TO: THE BAR AND THE BENCH OF VIRGINIA

FROM: Advisory Committee on Rules of Court

April 25, 2023

PROPOSED RULE SPECIFYING
STANDARD FOR A PRELIMINARY INJUNCTION

The Advisory Committee on Rules of Court in Virginia seeks public comment on proposed Rule 3:26: Preliminary Injunctions—Standard for Granting.

Background

The law is currently unclear about the standard that Virginia trial courts should apply when evaluating a motion for a preliminary injunction. In 2008, the Supreme Court of Virginia expressed "no view" about whether Virginia should follow the federal "four-factor approach for determining whether a preliminary injunction should issue, similar to that adopted by the United States Court of Appeals for the Fourth Circuit." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 & n.6 (2008).

At that time, the Fourth Circuit followed the *Blackwelder* test, under which trial courts applied a sliding-scale balancing test when considering the four preliminary injunction factors: (1) the likelihood of the movant's ultimate success on the underlying action; (2) the likelihood that the movant will suffer irreparable harm without a preliminary injunction; (3) the balance of hardships to the movant and to the respondent without or with a preliminary injunction; and (4) whether the public interest favors preliminary relief. *See Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 194-95 (4th Cir. 1977). Under the sliding-scale balancing test, "[t]he importance of probability of success increases as the probability of irreparable injury diminishes." *Id*. at 195.

In 2008, the United States Supreme Court indicated that a movant seeking a preliminary injunction must satisfy all four factors. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Winter* rejected a standard that would allow the movant to prevail by showing only a "possibility" of irreparable harm. *Id.* at 22. The following year, the Fourth Circuit held that the *Blackwelder* sliding-scale balancing test was inconsistent with *Winter* and that, under *Winter*, the movant must satisfy all four factors to obtain a preliminary injunction. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089, *reinstated in relevant part*, 607 F.3d 355 (4th Cir. 2010).

Since then, lower courts and commentators have suggested different standards that Virginia trial courts should apply. In 2015, Judge Lannetti—accepting the premise that Virginia trial courts should continue to look to federal law—recommended that Virginia formally adopt a

specific interpretation of the *Winter/Real Truth* standard. *See* David W. Lannetti, *The Test—Or Lack Thereof—For Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. Rich. L. Rev. 273, 275 (2015). The Virginia Civil Benchbook similarly has referenced the *Winter/Real Truth* standard for many years. *See, e.g.*, Va. Civil Benchbook for Judges and Lawyers § 8.06[3][b] (2021-2022 ed.). In 2022, Judge Raphael wrote that 18th- and 19th-century Virginia precedents (and English chancery cases) support a balancing test, provided that the movant shows that it would likely suffer irreparable harm absent a preliminary injunction. *See* Stuart A. Raphael, *What Is the Standard for Obtaining a Preliminary Injunction in Virginia?*, 57 U. Rich. L. Rev. 197, 200-01 (2022). Judge Raphael identified *Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825, 831-32 (1875), as setting forth the proper standard. Under that standard, the likelihood-of-success factor is replaced with the requirement that the movant set forth "a prima facia case" that the underlying claim is meritorious. *Id*. at 225-26, 228-30.

In 2022, after a year-long study, the Boyd-Graves Conference proposed the adoption of Rule 3:26. The study-committee report is available online. *See* Conference Booklet at 12-1. Judge Lannetti chaired the study committee, whose membership included Judge Raphael. The committee considered three options: the *Manchester Cotton* standard; the *Winter/Real Truth* standard; and the *Blackwelder* standard (modified to require a threshold showing of irreparable harm). *Id*. at 12-13 & 12-21.

The committee concluded that the modified *Blackwelder* standard is the most appropriate standard. *Id*. at 12-14 to 12-15. The Boyd-Graves Conference subsequently approved the committee's recommendation at its October 2022 meeting. The text of the rule proposed here is modeled on that recommendation.

Proposed Rule 3:26

The Advisory Committee seeks comment on this proposed rule:

Rule 3:26: Preliminary Injunctions—Standard for Granting.

(a) *Scope of Rule.* — This rule applies to motions for preliminary injunctions under Code § 8.01-628. This rule does not apply to motions under any other statute that specifies the requirements for obtaining a preliminary injunction. As used in this rule, the term *preliminary injunction* is interchangeable with *temporary injunction*, *interim injunction*, and *interlocutory injunction*.

(b) *Grounds*. — The circuit court may issue a preliminary injunction only if it is "satisfied of the plaintiff's equity." Code § 8.01-628. A defendant may also seek a preliminary injunction. In determining whether a preliminary injunction is appropriate, the court should consider

(1) whether the movant is likely to suffer irreparable harm in the absence of the preliminary injunction;

(2) whether the movant is likely to succeed on the merits of the underlying action;

(3) whether the balance of hardships—that is, the harm to the movant without the preliminary injunction compared with the harm to the opposing party with the preliminary injunction—supports granting a preliminary injunction; and

(4) whether the preliminary injunction is in the public interest.

Unless a statute entitles the movant to injunctive relief, the movant must first show that it more likely than not will suffer irreparable harm without the preliminary injunction. The court may then balance the factors such that a stronger showing on one factor may offset a weaker showing on another. If the balance of hardships tilts decidedly in the movant's favor, the movant need not prove that it is likely to succeed on the merits if the movant has raised serious questions going to the merits that are sufficient to make them fair ground for litigation and for more deliberate investigation.

Alternatives

The Advisory Committee also seeks comment on whether an alternative to the modified *Blackwelder* standard would be better, and if so, why. *See* Boyd-Graves Committee Report, Conference Booklet at 12-13 & 12-21.

In particular, the Committee invites comment on three alternatives. Each would keep the text of the rule proposed above but would change the last paragraph:

Alternative One (retain the modified-*Blackwelder* standard but delete the last sentence). If commenters prefer Proposed Rule 3:26 to other alternatives, the Advisory Committee invites comment about whether the last sentence ("If the balance of hardships . . . .") should be deleted. That sentence adopts the "serious question" standard from *Blackwelder*. *See* Raphael, *supra*, at 202-03, 217-19, 229-30. Comment is also requested about whether—when the balance of hardships tips decidedly in the movant's favor—the movant may obtain a preliminary injunction *without* demonstrating more than a 50% probability of success on the merits. *See id.* at 230-31.

Alternative Two (*Manchester Cotton*)—replace the last paragraph of proposed Rule 3:26 with the following:

Unless a statute entitles the movant to injunctive relief, the movant must first show that it more likely than not will suffer irreparable harm without the preliminary injunction. The court may then balance the factors such that a stronger showing on one factor may offset a weaker showing on another. If the balance of hardships tilts decidedly in the movant's favor, the movant need not prove that it is likely to succeed on the merits if the movant has put forth [**a prima facie case**] [**at least a strong prima facie case]** that the underlying claim is meritorious.

If commenters prefer this alternative, which is based on *Manchester Cotton*, 66 Va. at 825, the Advisory Committee invites comment about whether "a prima facie case" or "at least a strong prima facie case" provides the better formulation. *See* Raphael, *supra*, at 225-26, 228-29.

Alternative Three (*Winter/Real Truth*)—replace the last paragraph of proposed Rule 3:26 with the following:

> The movant must show that each factor supports preliminary injunctive relief. In making that showing, the movant must demonstrate a likelihood of success and likelihood of irreparable harm by more than a 50% probability.

This alternative would require the movant to show that all four factors support a preliminary injunction. If commenters prefer this alternative, the Advisory Committee invites comment about whether to include the second sentence that requires more than a 50% probability of success on the merits. *See* Lannetti, *supra*, at 275, 297-03, 321-22; Raphael, *supra*, at 204, 230-31.

The proposed Rule 3:26 and all three alternatives require the movant to show by more than a 50% probability (i.e., "more likely than not") that it will suffer irreparable harm without a preliminary injunction. That threshold requirement is consistent with longstanding Virginia precedent. *See* Raphael, *supra*, at 223-24.

Email Comments: Please send comments on or before August 1, 2023 to:

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