

The Sedona Conference

Commentary on Equitable Remedies in Trade Secret Litigation

Obtaining or resisting some form of equitable relief is a key component of many trade secret disputes, both at an early stage and following trial on the merits. The *Commentary on Equitable Remedies in Trade Secret Litigation* is designed to be a resource to assist parties and decision-makers in conducting this analysis. The *Commentary* reminds readers that equitable relief in trade secret disputes does not stand apart from general principles of equity and explores how those principles have been applied to trade secret disputes. Given the nature of equitable relief, the *Commentary* does not, and by definition, could not, urge a one-size-fits-all approach to equitable relief in trade secret disputes. Rather, it focuses on exploring the key factors courts consider in assessing any equitable relief and considers how courts have applied these basic equitable factors to evaluating and fashioning equitable relief in trade secret disputes.

Trade secret disputes often arise on an emergency basis before either party has developed a full evidentiary record. The perceived “need for speed” can lead to a number of problems that the *Commentary* works to address. First, it offers suggestions for assessing how an early remedy can be calibrated to the availability of evidence and whether targeted expedited discovery may assist the parties and the court in evaluating early requests. Second, it emphasizes that equitable relief, or its denial, must always be tied to the direct and circumstantial evidence presented to the court and the reasonable inferences therefrom and not rely simply on oft-cited mantras or invocations of presumptions. It offers examples of how such assessments have been made in a variety of cases in jurisdictions across the country. Finally, the *Commentary* gives guidance for selecting, scoping, and drafting a variety of equitable remedies to suit the needs of a variety of disputes.

This *Commentary* presents five Principles for equitable remedies in trade secret litigation:

- Principle 1** What constitutes an appropriate equitable remedy may change over the course of the dispute given the evidence available to the parties and the reasonable inferences to be drawn therefrom.
- Principle 2** On all motions for interim equitable relief, the court should consider the nature and urgency of the harm alleged and the extent to which material facts are undisputed, are known or accessible to either or both parties, or require further discovery to resolve.
- Principle 3** On motions for preliminary equitable relief, the parties and the court should consider whether targeted expedited discovery is appropriate.
- Principle 4** The parties and the courts should evaluate the available evidence and the parties’ respective burdens before determining whether any presumptions should apply to requests for equitable relief.



Principle 5 The court may incorporate provisions into orders granting equitable relief designed to balance the hardships between the parties.

The full text of *The Sedona Conference Commentary on Equitable Remedies in Trade Secret Litigation* is available free for individual download from The Sedona Conference website at:

https://thesedonaconference.org/publication/Commentary_on_Equitable_Remedies_in_Trade_Secret_Litigation

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