

# Chancery Practice Dot Com

## Three Rules for Getting Immediate Results in the Chancery Division

by Joseph A. Bahgat

When a client needs immediate relief against a website, hacker, or sociopathic ex-boyfriend-turned Internet pirate, filing an action in the Chancery Division, general equity part of the superior court, is often just what the doctor ordered. If a practitioner gets a call from a prospective client fuming over a scathing online review left about his business on Yelp—assuming there are good grounds for instituting legal action—filing a garden-variety tort complaint in the Law Division isn't likely to yield a favorable result. Even if the declarant's identity and address can be verified, a complaint can be drafted and filed, and they can be served with a summons within 48 hours, it is still going to be months before the case goes anywhere. At a minimum, there will be a 35-day wait before getting a response from the defendant, and even then, defamation cases are assigned to discovery track III, which is 450 days.<sup>1</sup> By that time, the client may be lucky to still be in business, much less paying the attorney's bills.

By contrast, if a verified complaint and application for an order to show cause with temporary restraints is filed in the chancery court, the matter can go before the court within a few days (if not sooner). If the defendant is posting defamatory statements about the client on the Internet, it is possible to get an *ex parte* temporary restraining order the same day. From the moment a case is filed in the Chancery Division, it is assigned to a particular judge in the general equity part. Many vicinages, in fact, have only one or two such judges. Once the case is assigned to a judge, it is almost entirely managed by that judge's chambers and staff. When immediate action is needed on something, instead of filing a motion and waiting for the return date, the practitioner can go directly to the judge's law clerk, who can provide valuable advice on the best way to get a prompt resolution.

For these reasons, filing in the Chancery Division is often advantageous for cases involving modern technology such as the Internet and social media. But in addition to having a solid foundation of the substantive law at issue—whether defamation, right of publicity, or another variation of intellectual property or tort law—it is important to understand the procedural distinctions of chancery practice, and how to navigate the Chancery Division. This article will present a framework for getting equitable relief in Internet-related cases.

### Rule No. 1—Know the Venue

Before filing a case in the Chancery Division, it is important to make sure it is the proper venue. The answer isn't always black and white. As a general rule, the role of courts of equity is to make the defendant *do* something (or refrain from doing something) as opposed to paying money.

The jurisdiction of the Chancery Division to adjudicate all controversies brought before it and render both legal and equitable remedies is co-extensive with that of the Law Division. Our court rules simply establish a preference and procedure for determining the appropriate forum for a specific claim. Thus, cases in which the "primary right or the principal relief sought is equitable" should be filed in the Chancery Division.<sup>2</sup>

It's usually not the end of the world if an action is 'inappropriately' filed in the Chancery Division when it should have been filed in the Law Division; that court has the jurisdictional power to transfer the case.<sup>3</sup> And vice versa, if a case is filed in the Law Division seeking primarily equitable relief, the Law Division has the power under the New Jersey Constitution to grant equitable relief.<sup>4</sup> The reason it pays to get it right the first time is that the process will be much more efficient. For example, if a case is mistakenly filed in the general equity part in Essex County seeking emergent relief, it would

be better if the practitioner re-filed the case in the Law Division him or herself, rather than waiting for the clerk to transfer it.<sup>5</sup>

### **First Scenario**

Sometimes the only relief desired is to remove offensive material from a website, and to prevent the person from reposting the same material elsewhere. This type of case fits squarely within the purview of the general equity part.

Often, the first challenge in an Internet case such as this is identifying the defendant, and figuring out where they are amenable to suit. Sometimes it is easy to trace a domain name back to its owner or operator, but other times it is not. When it is not readily apparent who or what is responsible for the content on a website the first thing that should be done is called a 'whois' query. Before a domain name is issued, registered, or renewed, the owner has to provide the domain name registrar<sup>6</sup> contact information, including a physical address. Identifying the proper defendant in an Internet case could easily be an article unto itself, but for the purposes of this article, assume the location of the defendant is known, and that jurisdiction is proper in the vicinage where the client is domiciled.

Starting a case in the general equity part differs from the Law Division in a few respects: First, a case information statement is not needed. Second, a summons will not be served. When an order to show cause (OSC) is filed it serves in place of the summons. This is because an OSC already commands the defendant to appear before the court on a date certain—that date is the return date for the OSC. Usually the court will set a return date within 35 days; however, it all depends on whether temporary restraints were required. (Temporary restraint is the term used in the New Jersey Court Rules in place of a TRO, or temporary restraining order.)

In most instances when the court is asked for temporary restraints, immediate emergent relief is being requested, often on an *ex parte* basis. Needless to say, this is an extraordinary remedy, which courts do not grant freely. Nonetheless, if the objective is to get immediate emergent relief, there's a specific procedure that needs to be followed, which—unless the practitioner is a frequent flyer in the Chancery Division—is wholly counterintuitive to everything learned about filing lawsuits thus far. Unfortunately, the answers will not be found in the court rules.

### **Rule No. 2—Timing is Everything**

If the court is to even entertain the request for temporary restraints, the practitioner must provide notice to the adverse party in advance of the request. Ideally, the attorney will want to serve the documents on the other party, and then file the complaint with the court—where the matter should be filed will differ depending on the vicinage. Sometimes a filing fee will need to be filed first with the finance office. This step can be saved if the practitioner has already established an attorney collateral account. The rules and procedures of attorney collateral accounts are a bit draconian, but it really pays off to have an account when time is of the essence.

### **Rule No. 3—Just Do It**

After the complaint and other documents are filed, a complete copy of everything needs to be delivered to the judge's chambers. Ideally, if notice has been given to the other party, there will be an opportunity to present the case to the judge *ex parte*, and get the order for temporary restraints signed at that time. In reality, it doesn't usually work out that way; usually the judge will set the matter for an emergent hearing sometime within 48 hours, if possible. Because this final step involves taking

the papers to the judge's chambers and requesting immediate relief, the practitioner has to do it personally—Lawyers' Service or FedEx may be able to serve the papers on the adversary, but they cannot argue the case before the chancery judge.

Conversely, if the papers were sent to the court by mail or courier, even if a courtesy copy is sent to the appropriate judge, the matter is not likely to be looked at for at least a few days. Aside from the fact that this would delay the relief the client needs, by sending the papers to the court instead of delivering them personally, the practitioner is implicitly sending a message to the court that the matter isn't that important. By taking the time to deliver the papers personally—or sending a trusted associate or colleague—a strong message is sent to the court that this is a truly urgent matter that requires immediate attention.

If personally delivering the papers to the court is not an option (e.g., the court is too far away) the next best thing is to call the court in advance of filing, and explain that an OSC with temporary restraints is going to be filed. The practitioner should confirm which judge the case will be assigned to and, if possible, give the clerk his or her attorney collateral account number and get a docket number in advance. After learning which judge will be handling the case, the judge's law clerk should be contacted. The clerk should be informed of the situation and asked whether the judge is in chambers that day, and if so, for how long. The practitioner should then tell the clerk that the papers will be hand-delivered to chambers and the clerk's office at a certain time. Often the clerk will call back shortly after receiving the papers, but if not, it is wise to wait about an hour and call the clerk back. The clerk will usually explain how the judge is inclined to handle the request for temporary restraints, either granting, denying, or setting the matter for an emergent hear-

ing on short notice.

### **Second Scenario**

A client is seeking help getting offensive material removed from the Internet, but also wants monetary relief for the harm caused to his business by the offensive material. This case could easily go into either the Chancery Division or the Law Division. In this instance, however, the primary objective is to stop the bleeding—getting the offensive material taken off the Internet, so the client's business, reputation, and goodwill are not continually harmed during the time it takes to litigate. Since the primary objective is equitable in nature (*i.e.*, having the court make the defendant do/not do something) the case would be better filed in the Chancery Division.<sup>7</sup>

### **Third Scenario**

A client is a freelance photographer, and sees one of his works prominently displayed—without prior authorization or license—on a popular website, billboard, or magazine. Although this might seem like an easy case to be filed in the Chancery Division, it absolutely cannot be filed there (nor in any other New Jersey state court). This is a copyright infringement case. Under 28 U.S.C. § 1338, the federal courts have original and exclusive jurisdiction over all civil actions based on copyright law. So long as the case is properly filed in the U.S. District Court for the District of New Jersey, that court will have supplemental jurisdiction over any state law claims that are ancillary to the copyright claim.<sup>8</sup>

### **Fourth Scenario**

For three decades a client has owned and operated a local retail business that sells officially licensed collegiate apparel and merchandise, and over the past 10 years has also built a sizable online business selling those same goods on its e-

commerce website. Recently, the client discovered another website that looks strikingly similar to his, using virtually identical colors and design elements, even employing a similar logo and a similar domain name. One difference is that it sells counterfeit or otherwise inferior merchandise. This is a trademark/unfair competition case. Although the district courts have *original* jurisdiction over cases brought under the Lanham Act (federal trademark law), federal court jurisdiction is not exclusive. Thus, the practitioner is free to file the case in state court, though that does not necessarily mean it should file in state court.<sup>9</sup>

Federal district judges and magistrate judges are accustomed to hearing these types of cases. Additionally, when a lawsuit involves an entity that has only an online presence, more often than not the practitioner will encounter complex jurisdictional, service of process, or conflict of law issues, which are easier to address in federal court. Though the terminology is slightly different, the standard for getting injunctive relief in federal court is practically the same as in New Jersey state courts.<sup>10</sup> The procedures are fairly similar as well.

Having said that there can be significant advantages to filing trademark/unfair competition cases in federal court, sometimes circumstances dictate that a case be brought in state court. For example, if the case concerns an unregistered trademark, and is not otherwise protected by the Lanham Act, it may be limited to New Jersey statutory and/or common law relief. Whether it should be filed in the Law Division or Chancery Division would largely depend on whether emergent relief is being sought. If the infringing website did not pose an immediate and substantial threat to the client's business, the case could safely be filed in the Law Division. If the converse were true, the Chancery Division would be more appropriate.

## **A Final Rule of Usage**

Attorneys don't file orders; they file motions, notices of motions, or applications. Typically a proposed order can be attached to the application, which provides a convenient vehicle to the court for granting the requested relief. The court, of course, has *carte blanche* to grant, deny, or modify the relief requested in the proposed order. Many New Jersey practitioners freely use the phrase—often when attempting to threaten their adversaries—"I'm going to *file* an order to show cause." Here is why this should not be done: A *proposed* order to show cause can be filed, but only the court has the power to grant or enter the OSC. Instead it might be wise to say: "I'm going to *ask* the court for an OSC," or, "I'm going to *get* an OSC."

As learned professionals, attorneys have an implicit duty to follow generally accepted rules of grammar and usage, which especially applies to legal terminology.

## **Some General Guidelines**

Practitioners don't have to be in the Chancery Division to apply for an order to show cause. An OSC can be obtained in the Law Division just as easily, even in the special civil part. Typically when a case is filed in chancery, the OSC will be the first document filed with the court, together with a supporting brief, and a verified complaint for injunctive relief.

Declaratory judgment actions do not typically belong in the Chancery Division.<sup>11</sup>

A breach of contract claim—even when requesting specific performance—does not automatically belong in the Chancery Division.

## **Conclusion**

The Chancery Division can be a very effective and efficient venue for resolving disputes where equitable relief is the primary goal, which is especially advantageous to matters involving Internet,

media, and privacy law, as well as intellectual property. If the attorney is not a seasoned chancery practitioner, however, he or she needs to take the time to become familiar with the intricacies and nuances of chancery practice. What complicates things even more is that the answers are not always spelled out in the court rules. Many Chancery Division judges are aware of the numerous pitfalls, and they can be fairly forgiving if a practitioner makes a misstep. But it is always best to try to do things right the first time, because that will make the best impression on the court and put the practitioner in the best position to get the client the result they desire. ☞

## Endnotes

1. See N.J. Ct. R. 4:24-1(a).
2. *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*, 253 N.J. Super. 515, 526 (App. Div. 1991).
3. See N.J. Ct. R. 4:3-1(b).
4. N.J. Const. Art. 6, § 3, ¶ 4; *O'Neill v. Vreeland*, 6 N.J. 158, 166 (1951) (citing *Steiner v. Stein*, 2 N.J. 367, 377-78 (1949)).
5. Thomas P. Olivieri, J.S.C. (Ret.), *et al.*, CLE Presentation at the N.J. State Bar Ass'n Annual Meeting: Chancery Litigation & the YLD Practitioner (May 16, 2013) (presentation notes on file with author), available at [njsba.com/images/content/1/0/1006524.pdf](http://njsba.com/images/content/1/0/1006524.pdf) (last visited Feb. 26, 2014).
6. Examples of domain name registrars include [networksolutions.com](http://networksolutions.com), [register.com](http://register.com), [gandi.net](http://gandi.net), and countless others. A complete list of domain name registrars is on file with the Internet Corporation for Assigned Names & Numbers (ICANN) available at [icann.org/registrar-reports/accredited-list.html](http://icann.org/registrar-reports/accredited-list.html).
7. See Justin Jouvenal, Virginia Woman is Sued Over her Yelp Review, *Wash. Post*, Dec. 4, 2012, available at [washingtonpost.com/local/crime/2012/1](http://washingtonpost.com/local/crime/2012/1)

[2/04/1cdfa582-3978-11e2-a263-f0ebffed2f15\\_story.html](http://2/04/1cdfa582-3978-11e2-a263-f0ebffed2f15_story.html).

8. See 28 U.S.C. § 1367(a).
9. *Chanel Inc. v. Casa Flora Co.*, 94 N.J. Super. 110, 115 (Ch. Div. 1967) modified by 100 N.J. Super. 19 (App. Div. 1968).
10. See Fed. R. Civ. P. 65; cf. *Crowe v. DeGioia*, 90 N.J. 126 (1982).
11. See, e.g., *Rego Indus., Inc. v. Am. Modern Metals Corp.*, 91 N.J. Super. 447, 457 (App. Div. 1966).

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