

**TEMPORARY INJUNCTIONS, PRELIMINARY INJUNCTIONS
AND TEMPORARY RESTRAINING ORDERS**
(when and how to obtain an order and how to defend against the motion)

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In Florida, immediate relief in the form of an injunction, which is designed to preserve the status quo pending a hearing on the merits, is available in both state and federal court, with or without notice. In federal court, immediate injunctive relief is referred to as either a "Preliminary Injunction" (with notice) or a "Temporary Restraining Order" (without notice). *See* Fed.R.Civ. P. 65. In federal court, a temporary restraining order expires no later than 10 days after it is entered unless, before expiration, the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents to an extension for a longer period. *See* Fed.R.Civ.P. 65(b).

In Florida state court, immediate injunctions are referred to as "Temporary Injunctions." *See* Fla. R. Civ. P. 1.610. Temporary Injunctions and Temporary Restraining Orders may be sought without notice.¹ In state court, a temporary injunction remains in effect until further order of the court. Such injunctions, however, when challenged, require an expedited hearing (within five days in state court and within two days in federal court.)

Generally, state courts are more reluctant to issue mandatory temporary injunctions than prohibitory ones. To justify granting a mandatory temporary injunction, Florida courts have imposed an additional burden or special standard of proof on the plaintiff. Some courts have described that burden by commenting that a mandatory temporary injunction may not be granted "except in those rare cases where the right to it is clear and free from reasonable doubt." *See Delta General Corp. v. Priess*, 389 So.2d 1083 (Fla. 3d DCA 1980).

The decision to seek an injunction prior to a decision on the merits of a case involves a number of strategic considerations such as: (1) whether the probability of success in the action would be greater if the movant did not seek an injunction but rather some other type of relief, *e.g.* a declaratory decree; (2) the period of time the injunction will be of practical or legal effect, and how this affects the value of a successful action; (3) the strength of the evidence in hand; and (4) the overall viability of the movant's

¹ Seeking an injunction without notice is more difficult in both state and federal courts because such injunctions require a certification of counsel of all efforts undertaken to notify the opposing party and reasons why notice should not be required.

claims. Preliminary and temporary (with notice) injunctions are customarily granted following an evidentiary hearing that is less complete than in a trial on the merits and prior to full discovery (often without any discovery.)

The attorney representing the Plaintiff seeking a temporary injunction must weigh the benefits of setting forth their case at such an early stage and generally should not seek an injunction without strong evidence to support the Plaintiff's motion. While a preliminary or temporary injunction does not ordinarily decide the merits of the case and the denial of the motion does not preclude the granting of a permanent injunction at the conclusion of the case, the findings and rulings of the court on such a motion travel with the case and set the tone with the court and opposing parties in all future proceedings.

Moreover, a temporary injunction motion must be neither too early nor too late. A request for injunctive relief is too early if irreparable harm is not reasonably imminent. *See City of Coral Springs v. Florida National Properties, Inc.*, 340 So.2d 1271 (Fla. 4th DCA 1976). A request for injunctive relief is too late if the harm sought to be enjoined has already occurred to the extent that the granting of an injunction would destroy, rather than maintain, the status quo. *See Speer v. Evangelisto*, 662 So.2d 1340 (Fla. 2d DCA 1995).

Finally, the expense that the movant will likely incur (including the bond which will be required if an injunction is entered) must also be considered.² An injunction proceeding even in a simple state court case will usually result in the client incurring at least \$10,000 in fees. Injunctions in federal court or in complex cases are many times that amount. In addition, if an injunction is obtained, with limited exceptions, the prevailing party must post a bond. The client typically will need to have collateral and pay a bond premium which is usually ten percent of the bond amount.

THE ELEMENTS

A temporary injunction is an "extraordinary remedy" that should be sparingly granted and that is properly entered "only in certain well-defined circumstances." *Tom v. Russ*, 752 So. 2d 1250, 1251 (Fla. 1st DCA 2000). A party seeking the entry of a preliminary injunction carries the burden of persuasion and must demonstrate: (1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits or a clear, legal right to the requested relief; (3) that the threatened injury to the petitioner outweighs and possible harm to the respondent; and (4) that the granting of a temporary injunction will not disserve the public interest. *See Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville*, 659 So.2d 1046, 1047 (Fla. 1995); *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 770 (Fla. 5th DCA 2000). Furthermore, "clear, definite, and unequivocally sufficient factual findings"

² Prior to seeking an injunction, the attorney should explore whether an agreement to maintain the status quo can be obtained pending resolution of matter. This will likely save the client significant resources.

must support each of the elements necessary to justify entry of a preliminary injunction. *Tom v. Russ*, 752 So. 2d at 1251.

STATE OR FEDERAL COURT

In cases where both state and federal courts have jurisdiction, a strategic decision regarding where to file must first be made. This decision often turns, as a practical matter, on the perceived speed and efficiency of the court. Litigating injunctions in state court is typically easier and less expensive. Also, the Plaintiff must consider the practical aspects of the injunction such as the geographic area in which the injunction is to be enforced. Federal court injunctions are usually easier to enforce in other states. However, aside from general considerations such as relative crowding of dockets, differences in discovery rules, and the particular judges involved, differences between federal and state procedural and local rules regarding injunctions should always be explored. *See Fed.R.Civ.P. 65(b) and Fla. R. Civ. P. 1.610(d) discussed supra.*

FLORIDA STATE COURT INJUNCTIONS - RULE 1.610

Florida Rule of Civil Procedure 1.610 governs temporary injunctions and provides:

(a) Temporary Injunction.

(1) A temporary injunction may be granted without written or oral notice to the adverse party only if:

(A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.

(2) No evidence other than the affidavit or verified pleading shall be used to support the application for a temporary injunction unless the adverse party appears at the hearing or has received reasonable notice of the hearing. Every temporary injunction granted without notice shall be endorsed with the date and hour of entry and shall be filed forthwith in the clerk's office and shall define the injury, state findings by the court why the injury may be irreparable, and give the reasons why the order was granted without notice if notice was not given. The temporary injunction shall remain in effect until the further order of the court.

(b) Bond. No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined. When any injunction is issued on the pleading of a municipality or the state or any officer, agency,

or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person.

(c) Form and Scope. Every injunction shall specify the reasons for entry, shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document, and shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

(d) Motion to Dissolve. A party against whom a temporary injunction has been granted may move to dissolve or modify it at any time. If a party moves to dissolve or modify, the motion shall be heard within 5 days after the movant applies for a hearing on the motion.

FEDERAL COURT INJUNCTIONS - RULE 65

Federal Rule of Civil Procedure 65 governs Preliminary Injunctions and provides:

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) 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 (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 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. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.

EFFECT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

A temporary injunction does not decide the merits of the case unless (1) the hearing is set specifically for that purpose, and (2) the parties have had a full opportunity to present their cases. *Cox v. Florida Mobile Leasing, Inc.*, 478 So.2d 1200 (Fla. 4th DCA 1985). Because a party is not required to prove its case in full at a temporary injunction hearing, the findings of fact and conclusions of law made by the court at that hearing are not binding at a trial on the merits. *See University of Texas v. Camenisch*, 451

U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). When review by an appellate court of an order granting or denying a temporary injunction is based on a record made at a less than full hearing, any expression on the merits of the case will not be binding at a trial on the merits. *Id.*

It is not uncommon, however, for litigants to agree, in situations in which they are able to marshal their evidence and witnesses in a short period of time, to consolidate the hearing on the motion for temporary injunctive relief with trial on the merits. Moreover, under Florida Rule of Civil Procedure 1.270, the court has the right to consolidate the hearing on a temporary injunction with the trial of the action.

INJUNCTION ORDERS

An injunctive order should be narrowly tailored so as to not be broader than is necessary to secure the injured party, without justice to the adversary, relief warranted by the particular circumstances of the case. The form of the injunction order is governed by Florida Rule of Civil Procedure 1.610(c), which provides that every injunction order must specify the reasons for entry of the injunction and describe in reasonable detail the act or acts restrained without reference to a pleading or another document. The order must set forth “[c]lear, definite, and unequivocally sufficient factual findings” regarding the likelihood of irreparable harm, unavailability of an adequate remedy at law, substantial likelihood of success on the merits, and considerations of public policy. *City of Jacksonville v. Naegle Outdoor Advertising Co.*, 634 So.2d 750, 754 (Fla. 1st DCA 1994). The order should be confined within ascertainable limitations and phrased in such a manner that the one against whom the injunction is entered should plainly determine what is required of him.

COMMON CAUSES OF ACTION THAT PERMIT INJUNCTIVE RELIEF (PRELIMINARY AND PERMANENT)

A. Enforcement of Restrictive Covenants.

Injunctive relief is often sought in actions to enforce a non-compete agreements. *See* Section 542.335, Fla. Stat. (2007).

B. Trade Secret Act- Enjoining Misappropriation of Trade Secrets.

The Uniform Trade Secrets Act, Section 688.001, Florida Statutes *et seq.*, provides a statutory basis for enjoining “[a]ctual or threatened misappropriation” of trade secrets. *See* § 688.003, Fla. Stat. (2007). The Act provides attorney’s fees to the prevailing party on a finding that the claim was made in bad faith, a motion to dissolve an injunction was made or resisted in bad faith, or misappropriation was willful and malicious. *See* § 688.005, Fla. Stat. (2007). The Act also purports to displace “conflicting tort, restitutory, and other law” of Florida “providing civil remedies for misappropriation of a trade secret.” § 688.008(1), Fla. Stat. (2007).

Florida Statutes Section 688.003 provides:

(1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(2) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.(3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

(3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

C. Tortious Interference.

Temporary injunctions have been recognized as a viable form of relief in a suit for tortious interference with a contract. *See Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1075 (Fla. 5th DCA 1982); *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371 (Fla. 4th DCA 1987)(remedy at law inadequate because of the difficulty in determining how many sales were lost and what the profit on each such lost sale would have been).

D. Florida's Deceptive and Unfair Trade Practices Act.

Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida Statutes Section 501.201, *et. seq.*, permits injunctive relief. Florida Statutes § 501.211(1) provides:

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

See also, Big Tomato v. Tasty Concepts, Inc., 972 F. Supp. 662, 664 (S.D.Fla. 1997)(a competitor may seek an injunction under Section 501.211(1) of Florida's Uniform Deceptive and Unfair Trade Practices Act).

E. Civil Theft Statute Florida Statutes.

Florida Statutes § 812.035 provides the authority for this Court to act by:

(a) Ordering any defendant to divest himself or herself of any interest in any enterprise, including real estate.

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he or she was engaged in violation of the provisions of §§ 812.012-812.037 or § 812.081.

...

(6) Any aggrieved person may institute a proceeding under subsection (1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

F. Breach Of Contract

As a general proposition, very rarely will a court enjoin a threatened breach of contract, because an action seeking to enjoin a breach of contract is the equivalent of an action for specific performance. Consequently, such injunctions are subject to the same limitations and strict standards as an action for specific performance, including specificity of terms and mutuality of remedy. *See Wilson v. Sandstrom*, 317 So.2d 732 (Fla. 1975). The one notable exception to this rule is the injunction against breach of a noncompete covenant, as discussed *supra*.

G. Corporations

Injunctive relief has been granted to prevent officers or directors from breaching their fiduciary duties, particularly in cases of self-dealing or infringement on shareholder voting rights. *See Poynter v. Smith*, 120 Fla. 469, 162 So. 874 (1935); *Schwadel v. Uchitel*, 455 So.2d 401 (Fla. 3d DCA 1984). A court may issue injunctions in connection with corporate dissolutions. *See* § 607.1431(3), Fla. Stat. (2007). A trial court may issue an injunction to preserve corporate assets amid allegations of a deadlock among the shareholders and misapplication of corporate assets. *See Tabsch v. Nojaim*, 548 So.2d 851 (Fla. 3d DCA 1989).

H. Letters of Credit

Generally, a bank's obligation to honor drafts against an irrevocable letter of credit will not be enjoined unless a fundamental, egregious fraud in the underlying transaction is shown. *See B.G.H. Insurance Syndicate, Inc. v. Presidential Fire & Casualty Co.*, 549 So.2d 197 (Fla. 3d DCA 1989); *Tandy Brands, Inc. v. Master Marketing Ass'n, Inc.*, 481 So.2d 925 (Fla. 4th DCA 1985). *But see Cargill, Inc. v. Sunlight Foods, Inc.*, 586 So.2d 366 (Fla. 3d DCA 1991).

I. Florida RICO Act

The Florida Racketeer Influenced and Corrupt Organization Act (RICO) provides that a civil litigant may obtain an injunction under Section 895.05(1), Florida Statutes, against racketeering activities prohibited by the statute. One appellate court has reversed temporary injunctions freezing assets alleged to be proceeds of racketeering activities, holding that the plaintiffs had failed to show a clear legal right in that they had failed to carry their burden of proving that the funds sought to be frozen could not have come from legitimate sources. *See Shouten v. Utah International, Inc.*, 515 So.2d 366 (Fla. 4th DCA 1987); *Finkelstein v. Southeast Bank, N.A.*, 490 So.2d 976 (Fla. 4th DCA 1986). Certifying conflict, a different appellate court has held that the Florida RICO statute does not require tracing the funds sought to be frozen, and, furthermore, that no common-law requirements for a temporary injunction need be met, only "a showing of immediate danger of significant loss or damage" and the posting of a sufficient bond. *See Banco Industrial de Venezuela, C.A. v. Mederos Suarez*, 541 So.2d 1324, 1326 (Fla. 3d DCA 1989).

J. Promissory Notes

Typically, a court will refuse a request by the holder of a promissory note to enjoin the dissipation of assets. *See Mary Dee's, Inc. v. Tartamella*, 492 So.2d 815 (Fla. 4th DCA 1986); *Acquafredda v. Messina*, 408 So.2d 828 (Fla. 5th DCA 1982). Such cases are controlled by the general principle that creditors have adequate legal remedies for money judgments.

K. Trusts

One Florida appellate court has upheld a circuit court's injunction against the distribution of funds held in Florida bank accounts for children of a decedent. *See Sanchez v. Solomon*, 508 So.2d 1264 (Fla. 3d DCA 1987).

L. Continuing Trespass

Injunctions are available against continuing trespasses or encroachments. *See Hanna v. Martin*, 49 So.2d 585 (Fla. 1950). A court will not enjoin conduct that has been allowed to continue for so long that the harm to the party enjoined would outweigh the harm to

the party seeking the injunction if no injunction were issued. *See Brewer v. Hibbard*, 424 So.2d 988 (Fla. 5th DCA 1983).

M. Trademark Infringement

Injunctions are available against trademark infringement under Section 495.141, Florida Statutes. Injunctions are also available to prevent dilution of the distinctive quality of a mark, trade name, label, or form of advertisement within the meaning of Section 495.151. *See Glen Raven Mills, Inc. v. Ramada International, Inc.*, 852 F.Supp. 1544 (M.D. Fla. 1994). Injunctions have also been granted for injury to business reputation under that statute. *See Marks v. Cayo Hueso, Ltd.*, 437 So.2d 775 (Fla. 3d DCA 1983). Effective January 1, 2007, Section 495.151 has been substantively amended to provide injunctive and other relief to the “owner of a mark that is famous,” where another person uses the mark after the mark has become famous and where such use is likely to cause dilution of the famous mark. The statute as amended enumerates eight (8) nonexclusive factors courts may consider in determining whether a mark is famous, including the distinctiveness of the mark, the duration and extent of use of the mark, and the duration and extent of advertising and publicity of the mark. See Section 495.151(1)(a-h), Florida Statutes. The amended statute also provides three exceptions in which use of a famous mark is permissible: fair use, *i.e.* use by a competitor “to identify the competing goods or services of the owner of the famous mark”; noncommercial use; and news reporting and news commentary.

Injunctive relief is also available for common-law unfair competition based on trademark infringement. *See American Bank of Merritt Island v. First American Bank & Trust*, 455 So.2d 443 (Fla. 5th DCA 1984); *Babbit Electronics, Inc. v. Dynascan Corp.*, 828 F.Supp. 944 (S.D. Fla. 1993).

N. Little FTC Act

A party “aggrieved by a violation” of Florida’s “Little FTC Act,” Section 501.201 *et seq.*, Florida Statutes, may seek “to enjoin a person who has violated, is violating, or is otherwise likely to violate” the Act. *See* Section 501.211(1), Florida Statutes. The statutory language “anyone aggrieved by a violation of this part may bring an action,” appears to grant standing to any person, not just consumers, to seek an injunction.

O. Digital Millennium Copyright Act (DMCA)

The Digital Millennium Copyright Act (DMCA) provides for an injunction against acts, as well as seizure and impoundment of materials, during a pending lawsuit, believed to be involved in circumventing a technological measure in protecting a copyrighted work. 17 U.S.C. §1203(b)(1)–(2). The DMCA was enacted in October 1998 and contains anti-circumvention provisions that were considered essential to proper protection of copyrighted materials in the digital age.

PRACTICAL CONSIDERATIONS

As stated, a number of considerations are relevant in deciding whether to request an injunction, including:

- Cost of Bond.
- Verification and Investigation Issues.
- Witness Preparation and Evidence Presentation.
- Scheduling with Judicial Assistants, Alternate Judges.

EXAMPLES OF TYPICAL BUSINESS LAW INJUNCTIONS

Casa Caribe v. R. Fulton Macdonald, Case No. 05-07189 CA (09), Miami-Dade Circuit Court. *See* attached Motion for Temporary Injunction and Order entered by Court in business tort case.

Suncoast Title of Wellington v. Judith Carpenter, Case No. 2005 CA 003548 AG, Palm Beach County Circuit Court. *See* attached Motion for Temporary Injunction, Response to Motion for Temporary Injunction and Order entered by Court in action to enforce non-compete agreement.

DEFEATING MOTIONS FOR PRELIMINARY INJUNCTION

Defense counsel should first consider simply agreeing to an injunction in the case where the client is not engaged in the activity complained of or will voluntarily cease such activity. If the foregoing is not possible, then defense counsel must focus on demonstrating that the movant has not satisfied one or more of the elements which must be shown before injunctive relief may be granted: (1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) that the threatened injury to the petitioner outweighs and possible harm to the respondent; and (4) that the granting of a temporary injunction will not disserve the public interest. In addition, if the injunction sought is based on enforcement of a contract, it may not be enforced if the Plaintiff has itself breached the contract. *See* examples attached. Defense strategies are highly factually driven but should include considerations of the amount of time the court will set aside to consider the motion, whether the Defendant should attempt to obtain discovery, and whether necessary witnesses and documents are available. Defense counsel should also consider available equitable defenses where applicable, such as the doctrine of unclean hands. *See Pilafian v. Cherry*, 355 So.2d 847 (Fla. App. 1978).