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## **Shifting Strategies in Pursuing Injunctive Relief in the wake of COVID-19**

Troy S. Brown, Michael D. Blanchard,  
Michelle Pector, and David W. Marston, Jr.

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**Section 01**

# **Overview**

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# Overview

- As businesses struggle to deal with financial, operational, workforce, and myriad other challenges during the COVID-19 pandemic, certain commercial business tactics and strategies are emerging that will necessitate injunctive relief or, conversely, a plan to oppose injunctive relief
- Some Recent Trends
  - 1 Counterparty seeks to renegotiate business terms or extract new concessions under threat of nonperformance that would irreparably harm Party
  - 2 Party seeks to exercise contractual or common law rights, but faces threat of injunctive relief from Counterparty despite no real irreparable harm
  - 3 Counterparty seeks to turn ordinary commercial dispute into matter creating “public harm” during pandemic

# Overview

- Today, we'll address injunction hearings during the pandemic, including:
  - Strategies for seeking injunctive relief to enforce commercial relationships under threat of breach/nonperformance
  - Strategies for opposing injunctive relief, including when there is no irreparable harm and/or the alleged "public harm" is manufactured
  - Best practices for TRO and preliminary injunction arguments and evidentiary hearings held remotely



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**Section 02**

# **Seeking Injunctive Relief During the Pandemic**

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# Seeking Injunctive Relief During the Pandemic

- Build the Pre-Litigation Record When Opposing Counterparty's Renegotiation Efforts
- Prepare TRO/PI Filings Early in Pre-Litigation Phase – Be Ready to File
- Prepare Compelling, but Targeted, Supporting Declarations
- Be Zealous Advocates, but Recognize Current Judicial Climate Encouraging Heightened Professionalism During Pandemic

# Pre-Litigation Preparation: Building the Record

## Rule Number One: Every piece of correspondence is written for the court

- Clearly identify the objectives of the pre-litigation record
  - Ripeness? Is there a case or controversy?
  - Lock in positions and pin down the record (substantial likelihood of success)
  - Never fail to rebut material assertions
  - Establish the consequences of a failure to resolve (irreparable harm is threatened)
  - Wear the “White Hat” (appear more reasonable than your adversary)
- Clearly identify the breaking point
  - Know when it is time to pull the trigger
  - Attempt to time it favorably

## Pre-Litigation Preparation: Get Out In Front Of It!

- Prepare everything you possibly can in advance
- Know where you are filing and why
- Understand all local practice requirements and be prepared to comply
- Understand any service of process issues before you have to serve
- Know your burden of proof, the issues you must address, and how you will do it
  - Who are your declarants and what will they say?
  - How will your opponent respond, and will you be able to address it?
  - What evidentiary issues will arise?
- Injunctions are about the most compelling narrative



## Professionalism Considerations: Is It Really An Emergency?

- Injunctions and emergencies often go hand in hand
- But during the pandemic, courts are demanding that counsel “keep it in perspective”

Moving past the incorrect and, frankly, reckless designation of this dispute as an “emergency,” the Undersigned is shocked that counsel could not on their own resolve the issue. Given the health and economic crisis we are in, not postponing the deposition scheduled for next week is patently unreasonable... the Undersigned will be requiring counsel for both sides to appear for a hearing at some point, even if they work out the rescheduled date for the corporate deposition. That hearing will require the attorneys to explain their behavior in context of the far-more-important issues this Court (and the entire world) is facing.

- Be a zealous advocate, but recognize current judicial climate encouraging heightened professionalism during pandemic

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**Section 03**

# **Opposing Injunctive Relief During the Pandemic**

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# Opposing Injunctive Relief During the Pandemic

- **Build the Pre-Litigation Record**
  - No likelihood of success on the merits
  - No irreparable harm; dispute over money
  - Consider the impact of pandemic to both sides
    - Insolvency exception
    - Efficient breach
    - Public harm element
- **Prepare Opposing Brief Early in Pre-Litigation Phase**
  - Focus on how the facts defeat the required elements
  - Identify declarants and prepare supporting declarations

# Opposing Injunctive Relief During the Pandemic

## Pandemic May Offer Certain Advantages in Opposing a TRO

- Many district courts have changed the TRO process
- Require papers to be filed via ECF; not in-person ex parte
- Defendants may get additional response time in light of challenges associated with pandemic

# Opposing Injunctive Relief During the Pandemic

## SDNY example

- Complaint/TRO filed via ECF on Monday, April 20
- Plaintiff requested immediate telephonic hearing
- Defendant proposed to submit opposition on Friday, April 24
- Court set hearing for Friday; opposition due in 24 hours
- Brief and telephonic hearing may offer certain advantages

# Opposing Injunctive Relief During the Pandemic

- **Prepare a Persuasive Opposing Brief**
  - Be direct; confront plaintiff's factual and equitable bases for relief
  - Support your facts with declarants who will stand up to cross
  - Read plaintiff's cases and use them to your advantage
  - Rebut any claimed "public harm" element
  - Address the pandemic if relevant
- **Establish That Plaintiff Failed to Carry Its Burden**
  - Injunctive relief is extraordinary and drastic remedy
  - Are plaintiff's arguments supported by declarations?
  - Do the declarations offer more than simply conclusory statements?
  - Maintain your credibility and call out the other side if they overstep

# Opposing Injunctive Relief During the Pandemic

- **Be Prepared for Next Steps**
  - Assume, win or lose, plaintiff will seek preliminary injunction
  - Determine your discovery needs, if any
  - Prepare a proposed schedule for discovery and PI hearing
- **Consider the Format of the Evidentiary Hearing**
  - Submission on the papers with declarations
  - Telephonic evidentiary hearing
  - Webex/Zoom evidentiary hearing
  - Location of court reporter; issues with swearing in witnesses



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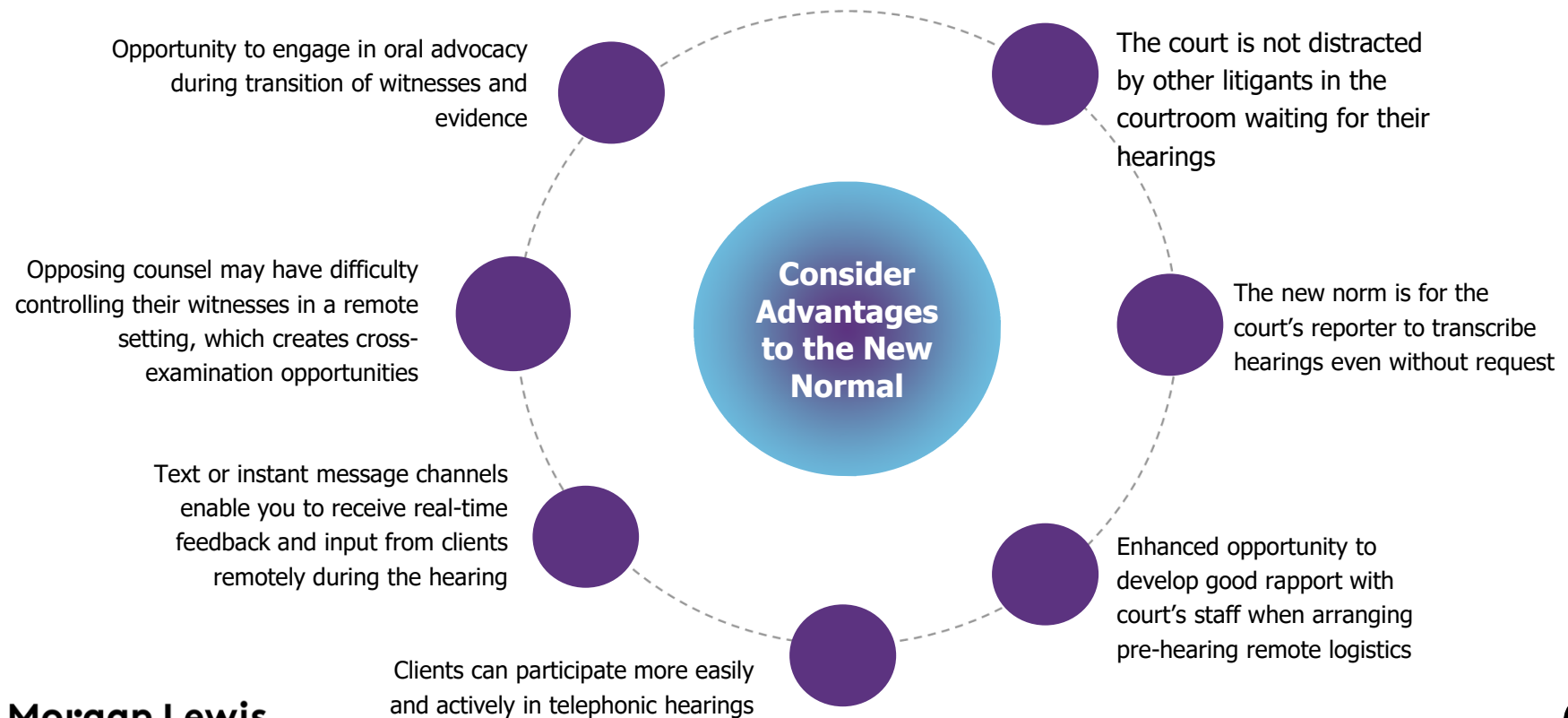
**Section 04**

# **Remote Arguments and Evidentiary Hearings: The New Normal**

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# Remote Arguments and Evidentiary Hearings: The New Normal



## Preparing for the Virtual Courtroom and Remote Advocacy

- Determine if the court has local rules for a virtual courtroom and comply
- Identify the remote platform the court will be using well before the hearing and install it
- Pre-mark exhibits and coordinate with the court clerk, court reporter, and opposing counsel on submission of exhibits before commencement of the hearing so the judge can easily follow along
- Test connections and technology in advance and confirm video capability and internet speeds for the witness, clients, and counsel



## Preparing for the Virtual Courtroom and Remote Advocacy

- Familiarize yourself with how to share exhibits and pre-highlight the portions you want to emphasize
- Consider using air-pods or another hand's-free device for the hearing (make sure they are fully charged)
- Check lighting, camera angle, and framing before you begin and when possible use a background that helps to identify you e.g., company logo
- Always mute your line when you are not speaking
- Have a separate dial-in or WebEx to serve as a virtual breakout room
- Develop a contingency plan to use if you lose connectivity or have tech problems during the hearing

# Training Your Witnesses to Successfully Testify in a Remote Environment

Share your themes with your witnesses so they can integrate the themes into their answers where applicable

Prep your witnesses remotely so they become comfortable with following along with the exhibits as they are introduced virtually and handling technology interruptions

Do a dry run of direct and cross examination of your witnesses remotely even if you will be in person together for the actual hearing as the court and opposing counsel will be remote

Encourage your witness to moderate their tone and pace. Keep their voice strong, but don't speak too quickly; using a more moderated pacing will help them deliver strong and effective testimony and will maximize the court's ability to hear it and digest it

Remind your witness to pause before answering the question to allow for objections

# Tools and Techniques to Enhance Remote Persuasion

- Routinely identify who is speaking to avoid confusion for the judge and the court reporter, particularly if the hearing is only telephonic and not video
- Before the hearing starts, confirm the court reporter and the clerk have all the pre-marked exhibits and proposed order
- Consider using a PowerPoint to walk the court and the witnesses through the evidence – provides an effective visual tool for the court to follow during the hearing
- Use demonstratives to illustrate or defeat imminent and irreparable harm where available
- Watch the Judge and the court reporter for cues on whether they are having any technical difficulties hearing the witness or seeing the evidence
- Admitting each piece of evidence as it's introduced during the hearing is an effective way to confirm that the court can see the evidence and hear the testimony
- Stay virtually connected with your client and co-counsel throughout the hearing so their real time feedback and observations can be incorporated into your arguments and evidence presentation



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**Section 05**

# **Summary**

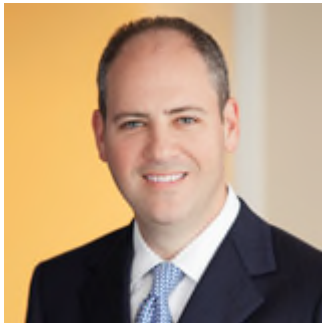
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## Summary

- Anticipate opportunities and challenges presented by the new injunctive relief landscape early in commercial dispute communications
- Whether planning to seek or preparing to oppose injunctive relief, start building your best record early
- On either side, find your best declarants/affiants/witnesses, recognizing strengths and weaknesses for likely remote hearings
- Review and implement best practices for successful telephonic or video arguments and hearings
- Keep perspective on judicial admonitions about professionalism and decorum, even in contentious litigation, during this unprecedented time



## Biography



### **Troy S. Brown**

Philadelphia

+1.215.963.5214

troy.brown@morganlewis.com

For nearly 25 years, Troy has successfully first-chaired jury and bench trials across the United States. He handles all aspects of litigation across the full range of M&A and other corporate and contract litigation and injunction proceedings, as well as disputes over alleged business fraud and claims of corporate wrongdoing. A leader in the firm's litigation practice, Troy was recently recognized by *The Am Law Litigation Daily* as its Litigator of the Week, by *The Philadelphia Inquirer* as one of its 2019 Influencers of Law in the category of Business Litigation, and by *The Philadelphia Business Journal* as one of its "Best of the Bar" for Business Litigation.

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## Biography



### **Michael D. Blanchard**

Hartford

+1.860.240.2945

[michael.blanchard@morganlewis.com](mailto:michael.blanchard@morganlewis.com)

Michael's practice focuses on all facets of shareholder litigation: books and records demands, derivative actions, securities class actions and enforcement, directors and officers compensation, indemnification and advancement. He counsels boards responding to shareholder litigation demands, and frequently serves as independent counsel to special committees. Michael works closely with the firm's shareholder activism defense and crisis management practices. He has successfully tried cases to judges and juries alike, including numerous appeals, and has obtained multiple dismissals, including, for example, the dismissal of a 1933 Act class action that *Forbes* magazine called a "stunning class action victory."

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## Biography



### **Michelle Pector**

Houston

+1.713.890.5455

[michelle.pector@morganlewis.com](mailto:michelle.pector@morganlewis.com)

Michelle is a seasoned trial lawyer who litigates a broad range of complex commercial disputes and employment matters. Michelle concentrates her practice on arbitrations, contract and supply chain disputes, misappropriation of trade secrets, unfair competition matters, consumer class actions, business torts and injunction proceedings. A substantial part of her practice is devoted to representing energy, healthcare, and technology clients in state and federal courts throughout the country. Michelle handles all aspects of litigation from pre-litigation advice through trial and post-trial business guidance with an emphasis on providing practical, innovative, and effective solutions for clients. Michelle has successfully tried cases to judges, juries, and arbitrators and routinely obtains and defends against temporary restraining orders and preliminary injunctions through expedited proceedings. Michelle is co-chair of Morgan Lewis's Energy Litigation Practice and a member of the firm's Covid-19 Texas Taskforce.

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## Biography



**David W. Marston, Jr.**

Miami

+1.305.415.3443

david.marston@morganlewis.com

David advises companies on intellectual property (litigation, class actions, and complex commercial matters. He counsels a diverse group of clients, including those in manufacturing, computer software and hardware, media, and information technology, with their patent, trademark, copyright, and complex commercial litigation. Dave represents plaintiffs and defendants in US federal and state courts, handling all aspects of litigation from inception through trial and post-trial appeals. Clients have also turned to him for international arbitration counsel. He is managing partner of Morgan Lewis's Miami office.

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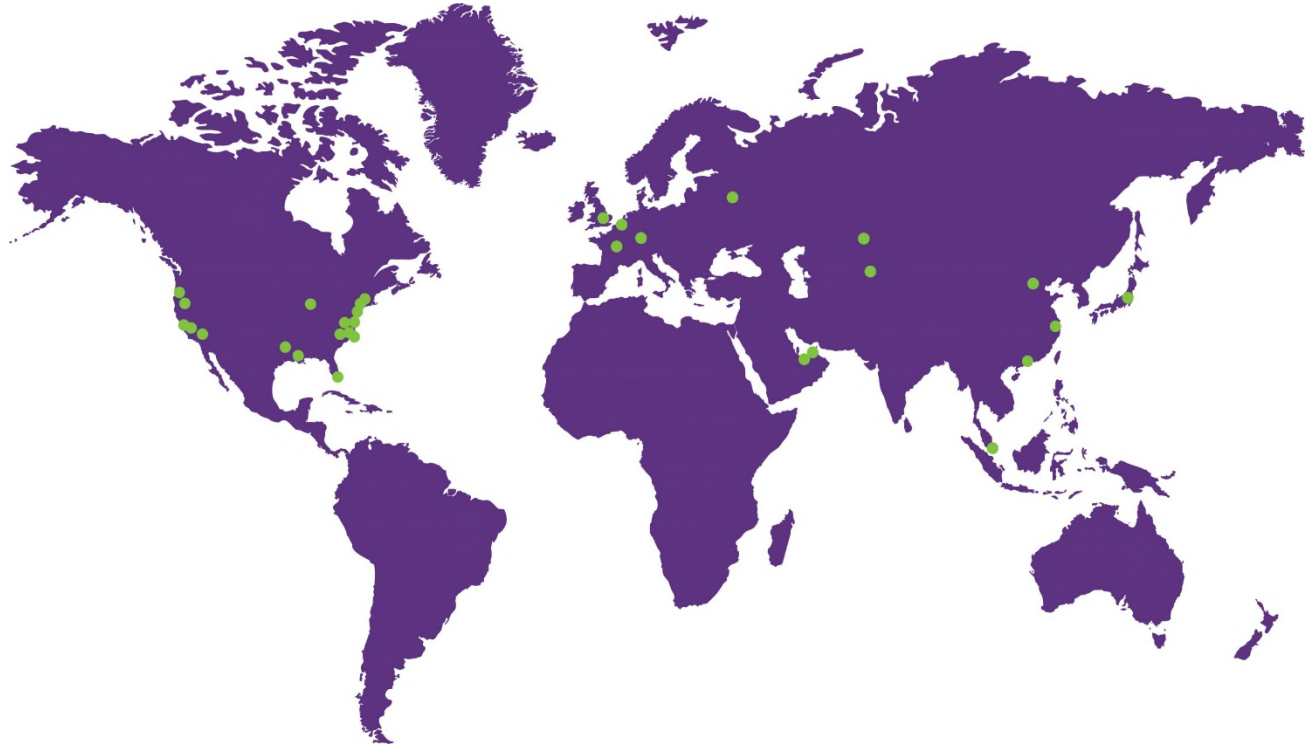
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