DEPOSITION PREPARATION BOOKLET

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DEPOSITION PREPARATION BOOKLET

The purpose of this booklet is to provide you with some background information and suggestions about your deposition. The booklet was developed as a result of participation in hundreds of depositions by our attorneys as well as the feedback that we receive from our clients. **You should read the entire booklet before our pre-examination under oath conference and call me with any questions or comments prior to then.**

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I.DESCRIPTION OF A DEPOSITION

In essence, a deposition is your oral testimony taken under oath by a court reporter in response to questions by other attorneys, and in some cases, by an attorney representing you. The testimony is transcribed after the deposition is concluded and is available for use by either side for summary judgment or trial. A judge or jury is not present during the deposition; only the lawyers, the witness, the court reporter, and a representative of each party usually attend. In all likelihood, the proceedings will be held in one of the attorneys' offices or in a court reporter's office.

II. PURPOSE OF A DEPOSITION

The opposing side is taking your deposition for several reasons:

(a) They want to ascertain what facts you know concerning the issues in the lawsuit. They are interested in knowing now the contents of your trial testimony.

(b) They want to document a specific story on record so that you will have to tell the same story at trial. This eliminates surprises and any unexpected new information so it is important to remain truthful for consistency.

(c) They hope to catch you in any type of misstatement so that they can show at the trial that you are not a truthful person and, therefore, that your testimony should not be believed on any of the points, particularly the crucial ones.

(d) They want to look at you, observe your manner of answering questions, and form an impression of the type of witness you will be in court. Perhaps this last consideration is the most important, for the lawyer is really trying to determine the probable effect your testimony will have on an impartial listener (the jury). Lawyers are discouraged when opposing witnesses are confident, informed, solid, and apparently unshakable.

III. DRESS AND APPEARANCE

Your appearance is very important. The opposing party, judge and jury's first impression of you will be based on your appearance and your attire.

A. **Attire:** Please dress in a conservative, business-appropriate manner. Below is a list of appropriate attire for trial.

DO:

Woman:

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1. Dress. If you wear a dress, it should be no shorter than the bottom touching the top of your knee and no longer than mid-calf.
2. Skirt and matching blouse. If you wear a skirt, it should be no shorter than the bottom touching the top of your knee.
3. Dress slacks and matching blouse. If you wear dress slacks, they should at least touch your ankles.
4. Dress shoes, polished and unscuffed.

Man:

1. Dress slacks with collared shirt.
2. Dress shoes, polished and unscuffed.

DO NOT:

5. Wear any jewelry. The only jewelry that should be considered is conservative earrings, a watch, a conservative necklace, and/or a wedding ring. However, this jewelry is not necessary.
6. Wear jeans, leggings, capris, t-shirts (including any shirts that have printed comments or wording), shorts, tennis shoes, thigh high boots, slippers, or flip flops.

B. **Appearance:** (such as hair, makeup, nails, body piercings, tattoos)

DO:

1. Wear hair clean and pulled back out of your face.
2. Wear light makeup.
3. Have neatly manicured nails, clean, fully polished, or unpolished.
4. Remove body piercings, i.e., nose ring, tongue ring, eyebrow ring. If you have your ears pierced more than once, please only wear one pair of earrings.
5. Cover <u>all</u> tattoos, either by wearing long pants, long sleeve shirts, or, if you wear a dress or skirt, wear dark colored pantyhose to match.

DO NOT:

1. Have any visible tattoos or body piercings.
2. Wear heavy makeup.

IV. SUGGESTIONS FOR TESTIFYING AND PITFALLS TO AVOID

A. Tell The Truth.

Of course, this does not need to be stated. Everyone understands this. This paragraph is not included because of doubt about your credibility or honesty. On the contrary, I have faith in your integrity. However, in my opinion, every lawyer is obligated by the Rules of Professional Conduct to specifically inform their clients to testify honestly. The truth, whether in the deposition or on the witness stand at trial, will never really hurt a litigant. A lawyer may successfully "defend or explain" the truth, but there is no defending or explaining why a witness lied or concealed the truth. In the eyes of the judge or jury, untruth devastates the credibility of a witness and hurts immeasurably. Florida law also has provisions directly on point. For example, pursuant to section 817.234, Florida Statutes, any person who, with the intent to injure, defraud, or deceive any insurer or insured, prepares, presents, or causes to be presented a proof of loss or estimate of cost or repair of damaged property in support of a claim under an insurance policy knowing that the proof of loss or estimate of claim or repairs contains any false, incomplete, or misleading information concerning any fact or thing material to the claim commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.803, or s. 775.084, Florida Statutes.

B. Just Give the Facts.

Remember that you have no purpose to serve other than to give the facts as you know them. A deposition is not a trial and you are not obligated to persuade the other attorney of the merits of your position or to state your case in full. Simply stated, we want to answer their questions and leave promptly. Generally, you are not required to give opinions, and if you are asked for an opinion, make sure you are comfortable with the response.

C. Never State Facts That are Beyond Your Knowledge.

Frequently, a witness is asked a question, and in spite of the fact that the witness feels he should know the answer, he does not. The witness is tempted to guess at or estimate the answer to avoid admitting lack of knowledge. This is a serious mistake. If you do not know an answer to a question, even though you think you may appear uninformed or evasive (to the other lawyer only) by stating that you do not know, you should nevertheless admit your lack of knowledge. "I guess," "Possibly," "Probably," "Maybe," "The odds are that…," "I have no reason to doubt…," and similar answers are generally the wrong answers from which your opponents can show that you either do not know what you are talking about or that you are deliberately misstating. Often, the opposing attorney knows the answer to his question but asks nonetheless, hoping you feel

compelled to guess. DO NOT GUESS! If you recall, state your recollection. If you do not recall, say that you "do not recall at this time". Provide no explanation of your failure to recall and offer no further assistance to the examiner.

D. Never Attempt to Explain Your Answer.

You are there to give the facts as you know them, and if a proper question is asked, you may be required to elaborate on your answer. However, you are not supposed to apologize for or attempt to justify those facts. Simply state the facts required to answer the question you were asked and then stop. A lawyer may look at you incredulously, smile, or pause for an extended time in order to make you self-conscious. Do not fall victim to this old tactic. Answer and stop.

E. You Should Give Only the Information That You Have Readily at Hand.

If you do not know certain information, do not attempt to give it. Do not turn to anyone in the room and ask for information. Do not promise more information and do not promise to look up something in the future. If you have given me a document during the litigation the contents of which document you cannot recall and the opposing attorney asks for information contained in that document, simply state the truth—you do not know the answer. Make the lawyer ask you the proper question, which in this instance would be "Do you have any document or have you had any document that would contain the information in my previous question?" Do not voluntarily testify about the existence of documents possibly unknown to your opponent. Also, if you do not know an answer but you know the person who does know the answer, do not tell the examiner unless they ask. Make the lawyer ask follow-up questions. Do not give the lawyer a break.

F. Do Not Use Documents During Your Depositions.

The purpose of a deposition is to find out the facts to which you can testify either of your own knowledge without documents or with the help of documents properly placed before you and identified on the record. Depositions are not a vehicle for the spontaneous production of documents. Accordingly, do not reach into your pocket or briefcase for notes or memoranda, produce any documents (particularly ones I have not seen), ask me to produce documents you have furnished me, or refer to any documents in any way in answering any questions unless the documents is presented to you by the other side and approved by me.

G. Do Not Answer a Question Which Calls For a Simple "Yes" Or "No" Reply With a Statement That Invites Further Probing.

For example, you may be asked "Did you speak with Mr. Smith last week?" If you answer "No, I didn't speak with him last week," you are in actuality saying "I spoke with him but not last week." Opposing counsel surely will continue questions concerning conversations with Mr. Smith. An answer of "No" is more likely to prevent further questioning.

H. Do Not Let the Opposing Attorney Get You Angry or Excited.

This destroys the effect of your testimony and you may say things that may be used to your disadvantage later. Attorneys sometimes try to get a deponent mad hoping that they will say things that may be used against them. Under no circumstances should you argue with the opposing attorney. Give the opposing attorney only the information that you have. That is all to which they are entitled. Try to give them the information in a courteous and unemotional tone of voice and manner.

I. If I Begin to Speak for Any Reason, Stop Your Testimony Immediately.

Do not speak again until I have completely finished speaking and listen carefully to what I say. If I object to a question, do not answer the question unless I instruct you to do so. If I instruct you not to answer, you should refuse to do so, of course.

J. Wait Until the Question Is Completed Before Beginning Your Answer.

(1) Although you may anticipate the balance of the question, you may guess incorrectly, and as a result, answer incorrectly. (2) I may want to object to the question. My objection is lost if you answer too quickly. (3) In order to accurately transcribe your testimony, the court reporter must hear the complete question and answer. The reporter cannot accurately capture the words with two persons talking simultaneously. (4) You should think about both the question and your answer before you give your answer. Obviously, if you answer before the question is complete, you have not thought about the question. This is dangerous.

K. You May Take Your Time Answering a Question.

Remember that the typed deposition will not show the length of time which you used in considering your answer. Of course, you should answer in a direct and straightforward manner, so as not to give the

opposing counsel the impression that you are composing an answer. However, you should avoid being drawn into a series of rapid fire questions and answers by the other side. Remember that the opposing counsel is attempting to encourage you to "blurt out" answers before you have time to think or I have time to object. Resist the temptation. TAKE YOUR TIME!

L. You Are Not Required to Give Information That You Learn in a Conference With Your Attorney.

If you are asked a question that would require you to give such information, simply state that your answer would have to be based upon information learned from your attorneys and I will make an appropriate objection, instructing you not to answer.

M. Freely Admit Discussing With Counsel Your Probable Deposition Testimony.

Discussions between a client and an attorney concerning the facts in issue occur in every case; consultation is entirely proper and expected. Freely admit your preparation.

N. Be Very Careful About Estimating Time or Distance (Or Anything Else).

Most people have difficulty with estimates. Examiners love for their witnesses to estimate. After an estimate you can expect a series of irritating questions attempting to require you to narrow the range of your estimates. Obviously, that is a trap into which you should not fall.

O. Do Not Try to Decide Before You Answer Whether a Truthful Answer Will Help or Hinder Your Case.

Answer truthfully. Your answer should not vary because of the effect you believe the answer will have on the case. The witness stand is a relatively poor place to make hurried judgments about the legal consequences of testimony. Avoid the temptation to adjust your answer in accordance with its possible consequences.

P. Resist The Temptation to Give Your Side of The Case In Its Entirety During Deposition.

The time to present your case will come later—in a forum much more receptive than a deposition conducted by opposing counsel. After each question, consider the scope of the question and answer only the question

you are asked. You need not elaborate, explain, or justify your answer. For example, if opposing counsel asks “Did you and XYZ meet on January 1, 1980?”, an acceptable answer is either “Yes” or “No.” You do not need to say “Yes, we met and discussed . . . “ or “No, it wasn’t January 1st; it was January 2nd.” Make the opposing counsel work for every bit of information you give them. Do not give an answer not required by the scope of the question. Our goal is to complete your examination as soon as possible. That goal is greatly assisted if you give short, rather than narrative, responses.

Q. Remember That Your Recollection Has Faded With Respect to Many of the Issues In This Litigation.

Never say “my memory is bad,” ”I’m not good at remembering names,” or anything similar. This is a form of apology or justification for not remembering (see paragraph (c) above). You do not owe anyone an apology or explanation for not remembering. Simply state “I do not recall at this time” and stop. Never say, “I do not remember, it’s been too long—it’s been ten years.” Other things affect recollection as much, or more than, time. For instance, you probably recall where you were and what you were doing a historic event. You may not recall what you were doing last week. The point is that the importance, complexity, duration, or intensity of an event affects recollection more than the passage of time. At any rate, do not apologize for or attempt to explain a failure of recollection.

R. Watch Out For Leading Questions.

For example, questions like “Is it not true that…” or “Is it not more like…” are leading questions. The opposing lawyer is trying to either characterize your testimony by using terms favorable to their case or require a short answer to a question garnished with words that are argumentative or “loaded.” If you have given a satisfactory answer, stick with it. You do not need to accept opposing counsel’s characterizations or limit yourself to their vocabulary.

S. Your Knowledge Necessarily Includes Hearsay.

The other lawyer may ask about hearsay during a deposition. In answering their questions, clearly distinguish between facts that are a matter of personal knowledge to you (things seen, heard, done, or spoken yourself) and matters that you know because you have been told them by someone else. This is an important distinction.

T. Never Joke During a Deposition.

Humor is not apparent on the typed transcript and you may look crude or cavalier about the truth. Avoid flippancy. Never use profanity—not even “hell” or “damn.” Never use racist, sexist, ethnic, religious, or other slurs. (This is easy if you remember to conduct yourself during a deposition as if a jury were present, as discussed on page 2 above.) A deposition is serious business and reqires .

U. Before, During, And After Mediation, Do Not Chat With The Opponents or The Opposing Party.

Remember, the other attorney and the opposing parties are not your “friend” for purposes of this case. Do not let their friendly manner cause you to drop your guard. Also, while I will be “friendly” and professional, it does not mean that I believe they are acting reasonably. This is a decision that we will make as the litigation progresses.

V. If You Are Handed a Document By Opposing Counsel And Asked a Question About It, Make Sure You Read the Document Before You Answer the Question.

Do not be concerned or nervous if the document is lengthy and requires five, ten, or fifteen minutes to read. Read it carefully in its entirety. Even if you think you recall the contents of the document, read it carefully in its entirety. If you insist (as you should) upon reading documents in their entirety, the opposing counsel will probably rephrase his question or otherwise avoid the necessity of your reading the document. However, if he does not rephrase or withdraw his question, read the document in its entirety.

If the question contains a premise with which you disagree or about which you have no knowledge, do not answer the question or answer it only after you have related your disagreement or lack of knowledge. We should not help our opponent by providing the answers to poorly phrased questions. We should make them work for every bit of information they requires.

W. If You Do Not Understand the Question, Insist That the Opposing Counsel Rephrase It.

Several times during your deposition, objections may be made by me on your behalf. Most objections are to preserve privileges that you may have. Others may be to preserve the objection for trial. Do not be disturbed or confused by my objection. In some cases, notwithstanding my objection

to the question, I will suggest that you answer the question. However, if you are unsure of the question, you should state such.

V. DO NOT DISCUSS YOUR CASE WITH THE OPPOSING PARTY

Remember, the other attorney and the opposing party(ies) are not your “friend” for purposes of this case. Do not let their friendly manner cause you to drop your guard. Again, attorneys sometimes try to get the opposing party mad hoping that they will say things that may be used against them. Under no circumstances should you discuss your case with the opposing attorney or speak to me about your case while anyone else is present. If there is something you wish to discuss, ask me to speak with you in private, so I can discuss such with you.

VI. RESIST THE TEMPTATION TO GIVE YOUR SIDE OF THE CASE

The time to present your case will come later—in a forum much more receptive than a deposition taken by opposing counsel. You need not elaborate, explain, or justify any facts or allegations made during your deposition. You can discuss them with me in private.

I apologize for the length of these instructions. However, your deposition is important, and I want to give you the benefit of these suggestions. Actually, giving your deposition is not difficult if we are well prepared, confident, and relaxed. I believe that you will be more confident, well prepared, and relaxed if you read and re-read these instructions carefully and participate in your pre-deposition conference.

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