

NO. D-1-GN-16-004769

DAVID A. ESCAMILLA,
TRAVIS COUNTY ATTORNEY

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261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

**PLAINTIFF'S RESPONSE TO TARA CORONADO'S
OBJECTIONS TO PLAINTIFF'S EXPERT WITNESSES**

I. RULE 195.2 DOES NOT GOVERN THIS CASE

Tara Coronado asserts that Plaintiff did not timely disclose expert witnesses pursuant to Texas Rule of Civil Procedure 195.2, which requires parties seeking affirmative relief to disclose experts ninety days before the end of the discovery period. If the Court were to find that Plaintiff did not timely disclose experts pursuant to Rule 195.2, the Court would have to likewise find that Tara Coronado did not timely disclose her expert witness, since neither party disclosed expert witnesses ninety days before the end of the discovery period. Such rulings are not warrant, however, because Rule 195.2 does not govern this case because the Court issued alternative deadlines in an Agreed Scheduling Order.

Plaintiff was served with a Request for Disclosure, which included a request to disclose expert witnesses, on March 9, 2017, to which Plaintiff had to respond by April 10, 2017. This deadline was extended, by agreement, to April 14, 2017. Likewise, Tara Coronado was served with a Request for Disclosure on March 9, 2017, and her response

deadline was extended to April 14, 2017. Neither Plaintiff nor Tara Coronado identified expert witness in their initial responses to the RFD, which were made after April 1, 2017.

On May 11, 2017, the Court signed an Agreed Scheduling Order providing that the discovery period ended on June 30, 2017. If Rule 195.2 applies to this case, as Tara Coronado claims, the Court, by signing this scheduling order, retroactively imposed a deadline of April 1, 2017 on the parties for disclosing experts; a deadline neither Plaintiff nor Ms. Coronado had met as of May 11, 2017, and now could not possibly meet. Of course, the Court never intended such a harsh and impossible requirement.

Instead, the Court's Agreed Scheduling Order provides alternative deadlines to those imposed by Rule 195.2. The Court ordered that witness lists be exchanged by June 23, 2017, and that the discovery period end on June 30, 2017. Plaintiff complied with this order by informing counsel for the other parties, on June 23, 2017, that he intends to call three witnesses at trial: Ann-Marie Sheely, Mack Martinez, and Randy Leavitt. Out of an abundance of caution, on June 30, 2017, the last day of the discovery period, Plaintiff informed the parties that Mr. Martinez and Mr. Leavitt would provide expert testimony.

Even though this designation was on the last day of the discovery period, it was not first time the parties learned of the evidence that would be presented through Mr. Martinez and Mr. Leavitt. On May 17, 2017, in response to Ms. Coronado's interrogatory number 7, Plaintiff explained in detail how disclosure of the Deferred Prosecution Agreement would interfere with the prosecution of crime. When Mr. Martinez and Mr. Leavitt were disclosed as experts, counsel were informed that the basis for their opinions

that disclosure of the Agreement would interfere with the prosecution of crime is the identical to the explanation given in response to interrogatory number 7.

Thus, Plaintiff timely disclosed Mack Martinez and Randy Leavitt as expert witnesses.

II. PLAINTIFF'S EXPERTS ARE QUALIFIED

Tara Coronado seems to contend that neither Mack Martinez nor Randy Leavitt are qualified to give testimony that disclosure of the Deferred Prosecution Agreement will interfere with the prosecution of crime. Mack Martinez has been employed with the Travis County Attorney's Office since 1995, during which time he served as Director of Intake, Director of Trial Courts, and First Assistant. He is currently the Director of Family Violence. His twenty-two years of experience as a prosecutor provide Mr. Martinez the requisite skill, knowledge, experience and training to testify about Deferred Prosecution and Deferred Prosecution Agreements. Mr. Martinez's testimony will be based upon facts about Deferred Prosecution and Deferred Prosecution Agreements that he has learned in his twenty-two years of experience as a prosecutor. (See Declaration of Mack Martinez attached hereto.)

Randy Leavitt has been licensed to practice law in Texas since 1980, having thirty-two years of experience as criminal defense attorney and five years of experience as a prosecutor, serving as First Assistant to the Travis County Attorney. Mr. Leavitt's experience as both criminal defense lawyer and prosecutor gives him the requisite skill, knowledge, experience and training to testify about Deferred Prosecution and Deferred Prosecution Agreements. Mr. Leavitt's testimony will be based upon facts about Deferred

Prosecution and Deferred Prosecution Agreements that he has learned in his thirty-seven years of experience as a criminal defense lawyer and prosecutor. (See Declaration of Randy Leavitt attached hereto.)

Tara Coronado asserts that the probative value of Randy Leavitt's testimony will be substantially outweighed by prejudice she contends exists because his clients have utilized deferred prosecution. However, because Mr. Leavitt has experience as a defense lawyer with deferred prosecution, combined with his experience as a prosecutor, he is extremely qualified to explain to the Court the importance of this tool and the necessity in excepting the Deferred Prosecution Agreement from public disclosure. Taking Ms. Coronado's argument to its logical conclusion would result in no one - neither prosecutor nor defense attorney - being qualified to testify in this case unless they testify that the agreement should be made public.

Plaintiff, David A. Escamilla, in his capacity as Travis County Attorney, asks the Court overrule Tara Coronado's objections to Plaintiff's expert witnesses.

Respectfully submitted,

DAVID ESCAMILLA
TRAVIS COUNTY ATTORNEY

By:



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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify by my signature above that, in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure, on July 28, 2017, a copy of the foregoing was emailed to:

Bill Aleshire
Email: Bill@AleshireLaw.com
Attorney for Tara Coronado Cunningham, Intervenor

Matthew Entsminger
Assistant Attorney General
Email: matthew.entsminger@oag.texas.gov.
Attorney for Ken Paxton, Texas Attorney General, Defendant

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261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,
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TRAVIS COUNTY, TEXAS

DECLARATION OF MACK MARTINEZ


1. My name is Mack Martinez. I was licensed to practice law in Texas in February 1978. I have been employed by the Travis County Attorney’s Office since 1995, during which time I have served as Director of Intake, Director of Trial Courts, and First Assistant. Currently, I am the Director of the Family Violence Division.

2. In my twenty-two years of experience as a prosecutor with the Travis County Attorney’s Office I have become very familiar with and knowledgeable about Deferred Prosecution and Deferred Prosecution Agreements, which is one of the tools prosecutors use in criminal cases.

3. I will offer testimony in this case about the use of deferred prosecution by the Travis County Attorney’s Office. I will testify that deferred prosecution is an essential and valuable tool used by prosecutors. I will also testify that releasing to the public the Deferred Prosecution Agreements at issue in this case will interfere with the prosecution of crime. My testimony will be based on the knowledge, skill, experience, and training I have acquired in my twenty-two years of experience as a prosecutor with the Travis County Attorney’s Office.

4. I am executing this declaration as part of my assigned duties and responsibilities as an Assistant Travis County Attorney. I declare under penalty of perjury that the foregoing is true and correct.

Executed in the Orleans Parish, State of Louisiana, on July 25, 2017.



Mack Martinez
Assistant County Attorney
Travis County Attorney's Office

DAVID A. ESCAMILLA,
TRAVIS COUNTY ATTORNEY

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261ST JUDICIAL DISTRICT COURT

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KEN PAXTON,
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

DECLARATION OF RANDY LEAVITT

1. My name is Randy Leavitt. I was licensed to practice law in Texas in November 1980. Since being licensed I have practiced both civil and criminal law my entire career. I served for over a decade as the Managing Partner at Minton, Burton, Foster and Collins P.C. law firm here in Austin, Texas. I served as the First Assistant Travis County Attorney for David Escamilla from January 2004 –January 2009. Since 2009, I have operated my own law practice now known as LEAVITT | TIBBE. I have been Board Certified in Criminal Law since 1987 by the Texas Board of Legal Specialization.

2. I am a member of the Texas Criminal Defense Lawyers Association - Board of Directors, 1993-1999, the Austin Criminal Defense Lawyers Association, the College of the State Bar of Texas, the Travis County Criminal Law & Procedure Section - Former President, the Texas Bar Foundation – Fellow, the State Bar of Texas Task Force on Habeas Counsel Training and Qualifications, and the Austin Bar Association. I am a member of the Texas District and County Attorneys Association.

3. I was the Course Director for the Advanced Criminal Law Course 2008. I have written numerous articles for continuing legal education programs throughout the State of Texas including *Defenses, Confessions, Pre-Trial Procedures, Exculpatory Evidence, Cross Examination, DWI Field Sobriety Testing*, and *HGN* for the State Bar, Texas District and County Attorneys Association, Austin Criminal Defense Attorneys Association, Texas Criminal Defense Lawyers Association, and Travis County Bar Programs. I authored *Fifth Circuit Survey, Criminal Law & Procedure*, which was

published in the Texas Tech Law Review, Vol. X, No. 3, 1979. I also authored *Horizontal Gaze Nystagmus* which was published in Voice for the Defense, Vol. 22, No. 9, 1993.

4. In my almost thirty-seven of experience as a defense lawyer in Austin and a prosecutor with the Travis County Attorney's Office, I have become very familiar with history, implementation and use of deferred prosecution, deferred prosecutions programs and Deferred Prosecution Agreements.

5. I will offer testimony in this case about the use of deferred prosecution in criminal cases and by the Travis County Attorney's Office. I will testify that deferred prosecution is an essential and valuable tool for handling criminal cases. I will also testify that making the Deferred Prosecution Agreement at issue in this case public will interfere with the prosecution of crime. My testimony will be based on the knowledge, skill, experience, and training I have acquired in my almost thirty-seven years in practicing law in both Federal and State Court, in Texas, both as a defense lawyer and as a prosecutor with the Travis County Attorney's Office.

6. My name is Randy Leavitt, my date of birth is April 24, 1954, my address is 1301 Rio Grande, Austin, Texas 78701, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on July 27, 2017.



Randy T. Leavitt