



IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.* STATE OF OKLAHOMA } S.S.  
MIKE HUNTER, ATTORNEY GENERAL }  
OF OKLAHOMA, CLEVELAND COUNTY }

*For Judge Balkman's  
Consideration*

**FILED**  
**APR 01 2019**

Plaintiff,

Case No. CJ-2017-816  
Honorable Thad Balkman

v.

PURDUE PHARMA L.P.; *et al.*

In the office of the  
Court Clerk MARILYN WILLIAMS

William C. Hetherington  
Special Discovery Master

Defendants.

**MOTION FOR ENTRY OF ORDER  
ON DEPOSITION DESIGNATION PROTOCOL**

The Teva and Actavis defendants (“Defendants”) move the Court to enter an order setting forth a protocol for the designation of deposition testimony by the parties in this action. Under 12 O.S. § 2104(C), counsel and the Court are required to conduct the proceedings in this jury case “so as to prevent inadmissible evidence from being presented to the jury . . . .” Therefore, Defendants request an order which will require the parties to purge the depositions of inadmissible matter prior to trial, shorten the length of time required to present video depositions during trial, and streamline the case for presentation to the jury.

This case is set for trial on May 28, 2019. Over 200 depositions have been taken. Discovery is closed. The Court should now enter an order providing for the orderly designation of deposition testimony so that the parties can purge the depositions of inadmissible matter prior to trial. This process needs to begin and be scheduled so that it can be completed before trial starts. Defendants have proposed a deposition designation protocol setting forth deadlines for the parties

to provide designations of deposition testimony, objections and counter-designations, and objections to counter-designations followed by a procedure for rulings on the objections by Judge Hetherington, appeal of the rulings to Judge Balkman, if necessary, and exchange of final cuts of the video and written excerpts of the corresponding transcript to all parties. A copy of the proposed deposition designation protocol is attached as Exhibit 1. The State has resisted as premature all efforts to reach an agreement on a deposition designation protocol.

The numerous depositions in this case are full of inadmissible, irrelevant, inflammatory testimony and sidebar comments which must be eliminated before presentation to the jury. Further, numerous objections during the testimony will need to be ruled on and edited out if overruled. The State attempts to push this issue to the eleventh hour and refuses to agree to a deposition designation protocol because it wants to use inadmissible testimony at trial. The State also resists the exchange of edited video and corresponding transcripts prior to showing the edited video to the jury. Defendants should be allowed to review the edited versions of the depositions prior to showing the videos to the jury and confirm that the videos have been correctly edited in conformance with the Court's rulings. Otherwise, the jury may be exposed to inadmissible matter – exposure which could be easily avoided by the exchange procedure Defendants suggest in the proposed protocol.

Section 2104(C) requires that “proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being presented to the jury by any means . . . .” 12 O.S. § 2104(C). This provision is “self-explanatory and its rationale simple and obvious. A ruling excluding evidence in a jury case is useless if the jury already knows the tenor of the evidence.” 2 Okla. Prac., Okla. Evidence § 11.12 (2d ed.). Where, as here, the Court and counsel may eliminate inadmissible evidence prior to trial by following a prescribed protocol, then such a protocol is

mandated by the Oklahoma Evidence Code. Moreover, if the State is allowed to show unedited deposition testimony with the Court ruling on objections at trial, there will be constant interruptions. Such “constant interruptions for rulings on evidence outside the hearing of the jury wastes time, destroys the continuity of the trial, and makes the jury fidgety.” *Id.* The jury in this case will already be participating in a lengthy and complicated trial. A deposition designation protocol would eliminate wasted time, lessen interruptions and streamline the trial, making the process much less burdensome for jurors.

Numerous courts have a standing practice of requiring the parties to purge depositions of inadmissible matter prior to trial. *See, e.g., Keil v. Eli Lilly & Co.*, 88 F.R.D. 296, 297 (E.D. Mich. 1980). In the *Keil* case, the court interpreted Federal Rule of Evidence 103(c), the federal corollary to Oklahoma’s section 2104(C), to support the process of eliminating inadmissible matter from depositions prior to their use at trial. The court explained that the Advisory Committee Note to Rule 103(c) provides that the rule “proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury.” *Id.* at 300. Additionally, the court reasoned that:

The court’s policy of requiring depositions to be purged of offensive matter prior to trial thus avoids the evil at which Rule 103(c) was directed. Additionally, by requiring that evidentiary issues be resolved prior to trial, the court insures that the momentum of the trial will not be interrupted by a constant barrage of objections to the admissibility of the testimony. As a result, the trial proceeds in an efficient, orderly way, and the jury is not exposed to prejudicial and inadmissible matter. These are valid and worthy goals, goals achieved in large measure by the efforts of the attorneys and the court in this case to complete the editing of the [witness’] deposition prior to trial.

*Id.* This Court should likewise require that evidentiary issues be resolved prior to trial and insure that the trial proceeds in an efficient, orderly way, and the jury is not exposed to prejudicial and inadmissible matter by entering an order setting out the deposition designation protocol requested by Defendants.

## CONCLUSION

The Court should enter an order setting out a deposition designation protocol to establish necessary deadlines and procedures to prepare the numerous video depositions taken in this case for use at trial.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was emailed this 1st day of April 2019, to the following:

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S500243



# **EXHIBIT 1**

**1**

**Subject:** Fwd: Draft Depo Designation Protocol  
**Date:** Thursday, March 28, 2019 at 1:41:20 PM Central Daylight Time  
**From:** Larry Ottaway  
**To:** Drew Pate  
**Attachments:** OMM\_US-#76647645-v1-Template\_for\_Deposition\_Designations.xlsx

Here it is

----- Forwarded message -----

**From:** Lynne Cooper <[lynnecooper@oklahomacounsel.com](mailto:lynnecooper@oklahomacounsel.com)>  
**Date:** Thu, Mar 28, 2019 at 1:17 PM  
**Subject:** Fwd: Draft Depo Designation Protocol  
**To:** Larry Ottaway <[larryottaway@oklahomacounsel.com](mailto:larryottaway@oklahomacounsel.com)>

Proposed Deposition Designation Protocol - template attached

(1) Parties are to designate and exchange citations to deposition testimony, including citations to exhibits cited therein, each intends to use at trial (utilizing the attached sample chart) by Tuesday, April 16, 2019.

(2) Within two weeks of receiving initial designations (April 30), parties are to provide objections to any such designations and identify counter-designations (using the same chart).

(3) Within one week of receiving counter-designations (May 7), parties are to provide objections to any such counter-designations (again, on the same chart).

After receiving objections to the counter-designations (or the time has expired to do so), the party who initiated the designation process for a particular witness shall within 3 days (May 10) submit to Judge Hetherington the completed chart along with a full copy of the relevant deposition transcript electronically with (i) designated and (ii) counter-designated testimony marked in a manner that allows the Court to distinguish between the two.

Judge Hetherington shall not rule on any objections to deposition designations until after MILs are decided -- as the parties anticipate many of the MIL rulings will impact rulings

on the designated testimony. Judge Hetherington, however, shall issue his rulings at least 10 days before any party intends to display the designated testimony to the jury, which will allow the parties time to complete the remainder of this protocol prior to doing so.

After Judge Hetherington issues his rulings as to deposition designations for any witness, the parties will have two days to submit papers to Judge Balkman challenging any of Judge Hetherington's rulings. The opposing party will have two days thereafter to submit any opposition papers to Judge Balkman.

Once the rulings on designations are final for a particular witness (i.e., Judge Balkman has ruled on objections to Judge Hetherington's rulings or the two-day period to challenge rulings to Judge Balkman has expired), no party shall add additional designations for the witness absent agreement from all parties. The parties may withdraw designated testimony at any time, but must give prompt notice to all other parties of any such withdrawal (and in no event shall a party give less than 3 days' notice of any such withdrawal prior to displaying designated testimony for the witness to the jury). In addition, the party who initiated the designation process for a particular witness shall provide the final cut (of the video and written excerpts of the corresponding transcript) to all parties at least 3 days before displaying it to the jury, allowing the parties time to address any discrepancies between the rulings and the final cut of the video before it is shown to the jury.

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