings. Unlike a motion to dismiss for failure to state a claim, which will be discussed later, the consideration of extraneous matters filed in support of a Rule 12.02(1) motion does not convert the motion to one for summary judgment. In Carson v. Daimler Chrysler Corp., 2003 Tenn. App. LEXIS 236—albeit unreported—the Court of Appeals observed that it is not inappropriate for the court to consider documents outside

the pleadings in order to determine whether it has subject matter jurisdiction. The court further noted that it has a duty to determine whether it has subject matter jurisdiction over a cause of action which is independent from the parties and may raise the issue *sua sponte* at any stage in the litigation, *Id.* (citing Luallen v. Henderson, 54 F.Supp.2d 775 (W.D. Tenn. 1999); Cockrill v. Everett, 958 S.W.2d 133 (Tenn. Ct. App. 1997)). The court held explicitly that the court's consideration of matters beyond the pleadings will not cause a Rule 12.02(1) motion for lack of jurisdiction over the subject matter to be considered a motion for summary judgment.

iv. **Rule 12.02(2) through (5).** Rule 12.02(2) permits a party to raise by a pre-answer motion defenses that once were required to be raised by special appearance. These defenses are lack of venue, lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process. Each of these defenses involves the personal privilege of the defendant and are readily waived. Rule 12.02(2) provides that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Thus, no special appearance is required.

v. Prior to the adoption of the Rules of Civil Procedure, these motions were generally referred to as dilatory defenses. At that time, they a special appearance was required to raise these defenses. These defenses are still disfavored and while no special appearance is required they still must be raised in a timely fashion or they will be waived.

vi. Often the resolution of these motions will involve a finding of fact by the trial court. In many cases, the facts may be undisputed but under 12.04 the court may conduct a hearing and on a motion to dismiss for lack of personal jurisdiction may certainly consider matters outside the pleadings such as affidavits. This will be discussed further under 12.04.

D. **Rule 12.02(6). FAILURE TO STATE A CLAIM.**

i. Certain general principles govern the disposition of motions to dismiss for failure to state a claim. The motion is determined on the face of the complaint. The court must treat the allegations of the complaint as true and construe averments liberally in favor of the pleader. The court must further give the nonmoving party the benefit of all reasonable inferences. The court must not grant the motion unless it appears beyond doubt that the plaintiff can prove

no set of facts in support of his complaint that will entitle him to relief. Pemberton v. American Distilled Spirits, 664 S.W.2d 690 (Tenn. 1984).

ii. Rule 12.02(6) motions must meet the particularity requirements of Tenn. R. Civ. P. 7.02(1), which reads as follows:

1. *An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing,* shall state with particularity the grounds therefore *and shall set forth the relief or order sought. (emphasis added)*

2. In Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422 (Tenn. 2011), the Tennessee Supreme Court declined to adopt the federal plausibility pleading standard that the United States Supreme Court adopted in Twombly and Iqbal. See Ashcroft v. Iqbal, 556 U.S. 662 (2009) (holding that the Twombly standard would apply to all federal cases); Bell Atl. Corp. v. Twombly, 425 F.3d 99 (2d Cir. 2005), rev'd 550 U.S. 544, 557 (2007) (adopting a plausibility standard for pleadings).

a. The court in Webb stated that a "Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." Webb, 346 S.W.3d at 426. Further, the resolution of a motion to dismiss for failure to state a claim is determined by an examination of the pleadings alone. Id.

iii. In order to preserve procedural consistency appellate courts will *sua sponte* require proper procedures to be followed. Finchum v. Ace, U.S.A., 156 S.W.3d 536 (Tenn. Ct. App. 2004).

iv. In Finchum, the trial court dismissed the complaint on a motion filed pursuant to Rule 12.02(6). However, because the motion to dismiss was procedurally deficient and did not comply with the rules of civil procedure, the Court of Appeals never reached the merits of the motion. The court, quoting from Willis v. Tenn. Dep't of Corrections, 2002 Tenn. App. LEXIS 389, 2002 W.L., 1189730 at page 16 and in particular, Judge Koch's "articulate dissent" stated:

1. “The motion to dismiss simply asserts that the petition should be dismissed pursuant to Tenn. R. Civ. P. 12.02(1) and (6). This motion, like most of the motions filed by the Civil Rights and Claims Division in cases of this sort, fail to comply with the rudimentary requirements of motion practice under Tennessee Rules of Civil Procedure, in terms that even first year law students can understand. Tenn. R. Civ. P. 7.01 requires the motion must state with particularity the grounds therefore and for the purposes of Tenn. R. Civ. P. 12.02(6) this means that the moving party must state in its motion why the plaintiff has failed to state a claim for which relief can be granted.”

2. In his dissenting opinion, Judge Susano recognized that the motion was deficient and pointed out that the possible cure stating "For example, in the instant case, the motion should have recited, on its face, that (1) the motion was filed pursuant to Tenn. R. Civ. P. 12.02(6) and (2) that the complaint fails to state a claim upon which relief can be granted in that the claim is for breach of contract but fails to reflect a promise by any of the defendants’ or words to this effect.”

3. Note that in the Finchum case the matter was dismissed at the appellate level without reaching the merits even though it was apparent from the record that the plaintiff clearly understood defendant's motion to dismiss inasmuch as plaintiff had responded eight days prior to the date upon which the trial court considered the defendant's motion and in her reply plaintiff acknowledged that she understood the basis of defendant's motion.

4. Of particular import to you as a trial judge are the concluding comments at page 39 of the Finchum opinion. The Court of Appeals said quite directly that "since the motion to dismiss did not comply with the Tennessee Rules of Civil Procedure, the trial court should not have considered the motion".

v. Parties invariably attempt to support 12.02(6) motions by affidavit and other matters outside the pleadings. The rule authorizes the court to treat a motion accompanied by such materials as a Rule 56 motion for summary judgment and dispose of it in accordance with the procedure of Rule 56.

1. If these extraneous matters are considered the court must adhere to the thirty-day notice requirement in Rule 56 and allow the non-moving party an opportunity to respond. If you do not choose to consider the extraneous materials, make it absolutely and abundantly clear that you are not considering them. Remember that if the defendant needs to submit extraneous materials in order to establish a valid defense the defendant may later do so with a true Rule 56 motion or with a motion for judgment on the pleadings.

vi. Additionally, the trial court has the authority to dismiss a complaint *sua sponte* in the absence of a motion to dismiss when the complaint fails to state a claim upon which relief may be granted. Lackey v. Carson, 886 S.W.2d 232 (Tenn. Ct. App. 1994).

vii. Early cases seem to disapprove of the use of a Rule 12 motion to present affirmative defenses. It was suggested that the proper way to raise an affirmative defense was to plead the defense specifically and file a motion for summary judgment. However, in Anthony v. Tidwell, 560 S.W.2d 908 (Tenn. 1977), the Supreme Court held that "a complaint is subject to dismissal under Rule 12.02(6) for failure to state a claim if an affirmative defense clearly and unequivocally appears on the face of the complaint". The court further observed that "it is not necessary for the defendant to submit evidence in support of his motion when the facts on which he relies to defeat the plaintiff's claims are admitted by the plaintiff in his complaint". Id. at 909.

viii. In Givens v. Mullikin, 75 S.W.3d 383 (Tenn. 2002), the Supreme Court noted a hesitancy to dismiss a complaint based upon the potential existence of a factual affirmative defense. The court noted that when the affirmative defense involves only an issue of law, such as whether the statute of limitations has run, the standard set forth in Rule 12.02(6) is appropriate. The court, however, stated that when the affirmative defense relates primarily to an issue of fact different concerns may often counsel against deciding the merits of the affirmative defense in a motion to dismiss. Id. at 404.

E. **Rule 12.02(8). LACK OF CAPACITY TO SUE OR BE SUED.**

i. Rule 12.02(8) refers to the defense of specific negative averments made pursuant to Rule 9.01. Rule 9.01 provides as follows:

1. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in

a representative capacity, he or she shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

ii. Thus, a party presenting the defense of lack of capacity will often need to present matters outside the pleadings to support the defense. Unlike a 12.02(6) motion, a 12.02(8) may consider affidavits and other evidence including oral testimony offered at a 12.04 hearing.

F. **Rule 12.03. MOTION FOR JUDGMENT ON THE PLEADINGS.**

i. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

ii. After the pleadings are closed any party may move for judgment on the pleadings pursuant to Rule 12.03. Principles for adjudicating the motion are the same as those for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. The question before the court is one that should be determined as a matter of law.

iii. Either party may move for judgment on the pleadings. Rule 12.03 does not specify the grounds that may be asserted in support of the motion on the pleadings just that it be based on the pleadings.

iv. The rule does not provide a cutoff for when the motion may be filed. It does provide that it must be filed "within such time as not to delay trial".

v. As with a 12.02(6) motion, if extraneous matters are presented to, and not excluded by the court, the motion shall be treated as one for summary judgment. This is a general rule, with a notable exception.

1. In McNeary v. Baptist Mem. Hosp., 360 S.W.3d 429 (Tenn. Ct. App. 2011), the court noted that “the Tennessee Supreme Court has previously held that this general rule is

inapplicable when the motion is one involving jurisdictional issues." McNeary, 360 S.W.3d at 436.

G. **Rule 12.04. PRELIMINARY HEARINGS.**

i. **Text of Rule 12.04:** *On application of any party, the defenses specifically enumerated (1) through (8) in 12.02, whether made in a pleading or by motion, and the motion for judgment mentioned in 12.03 shall be heard and determined before trial unless the court orders that the hearing and determination thereof be deferred until the trial.*

ii. When any of the eight defenses enumerated in Rule 12.02 are asserted either by motion or by answer, Rule 12.04 authorizes any party to apply to the court for a pre-trial hearing and determination of the defense or defenses. Although Rule 12.04 gives the trial court discretion to defer determination of the defenses, it creates a strong presumption in favor of a pre-trial hearing in determination of any of the 12.02 defenses, as well as for a judgment on the pleadings. Banks & Entman, *Tennessee Civil Procedure* §5.6.

iii. The Tennessee Supreme Court has provided guidance on the appropriate procedure for adjudicating a motion to dismiss for lack of subject matter jurisdiction in Cherhenault v.Walker, 36 S.W.3d 45 (Tenn. 2001). The court in Cherhenault opined:

1. "Regardless of the theory on which personal jurisdiction is based, though, the necessity of adopting a middle-ground solution-between relying merely on the pleadings and postponing a decision on jurisdiction until discovery has been completed-is apparent. Many federal courts have dealt with this issue, and there appears to be considerable agreement on several aspects of the procedure necessary to determine whether the evidence in favor of finding jurisdiction is sufficient to allow the case to proceed. *See* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (Supp.2000). It is clear that the plaintiff bears the ultimate burden of demonstrating that jurisdiction exists. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135, 1141 (1936); Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 142 F.3d 26, 34 (1st Cir.1998). If the defendant challenges jurisdiction by filing affidavits, the plaintiff must establish a prima

facie showing of jurisdiction by responding with its own affidavits and, if useful, other written evidence. See Posner v. Essex Ins. Co. Ltd., 178 F.3d 1209, 1214 (11th Cir.1999); Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2nd Cir.1999); OMI Holdings, Inc. y. Royal Ins. Co. of Canada, 149 F.3d 1086, 1091 (10th Cir.1998). A court will take as true the allegations of the nonmoving party and resolve all factual disputes in its favor, see Posner, 178 F.3d at 1215; IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254, 257 (3rd Cir.1998), but it should not credit conclusory allegations or draw farfetched inferences, see Massachusetts School of Law, 142 F.3d at 34."

H. **Rule 12.05. MOTION FOR MORE DEFINITE STATEMENT.**

i. **Text of Rule 12.05:** *If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fifteen (15) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or may make such order as it deems just.*

ii. A Rule 12.05 motion for more definite statement is so rarely granted it has been referred as a "disfavored motion". Seldom does a 12.05 motion seek anything more than that which could and should be obtained through the discovery process. There are, of course, possible exceptions such as when the plaintiff has pled generally that which should be pled specifically, such as particular averments of fraud or mistake.

iii. Additionally, there are cases where the provisions of an alleged contract between the two contracting parties are not elaborated upon in sufficient detail in the complaint so as to allow the defendant to determine what his duties were and how he breached his contractual obligation. For example, see White v. Tenn. Am. Water Co., 603 S.W.2d 140 (Tenn. 1980).

I. **Rule 12.06. MOTION TO STRIKE.**

i. **Text of Rule 12.06:** *Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading insufficient defense or any redundant, immaterial, impertinent or scandalous matter.*

ii. Rule 12.06 authorizes a party to file a motion to strike all or part of a pleading on two general grounds:

1. The pleading is legally insufficient; or

2. The pleading contains matter that is redundant, immaterial, impertinent or scandalous.

iii. Among other things the procedure provides a means to enforce Rule 8.05's requirement that pleadings be simple, concise and direct.

iv. A motion to strike suspends the time within which the movant must file a responsive pleading. Clearly, plaintiff is entitled to move to strike an insufficient defense. Such a motion is akin to a Rule 12.02(6) motion to dismiss for failure to state a claim.

v. Extraneous matters may be attached in support of the motion. There is no provision in Rule 12.06 to convert to a Rule 56 motion in the event that extraneous matters are considered. It has been suggested that the better practice would be to consider such a motion as improperly captioned and treat it as a Rule 56 motion with all of the procedural requirements of Rule 56.

J. **Rule 12.07. CONSOLIDATION OF DEFENSES.**

i. **Text of Rule 12.07:** *A party who makes a motion under this rule may join it with the other motions herein provided for and then available to the party. If a party makes a motion under this rule and does not include therein all defenses and objections then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in 12.08.*

ii. Rule 12.07 simply prevents piecemeal filings of motions. For example, if a party files a pre-answer motion to dismiss on grounds of lack of personal jurisdiction and insufficiency of service of process and the court denies the motion that party may not then file an additional pre-answer motion on grounds of failure to state a claim upon which relief can be granted. Tennessee Civil Procedure §5-6.

K. **Rule 12.08. WAIVER OF DEFENSES.**

i. **Text of Rule 12.08:** *Waiver of Defenses - A party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto, (provided, however, the defenses enumerated in 12.02(2), (3), (4), and (5) shall not be raised by amendment) except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of capacity, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it spears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at trial, shall be disposed of as provided in Rule 15 in the light of any evidence that may have been received.*

ii. A strict reading of this rule would indicate that a party waives all defenses and objections which are not raised either by motion or, if no motion is made, in a party's answer or reply or amendments thereto. However, it is equally clear that the intent of the rule is to preclude multiple and piecemeal filings of Rule 12.02 motions. Thus, the rule should be construed to mean as follows:

1. A party may raise the following defenses by answer or by pre-answer motion:
    a. A lack of jurisdiction over the subject matter;
    b. Lack of jurisdiction over the person;
    c. Improper venue;
    d. Insufficiency of process;
    e. Insufficiency of service of process;
    f. Failure to state a claim upon which relief can be granted;

g. Failure to join an indispensable party; and
h. The lack of capacity of a party to sue to be sued.

iii. A party who files a pre-answer motion pursuant to Rule 12.02 waives any of the following defenses that are not included in the motion:
1. Lack of jurisdiction over the person;
2. Improper venue;
3. Insufficiency of process;
4. Insufficiency of service of process;

iv. A party who does not file a pre-answer motion pursuant to Rule 12.02 waives any of the following defenses by not including them in his first answer:
1. Lack of jurisdiction over the person;
2. Improper venue;
3. Insufficiency of process;
4. Insufficiency of service of process;

v. Waiver of one or more of these four defenses may not be cured by an amendment of the answer even within the time for an amendment as a matter of course.

vi. The defense of lack of jurisdiction over the subject matter may be raised at any time and is not waived by a pleader's failure to include it in a previous motion or pleading.

vii. The defenses of failure to state a claim and failure to join a party required to be joined by Rule 19 may be raised by pre-answer motion or by answer, and neither defense is waived by failure to raise it in a previous motion or pleading. These defenses may also be presented a post answer motion, such as one for judgment on the pleadings or at the trial on the merits.

viii. The objection of failure to state a legal defense may be made by later pleading if one is permitted or by motion for judgment on the pleadings or at trial on the merits. Banks & Entman, *Tennessee Civil Procedure* §5-6(v).

ix. A pleader should assume that the defenses of lack of personal jurisdiction, improper venue, insufficiency of process and insufficiency of service of process will be waived if not included in a pleader's first response to the

complaint whether it be by answer or a Rule 12.02 motion. See e.g., P. E. K. v. J. M., 52 S.W.3d 653 (Tenn. Ct. App. 2001) (defendant waived defense of lack of personal jurisdiction by not including the defense when he filed a motion to dismiss for lack of subject matter jurisdiction); First Tennessee Nat'l Ass'n v. White, 1998 Tenn. App. LEXIS 579 (Tenn. Ct. App. August 20, 1998) (defendant waived objection to service of process by filing a motion to dismiss on the grounds that the statute of limitations had expired).

TENNESSEE RULES OF CIVIL PROCEDURE
RULE 65

Presented by:

Circuit Judge Robert L. Childers
Circuit Judge John J. Maddux, Jr.

Tennessee Judicial Academy
Thursday, August 21, 2014

RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Rule 65 gives the court extraordinary power to order someone to take an action or to refrain from taking an action, and it sets out strict guidelines about the use of such power. More damage can be done by the issuance of an ill-advised temporary restraining order than almost any other act a court can perform.

I. RULE 65 INJUNCTIONS

A. 65.01. Injunctive Relief.

i. **Text of Rule 65.01:** *Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment. A restraining order shall only restrict the doing of an act. An injunction may restrict or mandatorily direct the doing of an act.*

ii. As one can clearly see from the rule, there are three classes of injunctive relief. The restraining order often referred to as a temporary restraining order may be issued *ex parte*. The temporary injunction, as well as a permanent injunction, requires an evidentiary hearing with notice.

B. Difference between restraining order and injunction.

i. Please note the difference between a restraining order and an injunction. A restraining order can only restrain a person *from doing* an act. A person can only be ordered *to do* an act by an injunction. Do not request a restraining order and then ask the court to order the person to do something. Wilson v. Wilson, 877 S.W.2d 271 (Tenn. App.1993). An injunction has its own special rules under Rule 65.

ii. A long line of Tennessee decisions establishes that an injunction should be issued only when the complainant has no adequate remedy at law and will suffer irreparable harm. Times should be set forth clearly and objectively so that there is no question as to when the action is to cease or is to be done.

C. Requirements of Restraining Orders or Injunctions

i. **65.02. Requisites of Restraining Order or Injunction - Parties Bound.**

1. **Text of Rule 65.02(1):** *Every restraining order or injunction shall be specific in terms and shall describe in reasonable*

detail, and not by reference to the complaint or other document, the act restrained or enjoined.

2. **Text of Rule 65.02(2):** *Every restraining order or injunction shall be binding upon the parties to the action, their officers, agents and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise.*

3. **Text of Rule 65.02(3):** *Every restraining order or injunction must be very specific and must be reasonably capable of being performed by the defendant. Likewise the entire restraining order or injunction must be contained in the order itself, and may not reference the complaint or another document. In other words, the defendant can look at the order and see everything that is required of him. Also, the order is not only binding upon the party, but also upon the party's officers, agents and attorneys who receive actual notice of the restraining order or injunction.*

ii. **65.03. Restraining Order.**

1. **Partial Text of Rule 65.03(1):** ***When Authorized.*** […] *A restraining order may be granted at the commencement of the action or during the pendency thereof without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage, before notice can be served and a hearing had thereon.*

2. **Text of Rule 65.03(2):** ***Officers Who May Grant or Dissolve.*** *A restraining order may be granted, only by a judge of the court in which the action is pending or is to be filed; provided that if the judge of that court is disqualified, disabled or absent from the county, it may be granted by any judge having statutory power to enjoin or restrain. A restraining order may be dissolved on motion by the judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction. Before a restraining order may be granted or dissolved by one other than the judge of the court in which the action is pending, or is to be filed, the party applying therefor must show by*

affidavit the disqualifications, disability or absence of the judge and the fact that no judge has refused such relief.

3. **Text of Rule 65.03(3):** ***Issuance, Signing and Filing.*** *Every restraining order shall be indorsed with the date and hour of issuance, shall be signed by the judge granting it, and shall be forthwith filed in the clerk's office.*

    a. Be sure that every restraining order is endorsed with the date and hour of issuance. Rule 65.05(3) requires that every order be signed by the judge granting it. This calls into question the former practice of issuing a fiat to the clerk directing him to issue the restraining order.

4. **Text of Rule 65.03(4):** ***Service.*** *A copy of the restraining order for each party to be restrained, shall be delivered to a person authorized to serve a summons. Such person shall forthwith serve the order as provided by Rule 4.04 and forthwith make return thereof on the order. If a restraining order is issued at the commencement of an action, a copy shall be served with the summons.*

5. **Text of Rule 65.03(5):** ***Binding Effect and Duration.*** *A restraining order becomes effective and binding on the party to be restrained at the time of service or when the party is informed of the order, whichever is earlier. Every temporary restraining order granted without notice shall expire by its terms within such time after entry, not to exceed fifteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period, or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.*

6. Carefully consider how the restraining order is proposed. Lawyers can be quite creative in seeking a restraining order, particularly in divorce cases. Oftentimes, by prohibiting one from doing a particular act, one is required to perform another act resulting in a mandatory injunction. Such relief should be denied at the restraining order stage.

7. In 1966, the Federal Rule 65(b) was amended in an effort to avoid the interpretation that an applicant could obtain a restraining order without providing any notice to the opposing party, even though informal notice was possible.

The Federal Rule allows *ex parte* restraining orders to be issued "before the adverse party or his attorney can be heard in opposition." However, the Tennessee Rule 65 has no such safeguard. Even so, you should be extremely wary of granting *ex parte* orders. Virtually never will there be a situation where opposing counsel cannot be notified. If notice can be given, it is desirable to do so—even though it may be as informal as a phone call.

iii. A restraining order, but not an injunction, may be granted any time after suit is filed without notice but only when there is verified complaint or affidavit and the applicant's rights *are being, or will be, violated AND the applicant will suffer immediate and irreparable injury BEFORE notice can be served and a hearing thereon.* However, except in domestic relations cases, it is a good practice to require the applicant's attorney to give some kind of notice to the other party that a Temporary Restraining Order (TRO) is being sought. A simple telephone call to the opposing party's attorney or the party himself, by the applicant's attorney advising that he is going to appear before the judge immediately and ask for temporary restraining order is enough. This may take more of the applicant attorney's time, but in the long run it can save a great deal of time and trouble.

iv. A restraining order can only be issued or dissolved by the judge of the court in which the action is pending, except when that judge is not available. Even then, a restraining order cannot be granted or dissolved by another judge unless the party applying for the order has filed an affidavit showing why the judge of that court is not available and, in addition, that no judge has refused the restraining order.

v. The order must be endorsed with the date and hour of issuance and signed by the judge, and then served by a person authorized to serve a summons.

vi. A TRO granted without notice must expire in fifteen (15) days or less and the judge must put on the order the date of expiration. The fifteen day period can later be extended for good cause, but the good cause must be contained in the order.

vii. **65.04. Temporary Injunction.**

1. **Text of Rule 65.04(1): *Notice.*** *No temporary injunction shall be issued without notice to the adverse party.*

2. **Text of Rule 65.04(2): *When Authorized*.** *A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.*

3. **Text of Rule 65.04(3): *Officers Who May Grant, Modify or Dissolve.*** *A temporary injunction may be granted, modified or dissolved on motion by a judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction.*

4. **Text of Rule 65.04(4): *Issuance, Signing and Filing.*** *Every temporary injunction shall be indorsed with the date and hour of issuance, shall be signed by the judge granting it and shall be forthwith filed in the clerk's office and entered.*

5. **Text of Rule 65.04(5): *Binding Effect and Duration.*** *A temporary injunction becomes effective an binding on the party enjoined when the order is entered. It shall remain in force until modified or dissolved on motion or until a permanent injunction is granted or denied.*

6. **Text of Rule 65.04(6): *Findings of Fact and Conclusions of Law.*** *In granting, denying or modifying a temporary injunction, the court shall set forth findings of fact and conclusions of law which constitute the grounds of its action as required by Rule 52.01.*

7. **Text of Rule 65.04(7): *Consolidation of Hearing With Trial on Merits.*** *Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision [65.04(7)] shall be so construed and applied as to save to the parties any rights they may have to trial by a jury.*

8. Again, the temporary injunction must be specific so as to identify the applicable conduct that is being prohibited or mandated. Note that in a temporary injunction you may direct a specific act as well as prohibit specific acts.

9. Findings of facts and conclusions of law are required. The rule specifically states these findings and conclusions must be such as "required by Rule 52.01."

10. The most common description of the standard for preliminary injunction in federal and state courts is a four-factor test:

    a. First, the threat of irreparable harm to the plaintiff if the injunction is not granted;
    b. second, the balance between this harm and the injury that granting the injunction would inflict on the defendant;
    c. third, the probability that plaintiff will succeed on the merits; and
    d. fourth, the public interest. Denver Area Meatcutters v. Clayton, 120 S.W.3d 841 (Tenn. Ct. App. 2003).

11. Rule 65.04(7) provides for the consolidation of the hearing on the application for preliminary injunction and the trial of the action on the merits. Consider doing this whenever possible. Consolidation is particularly effective in cases involving non-compete agreements, restrictive covenants, and other such contractual proceedings where the validity and the enforceability of the agreement need be determined only once. If you choose to consolidate, be sure the parties have adequate time to prepare to put on all the proof necessary. If damages are sought, you may bifurcate the damages portion.

12. Even if you do not consolidate, evidence received at the preliminary injunction hearing is admissible at the trial and need not be repeated. Remind counsel of this if possible. If a court reporter is not present at the preliminary hearing, evidence may be repeated out of necessity.

D. **Notice Requirements**

i. An injunction cannot be issued under any circumstances without notice to the adverse party. The temporary injunction may be granted upon sworn complaint or affidavit, but the opposing party must be given a chance to file counter-affidavits. More commonly, both sides offer oral testimony at a temporary injunction hearing.

ii. Once again, the temporary injunction may only be granted, modified or dissolved by a judge of the court in which the action is pending, or if he is not available, the same conditions apply as for a temporary restraining order. Likewise, similar to TROs, a temporary injunction must be endorsed with the date, hour of issuance, and signed by the judge, and becomes effective and binding when the order is entered and remains in force until ordered otherwise.

iii. Please note that in granting, denying, or modifying a temporary injunction the court must make findings of fact and conclusions of law which constitute the grounds of his action. The court may order the trial of the action to be advanced and be heard at the same time as the temporary injunction hearing. If not, the proof offered in the temporary injunction hearing can and shall be used in the trial on the merits. However, if the court does hear the trial and the temporary injunction hearing at the same time, the court cannot deny a party the right to a jury trial.

E. **Injunction Bonds**

i. **65.05. Injunction Bond.**

1. **65.05(1):** *Except in such actions as may be brought on pauper's oath, no restraining order or temporary injunction shall be granted except upon the giving of a bond by the applicant, with surety in such sum as the court to whom the application is made deems proper, for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined. The address of the surety shall be shown on the bond.*

2. **65.05(2):** *A surety upon a bond under the provisions of this Rule submits himself to the jurisdiction of the court. The surety's liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided by Rule 5 at least twenty (20) days prior to the date of the hearing thereon.*

3. **65.05(3):** *A party restrained or enjoined may move the court for additional security; and if it appear on such motion that the surety is insufficient or the amount of the bond is insufficient, the court may vacate the restraining order or temporary injunction unless within a reasonable time sufficient security is given.*

ii. An injunction bond must be posted with all restraining orders or

temporary injunctions. The bond is to guarantee any damages that might be suffered by the opposing party as the result of the issuance of an injunction or restraining order. Of course, if the case qualified for a pauper's oath, a TRO or injunction can be granted on the pauper's oath, but a judge should be very careful in doing this. The amount of bond is based on the possible damage the injunction or TRO may cause to the opposing party and should be of sufficient amount to compensate the opposing party if it later appears that the TRO or injunction was improper.

iii. You should set a bond in every case with the exception of domestic relations cases. The bond provides the enjoined party with a remedy against the bond itself even though the person obtaining it might not be personally liable. If the injunction was erroneously obtained and the party was deprived of its rights, then he may recover against the bond without proving the person who obtained the injunction acted negligently or maliciously.

F. **Enforcement**

i. **65.06. Enforcement of Restraining Orders and Injunctions.**

1. **Text of Rule:** *Upon a showing by affidavit or other evidence of the breach or threatened breach of a restraining order or injunction, compliance with such order or injunction may be compelled or its disobedience punished as a contempt by a judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction.*

ii. Normally a violation of a TRO or injunction is punished by use of the court's contempt powers.

G. **Domestic Relations Cases**

i. **65.07. Exceptions.**

1. **Text of Rule:** *The provisions of this rule shall be subject to any contrary statutory provisions governing restraining orders or injunctions. In domestic relations cases, restraining orders or injunctions may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge to whom application therefor is made and the provisions of this rule shall be followed only insofar as deemed appropriate by such judge.*

ii. This section exempts domestic relations cases from the general

rules of Rule 65 and permits the judge great discretion in when, how, and under what circumstances a TRO or injunction can be issued in a divorce action. This discretion also extends to whether a bond should be required.

iii. However, even in domestic relations cases, it is still necessary to state with specificity the allegations that form the basis of the request for the restraining order or injunction. Simply stating that the "plaintiff fears that the defendant will do physical harm", without stating a basis for that fear, is not sufficient. Likewise, a legal conclusion that "defendant has physically abused plaintiff in the past" is not sufficient. It is necessary to state *specifically* what defendant did to the plaintiff.

iv. It is generally not appropriate to ask the court to enjoin the defendant from "coming about the plaintiff at any time or place", when the parties have minor children. That is tantamount to asking the court to award temporary custody of the children without notice and an opportunity for the defendant to be heard. Only the most extraordinary circumstances would warrant an *ex parte* award of temporary custody. A request for an *ex parte* award of temporary custody would, again, require the grounds to be stated and sworn to with specificity.

v. It is also not appropriate for a court to issue an *ex parte* mandatory injunction removing one of the parties from the marital residence. It is necessary to issue notice and provide opportunity for the defendant to be heard before granting such relief. Generally, a court can only order a party removed from the marital residence upon a showing of imminent danger of harm to the petitioner.

H. **TENN. CODE ANN. § 36-4-106(d). Automatic Temporary Injunctions.**

i. This section provides for automatic temporary injunctions (actually restraining orders) against both parties in divorce cases, except where the only grounds for the divorce are irreconcilable differences. Both parties are restrained from transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the court, any marital property. Expenditures from current income to maintain the marital standard of living and the usual and ordinary costs of operating a business are not restricted by the injunction. The statute requires each party to maintain records of all expenditures, copies of which shall be available to the other party upon request.

ii. The statute also restrains both parties from voluntarily canceling, modifying, terminating, assigning or allowing to lapse for nonpayment of premiums, any insurance policy, including life, health, disability, homeowners, renters and automobile.

iii. The statute further restrains both parties from harassing, threatening, assaulting or abusing the other and from making disparaging remarks about the other to or in the presence of any children of the parties or to the parties employers.

iv. Finally, the statute restrains both parties from relocating any children of the parties outside the state of Tennessee, or more than one hundred (100) miles (fifty (50) miles effective July 1, 2013) from the marital home, without the permission of the other party or an order of the court, except in the case of a removal based upon a well-founded fear of physical abuse against either the fleeing parent or the child.

v. Nothing in the statute prevents either party from applying to the court for further temporary orders, an expanded temporary injunction or modification or revocation of the temporary injunction.

I. **Special Situations**

i. An excellent and thorough discussion of injunctive relief in various situations is contained in Chapter 49 beginning at page 635 of *Gibson's Suits in Chancery,* Sixth Edition. However, two situations occur on a fairly regular basis.

ii. ***Labor cases.*** Most cases involving labor law are preempted by Federal Law. However, the state court does have the power to invoke its authority to stop and prevent violence. Management is generally the moving party and is usually very forceful and demanding of immediate action. However, a TRO should not be issued in labor cases without some kind of notice to the other side and a chance for the other side to have its say before the judge signs an order. Violations of TROs are punishable as criminal contempt of court with fines of up to fifty dollars ($50) and up to ten (10) days in jail for each offense.

iii. ***Real estate foreclosure sales.*** T.C.A. § 29-23-201 provides that no judge shall grant an injunction to stay the sale of real estate under a trust deed or mortgage unless five (5) days notice is given to the trustee or mortgagee of the time, place and the judge or chancellor before whom said application for injunction is to be made. The statute also provides that the judge shall not act upon

an application for an injunction against a mortgagee or trustee unless it is accompanied by proof of service on the trustee or mortgagee or proof that he is not to be found in the county, or is a non-resident. Thus, the statute prevents the judge from enjoining any foreclosure sale of real estate within five days of the sale.

iv. See *Gibson's* at page 647 for a list of improper situations for granting injunctions.

II. What about the new Rules of Professional Conduct?

A. Rule 3.3(a) of the Tennessee Rules of Professional Conduct contains language that directly relates to the *ex parte* provisions of Rule 65. The text of the Rule reads:

i. A lawyer shall not knowingly:

1. […] (3) in an ex parte proceeding, fail to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

B. The Comment to this particular Proposed Rule states:

i. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance or presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. As provided in paragraph (a)(3), the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

ii. No similar provision currently applies to the present Tennessee Rules of Civil Procedure.