

CAUSE NO. D-1-GN-16-004769

DAVID A. ESCAMILLA,
Travis County Attorney
Plaintiff

v.

KEN PAXTON
State of Texas Attorney General
Defendant

§ IN THE DISTRICT COURT
§
§
§
§ OF TRAVIS COUNTY
§
§
§ 261st JUDICIAL DISTRICT

**CROSS-PLAINTIFF/ INTERVENOR TARA CORONADO’S
OBJECTIONS & MOTION TO EXCLUDE TESTIMONY
OF PLAINTIFF’S UNTIMELY DESIGNATED EXPERTS**

Cross-Plaintiff/Intervenor Tara Coronado (Coronado) asks the Court to exclude the testimony of Mack Martinez and Randy Leavitt who were untimely designated as Plaintiff Travis County Attorney’s expert witnesses.

SUMMARY

As explained in detail below, the County Attorney waited until 4:30 p.m. on the discovery deadline of June 30th to designate any expert witnesses, despite requests by Coronado for such designations over 3 months ago. In addition, at no time, including on June 30th, did the County Attorney ever disclose what specific facts, events, or documents the witnesses (whether they be Rule 701 fact witnesses or Rule 702 expert witnesses) had reviewed or been involved in where the distinct issue of public disclosure of the Cunningham DPA (or any other DPA) came up with defendant prior to agreement to the DPA. Because the County Attorney deliberately withheld this information in response to a standard disclosure request and waited until after the TRCP 195.2 deadline to designate any expert witnesses, Mack Martinez and Randy Leavitt should be prohibited from testifying about their opinions about what effect public disclosure of the Cunningham DPA will have on the prosecution of crime.

The sole issue raised by the County Attorney's live pleading is whether disclosure of *the Cunningham* DPA will interfere in the prosecution of crime. Randy Leavitt apparently has no personal knowledge of the content of the Cunningham DPA and cannot testify about that key issue. And, as a criminal defense attorney with ongoing utmost duty of loyalty to his criminal defendant clients, any testimony Mr. Leavitt would give about disclosing DPAs generally is necessarily and irreconcilably prejudiced. It is clear that the Travis County Attorney's DPA is a God-send to a criminal defendant—as opposed to the other transparent alternatives of trial or deferred adjudication—because the criminal case is immediately dismissed before the defendant completes the requirements of the DPA, and the criminal records can be expunged with pledged support from the County Attorney. Mr. Leavitt's testimony is prejudiced because, given his duty to his clients, he could not possibly testify to support disclosure of DPAs because, in doing so, he would be betraying his duty to his clients who benefit also from the secrecy of the DPA.

BACKGROUND

1. Pursuant to an agreed scheduling order, this case is set for trial on August 8, 2017. Discovery ended on June 30, 2017. A pretrial hearing, including to hear objections and motions such as this one, is set for July 31, 2017 at 9:00 a.m. This objection/motion is timely filed by the deadline of July 17, 2017.

2. Coronado made timely and early requests to the County Attorney to disclose any expert witness(es).

a. On March 9, 2017, Coronado served the County Attorney with a Request for Disclosure (RFD), including a request to disclose any testifying expert witnesses and persons with knowledge.

b. On April 14th, the County Attorney responded to the RFD indicating “None”

regarding expert witnesses. Randy Leavitt was not on the list of “persons with knowledge” included in the RFP response.

- c. On May 19th, the County Attorney served an Amended Response to the RFD, still indicating “None” for expert witnesses. Randy Leavitt was not on the list of “persons with knowledge” included in the Amended RFP response.
- d. On April 14th, in response to the County Attorney’s RFD to Coronado, Coronado responded (regarding expert witnesses), “No testifying experts have been designated by any party, and therefore, Cross-Plaintiff/Intervenor has not designated any testifying experts for her case in main or in rebuttal.”
- e. On April 27th, Coronado served additional Interrogatories on the County Attorney, including INTOG 13 requesting the County Attorney to identify any witnesses he planned to call at trial, including any experts. (INTOG 13 said, “Identify every person whom you expect to call to testify at trial, including your experts.”)
- f. On May 30th, the County Attorney served a Response to INTOG 13 indicating that his only witnesses would be Mack Martinez and Anne-Marie Sheely, but not indicating that either of them would be providing expert testimony. Randy Leavitt was not mentioned in the INTOG 13 response. That same day, on May 30th, Coronado’s attorney, Bill Aleshire, emailed Tim Labadie, the County Attorney’s attorney, asking “Tim, May I assume, in the response for INTOG 13, that you will proffer Mr. Martinez and Ms. Sheely as fact witnesses since your response to the Request for Disclosure indicated you will not be calling any expert witnesses?” Mr. Labadie did not respond to that email.
- g. On June 23rd, Mr. Labadie sent an email (not an amended response to INTOG

13) indicating for the first time that, in addition to Mr. Martinez and Ms. Sheely, Randy Leavitt would be called as a witness, even though he had not previously been listed even as a person with knowledge. That email of June 23rd did not indicate that any of these witnesses would be testifying as experts.

- h. Then, in an email at 4:30 p.m. on June 30th (the discovery period deadline) the County Attorney served a “Supplemental” Response to the RFD designating, for the first time, Mr. Martinez and Mr. Leavitt to testify as experts. The designation did not include any information in response to TRCP 192.3(e)(6) of material provided to, reviewed by, or prepared by or for the expert witnesses.

ARGUMENT & AUTHORITIES

The County Attorney’s Late Designation of Experts Violates TRCP 195.2

3. The facts show that the County Attorney hid the fact that he was going to designate expert witnesses at all, and did not disclose information about those experts responsive to Coronado’s March 9th Request for Disclosure, until 30 minutes before the close of the discovery period. Such discovery abuse should not be rewarded. While waiting that long may have seemed like a clever tactic to keep Coronado from deposing the designated experts or conducting other discovery about them or designating her own rebuttal experts, the County Attorney waited too long.

4. TRCP 195.2 required the County Attorney to designate his experts (since the County Attorney is requesting affirmative relief) the later of 30 days after he was served on March 9th with the Request for Disclosure under 194.2(f) (i.e., by April 8th) or 90 days before the end of the discovery period (i.e., by April 1st). The County Attorney ignored his obligations under TRCP 195.2 and TRCP 194 and did not designate any expert witnesses until 4:30 p.m. on June

30th, the day discovery ended. The County Attorney's designation of experts was not timely by 83 days.

5. The distinct issue in this case about which the County Attorney will solicit testimony from his witnesses is whether mere disclosure of *the Cunningham DPA* would interfere in the prosecution of crime. While the County Attorney disclosed what opinion he expected Mr. Martinez and Mr. Leavitt to give at trial, the County Attorney failed to comply with discovery and also disclose what actual experience either witness has with whether disclosure of that DPA would prevent a defendant from agreeing to a DPA. This will be testimony of conjecture, speculation, and fantasy guesswork about how unspecified criminal defendants in the future may react if the Cunningham DPA is disclosed and what, if any, effect that might have on prosecution of crime. And the County Attorney failed to disclose what, if any documents, reports, data, etc. these witnesses were provided, reviewed by, or prepared by them related to that issue. A court must exclude the opinion testimony of an expert if it is not based on sufficient underlying facts or data, as required by Texas Rules of Evidence 702 and 703. Tex. R. Evid. 705(c); *see Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

6. Since there is no evidence that a Deferred Prosecution Agreement has ever been disclosed, these witnesses will be engaged in pure conjecture as to whether mere disclosure of the Cunningham DPA will result in interference with prosecution of crime. Mr. Cunningham has already agreed to the DPA, so testimony about a defendant not agreeing to a DPA if it is subject to disclosure is irrelevant and should not be allowed. Therefore, Coronado asks the Court to rule that the County Attorney's designation of expert witnesses was too late, that the County Attorney failed to make the timely disclosures required by the rules of discovery, and bar the County Attorney from presenting any expert testimony.

Criminal Defense Attorney Randy Leavitt's Testimony Is Irreconcilably Prejudiced

7. If a motion to exclude expert testimony is filed, the party offering the expert testimony bears the burden of showing that the testimony is admissible. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). An expert may testify about scientific, technical, or other specialized knowledge only if (1) the expert is qualified, (2) the probative value of the testimony *is not outweighed by the prejudice*, and (3) the opinion is relevant and based on a reliable foundation. *See* Tex. R. Evid. 401-403, 702; *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 215 (Tex. 2010).

8. Any probative value of Randy Leavitt's testimony is substantially outweighed by prejudice. A court must exclude the opinion testimony of an expert if its probative value is substantially outweighed by (1) the danger of unfair prejudice, confusion of the issues, or misleading the jury, (2) undue delay, or (3) needless presentation of cumulative evidence. *See* Tex. R. Evid. 403; *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d at 557. With all due respect to Mr. Leavitt, the Court should exclude the testimony of practicing attorney Randy Leavitt on the issue of disclosure of the Cunningham DPA because (a) Mr. Leavitt does not have personal knowledge of the contents of the Cunningham DPA, and (b) assuming that testimony would even be allowed that amounts to conjecture and speculation about the impact of disclosure of any other DPA, Mr. Leavitt has a conflict of interest in being able to testify in favor of disclosure because of his ongoing duty of loyalty to his criminal defendant clients.

PRAYER

For these reasons, Cross-Plaintiff/Intervenor asks the Court to hear this motion at the Pretrial Hearing on July 31, 2017 at 9:00 a.m., require the County Attorney to meet his burden of proof regarding this motion, and, after the hearing, exclude the testimony of the County

Attorney's experts, Mack Martinez and Randy Leavitt. If the Court decides to permit the County Attorney's late-designated experts to testify over this objection, then Cross-Plaintiff/Intervenor asks the Court to grant her permission to designate one or more rebuttal expert witnesses to be heard at trial on August 8, 2017.

Respectfully submitted,



Bill Aleshire
Bar No. 24031810
AleshireLAW, P.C.
700 Lavaca, Suite 1400
Austin, Texas 78701
Telephone: (512) 320-9155
Cell: (512) 750-5854
Facsimile: (512) 320-9156
Bill@AleshireLaw.com

ATTORNEY FOR CROSS-PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on Defendants by e-service on this 13th day of July, 2017.

ATTORNEYS FOR PLAINTIFF/CROSS-DEFENDANT

Tim Labadie
Texas State Bar No. 11784853
Assistant Travis County Attorney
P.O. Box 1748
Austin, Texas 78767
512 854-5864
512 843-9316 (fax)
tim.labadie@traviscountytexas.gov

ATTORNEYS FOR DEFENDANT

Matthew Entsminger
Assistant Attorney General
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548

Telephone: 512 475-4151
Fax: 512 457-4686
Matthew.entsminger@oag.texas.gov

Bill Aleshire
