



Arash Homampour

# The deposition and cross-exam of defense experts

## A narrative guide to asking the right questions at deposition and trial

*“Lesson here... You come at the king, you best not miss.” — Omar, HBO’s “The Wire”*

*“If the world should blow itself up, the last audible voice would be that of an expert saying it can’t be done.” — Peter Ustinov (1921 - 2004)*

What is a defense “expert”? To the inexperienced or unenlightened lawyer, the thought of cross-examining the other side’s “expert” may conjure up fear and doubt. In reality, experts are of varying professional quality and temperament: they can be very good, or they can be mediocre, maniacs, shoddy, BS artists, money-hungry vultures, myopic, arrogant, angry, condescending, unprepared, and the list goes on and on and on.

The point is that cross-examining experts is really not any different than with a lay witness. In fact, I find it easier.

### Preparation topics

#### • *Expert deposition notice and trial subpoena*

Prepare and serve a detailed deposition notice for expert witnesses. (See Exhibit A, on page 47) This notice covers all the bases. It asks for all the key materials and has proper notice of your intent to video tape the deposition. The materials requested are key, even if they don’t appear to be. Asking an expert to produce financial records is important because even if they don’t produce them at deposition, when you later do a motion to compel, you have a basis for your motion.

Asking an expert to produce all documents establishing the foundation for any scientific technique or method they

are relying on is critical. Of course, they never produce it at deposition or at trial. Then, when you ask for an Evidence Code section 402 hearing to challenge the admissibility of the testimony, the expert does not have the materials to establish: 1) the reliability of the technique/method; (2) that the expert is qualified to give an opinion on the subject; (3) the correct scientific procedures were used and (4) the scientific technique/method is sufficiently established to have gained general acceptance in the relevant scientific community. Testimony excluded!

Take your deposition notice and convert it to a trial subpoena and serve it on the expert at deposition. Tell the expert that he/she is expected to bring their entire file to trial pursuant to the subpoena.

#### • *Videotape*

All important expert depositions must be videotaped! Why? Because you are allowed to play portions of the expert’s videotaped deposition testimony at trial, during your case in chief and even though the expert is not actually on the stand.

I cannot tell you how many times I have flipped defense experts at deposition to testify favorably for plaintiff, but the defendant later decides not to call that expert. If you did not videotape the deposition, then you would need to call the expert live at trial and he or she will have more wiggle room. If you did videotape, then you give notice of the portions you plan on playing, the judge rules on any objections and then it’s “play away.”

Some judges do not know you can do this, so use “Exhibit B” (see page 47)

to prepare your brief detailing the law on this matter. Also attached is a sample form of the notice of page/line numbers you have to provide.

#### • *Research the expert*

Google the expert. Look at the expert designation to see what areas they have been designated on. Look at their Web site. Look at their CV and pull all the articles. Look at and order their publications. Look at what organizations of which they are members and see what materials or positions they have on the topics in your case.

For one notorious blowhard defense expert, his resume contains pages and pages of all the various schools he attended and organizations he is a member of. Subpoena those records. I did. I served over 10 trial subpoenas for all these records. Why? To see if the expert was lying on his resume or overstating anything. *One little tidbit can become a centerpiece for cross at trial.*

Determine in what areas they are really an “expert.” Many times the expert has no real experience in the area they are covering. Go to trialsmith.com and pull every single deposition that expert has given, especially where they have testified for plaintiff. The CAALA ListServe is an invaluable source for information and depositions regarding experts. I really cannot emphasize how critical it is to thoroughly research an expert before deposing them. Defense experts can be impeached with pretty much anything you uncover; contradictory materials on their Web sites, their own books, prior deposition or trial testimony, articles, financial relationships, etc.

*See Homampour, Next Page*

Trust me, experts can be like dominoes. Once you impeach or effectively cross them on one or more issue, they know...you know...and many times they "give it up" much easier.

• **Outline the legal issues**

Go to the CACI instructions covering liability, damages and defenses. Try to frame your questions using the words in the instructions. While expert depositions are frequently about determining what an expert is going to say, more times it's about getting them to concede issues the jury is going to determine.

• **Understand the science or topic**

It's 2012. You can pretty much find a book, treatise or article covering any scientific issue or topic on the Internet through a couple of searches. If it's an accident reconstruction expert, get the latest or best book that summarizes the topic. If it's an orthopedic issue, read the Internet. Talk to your own expert. Hire a second expert as a consultant at a lower rate to explain complicated issues to you until you understand them. Do something to understand what the expert is testifying to. I will never take an expert's depo unless I have mastered the topic. That way an expert can try to evade questions with gobbledygook but I can call them on it and again, let them know that I know.

**The deposition**

• **Admonitions**

Of course, go over the number of times they have been deposed before so you can gain their agreement that you don't need to go over the ground rules. That number can be powerful to establish bias. But, I always tell experts four things:

A.) They can amend, change or add to any previously answered question before the deposition is concluded;

B.) If they don't change the answer before the deposition is done and instead change it later when they review the transcript, I will tell the jury they changed it. That can be damaging to the expert and the defense;

C.) The best approach for them is to think and take all the time they need before they answer a question;

D.) They can take a break whenever for whatever reason.

Why do I do this? Many times you will lock an expert into favorable testimony for the plaintiff and the expert or defense will try to undermine that at trial by claiming they made a mistake or were bullied or confused. These four admonitions undermine any such attempt.

• **Deposition notice**

Go over the deposition notice and confirm the expert has brought everything requested, what was not brought and why. If they have not brought everything requested, make arrangements for them to produce it immediately (faxed or e-mailed during deposition if possible) and reserve the right to conduct a second session.

• **The importance of using self-contained questions**

Because you are videotaping the deposition, you need to be aware of the need to have self-contained, logical questions and answers. So, if it took four jumbled questions and answers to get a direct answer, ask it again in a complete form. For example, if it took 10 questions to get out the fact the expert's retention rate is 90 percent for defendants or insurance companies, then ask the question again: "90 percent of the time that you are retained as an expert, it is for defendants or insurance companies, correct?"

**Basic questions for the depo**

If you are going to do a "best of" testimony of the defense expert for your case in chief, make sure to ask all questions necessary to let the jury know who this person is. Always remember to drill down and get the answer. Follow the *who, what, where, how, when* and *why* format to get necessary details.

• **Retained by defense** – "You have been retained by the defense to act as their expert in the area of human factors, correct?"

• **Areas of expertise** –

"You hold yourself out as a human factors' expert, safety expert and reconstruction expert, correct?"

This is critical as you can use the "Ride the Pony" technique of covering

basic or specific areas the expert has to agree with and that the defense attorney did not anticipate you would cover. This also prevents the defense attorney from excluding unfavorable testimony on the grounds that it exceeds the area of the expert's retention. Lead the expert if necessary by going over the defense expert designation (which is usually overbroad.)

• **Prior retentions and expert work** –

"How many times have you been retained by [this Defendant, this law firm, this defense attorney]?"

"What percentage of your consultant or expert work is for the defense versus injured party? How did you arrive at this figure, from your head or from written materials? Where are those materials?"

"What percentage of your time is spent acting as an expert or consultant?"

• **When first retained** –

"You were first retained by defendants on January 1, 2011, correct?"

If the expert was retained shortly after the incident, this fact can be used that the defendant first focused on avoiding responsibility rather than making up for the harms caused. If the expert was retained two years before trial, then you can point out how much time the defense and expert had to do whatever they wanted.

• **Billings** –

"Your firm has billed defendant \$85,000 for work performed in this case, correct?"

"You expect to bill another \$4,500 for work performed through trial, correct?"

"How much has your firm been paid by the defendant (or insurance company) since you started?"

• **General bias** –

"You have never testified that a location was a dangerous condition, correct? You cannot identify one specific case where you testified for an injured party in the last five years, correct?"

• **Details as to the expert's assignment on this case**

"What were you asked to do in this case?"

"Who gave your instructions?"

*See Homampour, Next Page*

“When were you asked to do this?”

“Why were you asked to do this?”

This is important as many times you can establish the expert was hired and not told directly what to do. They knew what to do. Hurt the plaintiff.

“What did you actually do?” – Have them detail everything they did in order to reach their opinions. Detail each person they spoke with. Follow up with who, what, where, how, when and why. Have them detail everything they reviewed. Follow up with who, what, where, how, when and why.

“Who gave it to you?”

“Detail everything you did.” Follow up with who, what, where, how, when and why.

“Any Limits? Were there any limits placed on what you could do in order to reach your opinions?”

“Any limits on how much you could bill?”

“Anything you wanted the defendant to do or get that was not done?”

“Any depositions you asked be taken?” Follow up each with who, what, where, how, when and why.

• *Ask for and get Everything?*

“Did you ask defendant to give you all materials for this case (depositions, discovery, etc.)?”

“You did this because many times an opinion can change based on one fact or different testimony, correct?”

It’s easy to establish that an expert who was not provided key evidence or deposition testimony is just a hired gun and a biased witness.

• *Opinions and Basis for Opinions?*

“What are each of your opinions?”

“What is the basis for each opinion?”

Yes, these are the critical questions and no, don’t let the expert wiggle out of answering it with nonsense like, “I don’t know what I am going to be asked?” To that, I respond with “Whatever opinions you don’t disclose will be prohibited at trial” and “The purpose of this deposition is to find out what your opinions are.”

• *Any Other Opinions?*

You must conclude your deposition with this catch-all. Do it twice, if necessary.

“We have now covered all of your opinions, correct? You have no other opinions other than those you have disclosed today, correct?” This area is critical because you can then move to preclude the expert from stating new opinions at trial.

• *Any Other Work Planned?*

“What other work do you plan on doing between now and the time of

trial?” Follow up with who, what, where, how, when and why.

• *Criticisms of or Rebuttal to Plaintiff’s Experts?*

“Do you have any criticisms of plaintiff’s experts? Do you have any rebuttal opinions to those of Plaintiff’s experts?” Follow up with who, what, where, how, when and why.

[Ed. Note: The author first presented this information at the 2011 CAALA Annual Las Vegas Convention.]

*Arash Homampour is a trial attorney who represents individuals in catastrophic injury/wrongful death matters, employment, and insurance bad-faith cases. In 2007, he was named one of the Top 20 Attorneys Under the Age of 40 by the Los Angeles Daily Journal. In 2004, 2005, 2006, 2007 and 2009 he received nominations for Trial Attorney of the Year by the Consumer Attorneys of California and/or the Consumer Attorneys Association of Los Angeles. He was recently awarded CAALA’s Trial Attorney of the year award for 2009-2010. He also received recognition by the Los Angeles Daily Journal for obtaining one of the top 10 Verdicts in California in 2004.*



## Exhibit A

### Notice of Deposition

(See next seven pages)

**Exhibit A**  
Notice of Deposition

1 THE HOMAMPOUR LAW FIRM, PLC  
ARASH HOMAMPOUR (State Bar No. 165407)  
2 15303 Ventura Boulevard, Suite 1000  
Sherman Oaks, California 91403  
3 Phone: (323) 658-8077 | Fax: (323) 658-8477

4 Attorneys for Plaintiffs THOMAS PLAINTIFF and ELISA PLAINTIFF

6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
7 **FOR THE COUNTY OF NEVADA**

8 THOMAS PLAINTIFF and ELISA )  
9 PLAINTIFF, )  
10 Plaintiffs, )  
11 vs. )  
12 STATE OF CALIFORNIA and DOES 1 )  
through 30, inclusive, )  
13 Defendants. )

**CASE NO.: \*\*\*\*\***

**NOTICE OF TAKING DEPOSITION  
OF DEFENDANT STATE OF  
CALIFORNIA'S EXPERT  
WITNESSES AND REQUEST FOR  
PRODUCTION OF DOCUMENTS**

Trial Date: June 14, 2011

*Case Filed on April 23, 2010  
Case Assigned to Judge Dowling, Dept. 6*

16 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

17 PLEASE TAKE NOTICE that Plaintiffs THOMAS PLAINTIFF and ELISA PLAINTIFF, will  
18 take the depositions of Defendant State of California's Expert Witnesses on the following dates and  
19 times:

<u>Deponent</u>	<u>Date</u>	<u>Time</u>
Clay Campbell	May 3, 2011	9:00 a.m.
Thomas Boster	May 3, 2011	1:00 p.m.
Erin Forest	May 4, 2011	9:00 a.m.
Ron Nelson	May 4, 2011	1:00 p.m.
Edward Katz, M.D.	May 24, 2011	12:00 p.m.
Christopher Stephenson, M.D.	May 24, 2011	4:30 p.m.
William Hooker, Ph.D.	May 25, 2011	1:00 p.m.

1 Greg Sells May 26, 2011 9:00 a.m.

2 Mark Cohen May 26, 2011 1:00 p.m.

3 The depositions will take place at the offices of The Homampour Law Firm, 15303 Ventura  
4 Boulevard, Suite 1000, Sherman Oaks, California 91403, before a Notary Public and certified  
5 shorthand reporter, or any other officer authorized to administer an oath. The deposition will continue  
6 from day to day thereafter at the same place, Sundays and holidays excepted, until completed.

7 PLEASE TAKE FURTHER NOTICE that the deposing party intends to cause the proceedings  
8 to be recorded stenographically, through the instant visual display of testimony and by videotape.

9 PLEASE TAKE FURTHER NOTICE that under C.C.P. §§ 2025.340(m) and 2025.620(d),  
10 Plaintiff reserves the right to use at trial (during opening, direct, cross examination, closing, rebuttal  
11 or any other time) the video recording of the deposition testimony of these witnesses and even though  
12 the deponent is available to testify.

13 PLEASE TAKE FURTHER NOTICE that the deponents are hereby requested to produce at the  
14 deposition the **ORIGINALS** of the following described documents, records, and things for the  
15 purposes of inspection and/or photocopying.

16 **DEFINITIONS**

17 The following Definitions apply to each of the following Requests and shall be deemed  
18 incorporated therein.

19 A. The term "DOCUMENT" means and includes any type of "writing" (as that term is  
20 defined in Evidence Code section 250) and includes, without limitation, all written materials such as  
21 letters, memoranda, reports, studies, minutes, diary entries (including calendar entries indicating dates  
22 and participants to any meetings), all drafts; two writings of any kind; tapes, computer discs, CD  
23 Rom, CD-R, CD-RW, DVD, microfilm, microfiche, raster bitmaps, magneto optical (MO) disks,  
24 electronic images and associated indexing data, Write Once Read Many (WORM) laser disks; or any  
25 other form of photographically or electronically, digitally, magnetically impuled, or otherwise  
26 recorded or represented information, image or document storage, including, but not limited to word  
27 processor document resource information (e.g. MS Word, Corel WordPerfect "properties" tabs)  
28 drafts and redlined versions of documents, compound documents (e.g. documents where the image

1 is one file and the text is in another); e-mail and voice-mail archives; e-mail and voice-mail messages  
2 and back ups; databases; document management databases; Internet service provider's records,  
3 including user account information and identification of firewalls, caches and cookies; network router  
4 traffic indicia; world wide web pages, including HTML, XML, SGML, XGML, VRML, Adobe  
5 Acrobat, Corel Envoy, MIF, RTF, EPS, prepress formats. Additionally, "document" or "documents"  
6 shall specifically include transcripts of testimony, depositions, depositions de bene esse, or  
7 otherwise distinguished evidentiary testimony, in any recorded form; notes or records of telephone  
8 conversations, conferences or other oral communications and appointment records, time records,  
9 ledgers, journals, financial or accounting records, personnel records, annual reports, trial balances,  
10 work papers, schedules, photographs, videos, recordings, charts, graphs, transcriptions, tapes, discs,  
11 printouts, and other electronic data processing materials. It also includes each copy of a DOCUMENT  
12 that is not identical in all respects with or that contains any notation not appearing on any other copy  
13 of such DOCUMENT.

14 B. The term "COMMUNICATION" shall mean the giving, receiving, transmitting or  
15 exchanging of information including, but not limited to, any and all telephone and in-person  
16 conversations by or with any person, talk, gestures, or DOCUMENTS as defined in Paragraph A  
17 above which memorialize or refer to any COMMUNICATIONS.

18 C. The terms "PERSON" or "PERSONS" as used herein shall mean any natural person,  
19 corporation, partnership, association, venture, limited liability company, firm or other business  
20 enterprise or legal entity.

21 D. The terms "ELECTRONICALLY STORED INFORMATION" is defined as it is under  
22 C.C.P. § 2016.020 or "information that is stored in an electronic medium" with "Electronic" relating  
23 to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar  
24 capabilities.

25 **DOCUMENTS AND/OR TANGIBLE THINGS TO BE PRODUCED**

- 26 1. The deponent's entire file(s) for this case.  
27 2. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
28 INFORMATION and/or evidence reviewed by the expert in preparation for his/her deposition.

1           3.       A copy of the deponent's curriculum vitae, or resume, and, if not included within said  
2 curriculum vitae, a list of each, and every article, books treatises, or other literature authorized by the  
3 deponent whether published or not published.

4           4.       All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
5 INFORMATION (including, but not limited to, depositions, statements, journals, articles, bills,  
6 reports, medical records, hospital records and charts and other documentation) or items of evidence  
7 given to and/or reviewed by the deponent in this case.

8           5.       The original and drafts of all animations, graphics, photographs, images, models,  
9 diagrams, renditions, sketches or drawings of any item or thing that have been used by or will be used  
10 by the deponent in connection with this case.

11          6.       All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
12 INFORMATION that establish the basis for the deponent's expert opinion(s) to be rendered in this  
13 case.

14          7.       All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
15 INFORMATION that reflect COMMUNICATIONS (including memoranda of oral communications)  
16 between the deponent and/or his/her office staff and any other PERSON wherein this case was  
17 mentioned, discussed and/or referred to.

18          8.       Any and all books, treatises, articles, publications, journals (or journal articles) and/or  
19 learned documents of any sort referred to or relied upon by the deponent in forming his/her expert  
20 opinions to be rendered in this case.

21          9.       If any items listed in number 8 are unavailable, all DOCUMENTS/TANGIBLE  
22 THING/ELECTRONICALLY STORED INFORMATION that reflect the title, author, publisher,  
23 date, volume, chapter, and/or page information.

24          10.       Copies of any notices, announcements, advertising materials or any other form of printed  
25 materials whatsoever pertaining to the availability of the deponent's services as an expert consultant,  
26 including, but not limited to, any such documents the deponent has mailed or otherwise distributed  
27 to anyone within the last four years.

28          11.       Any and all transcripts or other DOCUMENTS/TANGIBLE

1 THING/ELECTRONICALLY STORED INFORMATION reflecting deposition or trial testimony  
2 given by deponent in any case where deponent has testified (whether in deposition or at trial) as an  
3 expert where the expert was retained by the Plaintiff or for the Los Angeles Unified School District.

4 12. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
5 INFORMATION that reflect the number of times the deponent has been retained and/or testified as  
6 an expert for the defendants, as an expert for Defendants' law firm, as an expert for the insurance  
7 carrier for any of the Defendants and/or as an expert for any plaintiff.

8 13. Any and all lists or compilations (including any Federal Court disclosures) that reflect  
9 each case wherein the deponent was retained as an expert and testified at deposition or at trial  
10 (including the name of the case; the name of the parties; the name and address of the court wherein  
11 the case was filed; and the name, telephone number and address of the attorneys for all parties.)

12 14. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
13 INFORMATION that reflect the amount of compensation paid or to be paid to the deponent for  
14 his/her services in this case, including but not limited to, a record of all charges billed, and the total  
15 number of hours spent in this matter.

16 15. Any and all reports (including drafts) that reflect the deponent's expert opinions and/or  
17 review of records in this case.

18 16. Any billing records for services rendered by the deponent or anyone acting at his/her  
19 direction or behalf in connection with this case, and the work and consultation thereof, including all  
20 time records showing time spent and the expenses incurred.

21 17. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
22 INFORMATION that reflect any experiments and/or re-creations considered or performed by the  
23 deponent in this case, including but not limited to photographs and videotape of said experiments  
24 and/or re-creations.

25 18. Copies of all articles and/or publications referenced in the deponent's CV or authored by  
26 the deponent.

27 19. Copies of all DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
28 INFORMATION given by the deponent or on the deponent's behalf to participants or attendees at

1 any of the deponent 's presentations referenced in the deponent's CV and the actual powerpoints or  
2 slides of presentations shown.

3 20. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
4 INFORMATION which reflect the amount of money earned by the deponent (or his/her firm) acting  
5 as a consultant or expert witness in any type of claim or action for the period from 2000 through  
6 2009.

7 21. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
8 INFORMATION that evidence or reflect contracts, agreements or arrangements between the  
9 deponent and any law firms or insurance companies with regard to compensation to be paid to the  
10 deponent (or his/her firm) for work done on multiple matters, claims or files.

11 22. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
12 INFORMATION that establish or from which it can be established the percentage of matters where  
13 the deponent has been retained by the defendant versus the plaintiff for the last 10 years.

14 23. All DOCUMENTS/TANGIBLE THING/ELECTRONICALLY STORED  
15 INFORMATION that evidence or reflect court orders where the deponent's testimony has been  
16 limited or excluded.

17 24. If any expert has utilized a computer program or software to calculate any values or to  
18 test any assumptions or conclusions, a copy of all data files relating to this work (in native format as  
19 well as excel, word or pdf), all graphics or reports that can be generated for the testing done, the data  
20 used or ultimate calculations and a copy of all manuals relating to the software used.

21 25. If any expert is relying on simulations, crash tests, crash test data for any assumptions  
22 or opinions in this matter, all evidence relating to the simulations, all crash tests, and all crash test  
23 data.

24 26. As to any scientific techniques or methods used (like correlating a change in velocity to  
25 injury potential or whether a particular injury can occur in a particular event), all documents  
26 establishing the foundation for the techniques/methods, including but not limited to, all studies, all  
27 peer reviewed articles, peer reviewed publications and all other DOCUMENTS/TANGIBLE  
28 THING/ELECTRONICALLY STORED INFORMATION showing (1) the reliability of the

1 technique/method, (2) the expert is qualified to give an opinion on the subject; and (3) the correct  
2 scientific procedures were used and (4) the scientific technique/method is sufficiently established to  
3 have gained general acceptance in the relevant scientific community.

4 27. If any of the above items, as described in Nos. 1- 26 are unavailable at the time and place  
5 of the deposition, the deponent is requested to identify where such items are located, who has  
6 possession of them, and how they may be obtained through the formal processes of the Court. The  
7 deponent's entire file(s) for this case.

8  
9 Dated: July 17, 2011

THE HOMAMPOUR LAW FIRM  
A Professional Law Corporation

10  
11 By: \_\_\_\_\_  
12 Arash Homampour, Attorneys for  
13 Plaintiffs THOMAS PLAINTIFF and ELISA  
14 PLAINTIFF  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Exhibit B**

**Brief Detailing Law on Videotaped Expert Depositions in the Courtroom**

1 THE HOMAMPOUR LAW FIRM, PLC  
2 ARASH HOMAMPOUR (State Bar No. 165407)  
3 15303 Ventura Boulevard, Suite 1000  
4 Sherman Oaks, California 91403  
5 Phone: (323) 658-8077 | Fax: (323) 658-8477

6 Attorneys for Plaintiffs THOMAS PLAINTIFF and ELISA PLAINTIFF

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
8 **FOR THE COUNTY OF NEVADA**

9  
10 THOMAS PLAINTIFF and ELISA )  
11 PLAINTIFF, )  
12 Plaintiffs, )  
13 vs. )  
14 STATE OF CALIFORNIA, and DOES 1 )  
15 through 30, inclusive, )  
16 Defendants. )

**CASE NO.: \*\*\*\*\***

**PLAINTIFFS' BRIEF RE USE OF  
VIDEOTAPED EXCERPTS OF  
DEFENDANTS' EXPERTS DURING  
TRIAL**

Trial Date: June 14, 2011  
Time: 9:00 a.m.  
Dept.: 6

*Complaint filed on April 23, 2010  
Assigned to Hon. Dowling, Dept. 6*

19 TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 Plaintiffs hereby file their brief on the issue of Plaintiffs being permitted to use the videotaped  
21 excerpts of Defendant's expert deposition during trial (opening, Plaintiffs' case in chief, etc.)  
22 Plaintiffs went to considerable expense to comply with their statutory right to videotape Defendant's  
23 expert witnesses depositions and then to use excerpts of those videotapes throughout trial.

24  
25 Under C.C.P. Section 2034.310(a), any party may elicit opinion testimony at trial from an expert  
26 designated by any other party, so long as that expert has been deposed. *Powell v. Superior Court*  
27 (1989) 211 Cal. App. 3d 441,444; *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal. App.  
28 3d 379, 387. In *Powell*, the Court of Appeal held that, under C.C.P. Section 2034(m) (predecessor

1 to Section 2034.310), the Plaintiff could call as a witness a doctor designated by the defendant even  
2 though the plaintiff had not properly listed him as plaintiff's expert. Section 2034.310 provides that:

3  
4 A party may call as a witness at trial an expert not previously designated by  
5 that party if either of the following conditions is satisfied: (a) that expert has  
6 been designated by another party and has thereafter been deposed. . .”

7  
8 Under C.C.P. §§ 2025.340(m) and 2025.620(d), Plaintiffs can show the jury excerpts from the  
9 videotaped deposition of Defendant's experts during opening and their case in chief, even if the  
10 expert is available to testify later on during Defendant's case in chief. C.C.P. Section 2025.620(d)  
11 provides that "Any party may use a video recording of the deposition testimony of a treating or  
12 consulting physician or of any expert witness even though the deponent is available to testify if the  
13 deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that  
14 party has complied with subdivision (m) of Section 2025.340.”

15  
16 Plaintiffs will have fully complied with §§ 2025.340(m) and 2025.620(d) and will be providing  
17 Defendant with notice of the page and line numbers for all video taped excerpts Plaintiffs plan on  
18 using. Therefore, Plaintiffs should be permitted to use the videotaped excerpts throughout trial.

19  
20 DATED: July 17, 2011

THE HOMAMPOUR LAW FIRM  
A Professional Law Corporation

21  
22 By:

Arash Homampour,  
Wendi O. Wagner, Attorneys for  
Plaintiffs THOMAS PLAINTIFF and ELISA  
PLAINTIFF