

RESOLUTION 1-06-03

DIGEST

Physical Examinations: Time Limit On Motions to Compel

Amends Code of Civil Procedure section 2032 to establish a deadline for motions to compel physical examinations and stay the examination pending a decision on such motion.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 2032 to establish a deadline for motions to compel physical examinations and stay the examination pending a decision on such motion. This resolution should be approved in principle because it closes what is otherwise an open-ended opportunity for a party to compel a physical examination.

Currently, after a defendant (including a cross-defendant) receives the plaintiff's (including cross-plaintiff's) refusal to, or modification of, the demand for a physical examination, there is no deadline for the defendant to file a motion to compel the examination. This lack of deadline leaves open a door for defendants to abuse the discovery process. For instance, defendants sometimes fail to bring a motion to compel a physical examination until the discovery motion cut-off date, which is only 15 days prior to trial (Code Civ. Proc. § 2024, subd. (a)), thus forcing a delay in the trial and the plaintiff's possible recovery. This delay may potentially prejudice a plaintiff who has prepared his or her case in reliance upon the failure by the defendant to timely seek an order to compel the examination. Additionally, delays in moving to compel reduce the parties' ability to litigate the case thoroughly and the court's ability to adjudicate the case fairly while keeping control of its own docket. For these reasons, other discovery mechanisms, such as interrogatories and requests for production of documents, require parties to file motions to compel within 45 days. (See Code Civ. Proc., §§ 2030, subd. (1), 2031, subd. (1).) This resolution would bring section 2032 into conformity with such other discovery statutes.

This resolution does not affect the case in which there is no response to a request or demand for an independent medical examination of a party litigant. (See Code Civ. Proc., § 2032, subd. (c)(6).)

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2032 to read as follows:

- 1 § 2032
- 2 (a) Any party may obtain discovery, subject to the restrictions set forth in Section 2019, by
- 3 means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3)
- 4 a natural person in the custody or under the legal control of a party, in any action in which the mental
- 5 or physical condition (including the blood group) of that party or other person is in controversy in the
- 6 action.
- 7 (b) A physical examination conducted under this section shall be performed only by a licensed
- 8 physician or other appropriate licensed health care practitioner. A mental examination conducted
- 9 under this section shall be performed only by a licensed physician, or by a licensed clinical
- 10 psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate

11 experience in the diagnosis of emotional and mental disorders. Nothing in this section affects tests
12 under the Uniform Act on Blood Tests to Determine Paternity (Chapter 2 (commencing with Section
13 7550) of Part 2 of Division 12 of the Family Code).

14 (c)(1) As used in this subdivision, plaintiff includes a cross-complainant, and defendant
15 includes a cross-defendant.

16 (2) In any case in which a plaintiff is seeking recovery for personal injuries, any defendant
17 may demand one physical examination of the plaintiff, provided the examination does not include any
18 diagnostic test or procedure that is painful, protracted, or intrusive, and is conducted at a location
19 within 75 miles of the residence of the examinee. A defendant may make this demand without leave of
20 court after that defendant has been served or has appeared in the action, whichever occurs first. This
21 demand shall specify the time, place, manner, conditions, scope, and nature of the examination, as
22 well as the identity and the specialty, if any, of the physician who will perform the examination.

23 (3) A physical examination demanded under this subdivision shall be scheduled for a date that
24 is at least 30 days after service of the demand for it unless on motion of the party demanding the
25 examination the court has shortened this time.

26 (4) The defendant shall serve a copy of the demand for this physical examination on the
27 plaintiff and on all other parties who have appeared in the action.

28 (5) The plaintiff to whom this demand for a physical examination has been directed shall
29 respond to the demand by a written statement that the examinee will comply with the demand as
30 stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for
31 reasons specified in the response, to submit to the demanded physical examination. Within 20 days
32 after service of the demand the plaintiff to whom the demand is directed shall serve the original of the
33 response to it on the defendant making the demand, and a copy of the response on all other parties who
34 have appeared in the action, unless on motion of the defendant making the demand the court has
35 shortened the time for response, or unless on motion of the plaintiff to whom the demand has been
36 directed, the court has extended the time for response.

37 (6) If a plaintiff to whom this demand for a physical examination has been directed fails to
38 serve a timely response to it, that plaintiff waives any objection to the demand. However, the court, on
39 motion, may relieve that plaintiff from this waiver on its determination that (A) the plaintiff has
40 subsequently served a response that is in substantial compliance with paragraph (5), and (B) the
41 plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable
42 neglect.

43 The defendant may move for an order compelling response and compliance with a demand for
44 a physical examination. The court shall impose a monetary sanction under Section 2023 against any
45 party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and
46 compliance with a demand for a physical examination, unless it finds that the one subject to the
47 sanction acted with substantial justification or that other circumstances make the imposition of the
48 sanction unjust.

49 If a plaintiff then fails to obey the order compelling response and compliance, the court may
50 make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or
51 a terminating sanction under Section 2023. In lieu of or in addition to that sanction the court may
52 impose a monetary sanction under Section 2023.

53 (7) If a defendant who has demanded a physical examination under this subdivision, on receipt
54 of the plaintiff's response to that demand, deems that any modification of the demand, or any refusal to
55 submit to the physical examination is unwarranted, that defendant may move for an order compelling
56 compliance with the demand. This motion shall be filed no later than 45 days after the service of the
57 plaintiff's response, and shall be accompanied by a declaration stating facts showing a reasonable and
58 good faith attempt at an informal resolution of each issue presented by the motion, and by proof of
59 personal service upon plaintiff not less than three court days prior to the examination date of a written
60 notice of cancellation of the examination pending a hearing on the motion. If defendant does not
61 timely serve notice of such cancellation of the examination upon plaintiff, then defendant waives any

62 objection to plaintiff's response. The time limit for filing this motion shall not be increased by any act
63 of defendant to cancel, re-notice, or amend the demand for examination, or by any amended response
64 served by plaintiff except as to new modifications or refusals therein as to which the time limit shall
65 run from service of the amended response.

66 The court shall impose a monetary sanction under Section 2023 against any party, person, or
67 attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand for a
68 physical examination, unless it finds that the one subject to the sanction acted with substantial
69 justification or that other circumstances make the imposition of the sanction unjust.

70 (8) The demand for a physical examination and the response to it shall not be filed with the
71 court. The defendant shall retain both the original of the demand, with the original proof of service
72 affixed to it, and the original response until six months after final disposition of the action. At that
73 time, the original may be destroyed, unless the court, on motion of any party and for good cause
74 shown, orders that the originals be preserved for a longer period.

75 (d) If any party desires to obtain discovery by a physical examination other than that described
76 in subdivision (c), or by a mental examination, the party shall obtain leave of court. The motion for the
77 examination shall specify the time, place, manner, conditions, scope, and nature of the examination, as
78 well as the identity and the specialty, if any, of the person or persons who will perform the
79 examination. The motion shall be accompanied by a declaration stating facts showing a reasonable and
80 good faith attempt to arrange for the examination by an agreement under subdivision (e). Notice of the
81 motion shall be served on the person to be examined and on all parties who have appeared in the
82 action.

83 The court shall grant a motion for a physical or mental examination only for good cause
84 shown. If a party stipulates that (1) no claim is being made for mental and emotional distress over and
85 above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding
86 this usual mental and emotional distress will be presented at trial in support of the claim for damages,
87 a mental examination of a person for whose personal injuries a recovery is being sought shall not be
88 ordered except on a showing of exceptional circumstances. The order granting a physical or mental
89 examination shall specify the person or persons who may perform the examination, and the time,
90 place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination. If the
91 place of the examination is more than 75 miles from the residence of the person to be examined, the
92 order to submit to it shall be (1) made only on the court's determination that there is good cause for the
93 travel involved, and (2) conditioned on the advancement by the moving party of the reasonable
94 expenses and costs to the examinee for travel to the place of examination.

95 (e) In lieu of the procedures and restrictions specified in subdivisions (c) and (d), any physical
96 or mental examination may be arranged by, and carried out under, a written agreement of the parties.

97 (f) If a party required by subdivision (c), (d), or (e) to submit to a physical or mental
98 examination fails to do so, the court, on motion of the party entitled to the examination, may make
99 those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a
100 terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may, on
101 motion of the party, impose a monetary sanction under Section 2023.

102 If a party required by subdivision (c), (d), or (e) to produce another for a physical or mental
103 examination fails to do so, the court, on motion of the party entitled to the examination, may make
104 those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a
105 terminating sanction under Section 2023, unless the party failing to comply demonstrates an inability
106 to produce that person for examination. In lieu of or in addition to that sanction, the court may impose
107 a monetary sanction under Section 2023.

108 (g)(1) The attorney for the examinee or for a party producing the examinee, or that attorney's
109 representative, shall be permitted to attend and observe any physical examination conducted for
110 discovery purposes, and to record stenographically or by audiotape any words spoken to or by the
111 examinee during any phase of the examination. This observer may monitor the examination, but shall
112 not participate in or disrupt it. If an attorney's representative is to serve as the observer, the

113 representative shall be authorized to so act by a writing subscribed by the attorney which identifies the
114 representative.

115 If in the judgment of the observer the examiner becomes abusive to the examinee or
116 undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to
117 enable the party being examined or producing the examinee to make a motion for a protective order. If
118 the observer begins to participate in or disrupt the examination, the person conducting the physical
119 examination may suspend the examination to enable the party at whose instance it is being conducted
120 to move for a protective order.

121 The court shall impose a monetary sanction under Section 2023 against any party, person, or
122 attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the
123 one subject to the sanction acted with substantial justification or that other circumstances make the
124 imposition of the sanction unjust.

125 If the examinee submits or authorizes access to X-rays of any area of his or her body for
126 inspection by the examining physician, no additional X-rays of that area may be taken by the
127 examining physician except with consent of the examinee or on order of the court for good cause
128 shown.

129 (2) The examiner and examinee shall have the right to record a mental examination on audio
130 tape. However, nothing in this article shall be construed to alter, amend, or affect existing case law
131 with respect to the presence of the attorney for the examinee or other persons during the examination
132 by agreement or court order.

133 (h) If a party submits to, or produces another for, a physical or mental examination in
134 compliance with a demand under subdivision (c), an order of court under subdivision (d), or an
135 agreement under subdivision (e), that party has the option of making a written demand that the party at
136 whose instance the examination was made deliver to the demanding party (1) a copy of a detailed
137 written report setting out the history, examinations, findings, including the results of all tests made,
138 diagnoses, prognoses, and conclusions of the examiner, and (2) a copy of reports of all earlier
139 examinations of the same condition of the examinee made by that or any other examiner. If this option
140 is exercised, a copy of these reports shall be delivered within 30 days after service of the demand, or
141 within 15 days of trial, whichever is earlier. The protection for work product under Section 2018 is
142 waived, both for the examiner's writings and reports and to the taking of the examiner's testimony.

143 If the party at whose instance the examination was made fails to make a timely delivery of the
144 reports demanded, the demanding party may move for an order compelling their delivery. This motion
145 shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an
146 informal resolution of any issue presented by the motion.

147 The court shall impose a monetary sanction under Section 2023 against any party, person, or
148 attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless
149 it finds that the one subject to the sanction acted with substantial justification or that other
150 circumstances make the imposition of the sanction unjust.

151 If a party then fails to obey an order compelling delivery of demanded medical reports, the
152 court may make those orders that are just, including the imposition of an issue sanction, an evidence
153 sanction, or a terminating sanction under Section 2023. In lieu of or in addition to those sanctions, the
154 court may impose a monetary sanction under Section 2023. The court shall exclude at trial the
155 testimony of any examiner whose report has not been provided by a party.

156 (i) By demanding and obtaining a report of a physical or mental examination under
157 subdivision (h), or by taking the deposition of the examiner, other than under subdivision (i) of Section
158 2034, the party who submitted to, or produced another for, a physical or mental examination waives in
159 the pending action, and in any other action involving the same controversy, any privilege, as well as
160 any protection for work product under Section 2018, that the party or other examinee may have
161 regarding reports and writings as well as the testimony of every other physician, psychologist, or
162 licensed health care practitioner who has examined or may thereafter examine the party or other
163 examinee in respect of the same physical or mental condition.

164 (j) A party receiving a demand for a report under subdivision (h) is entitled at the time of
165 compliance to receive in exchange a copy of any existing written report of any examination of the
166 same condition by any other physician, psychologist, or licensed health care practitioner. In addition,
167 that party is entitled to receive promptly any later report of any previous or subsequent examination of
168 the same condition, by any physician, psychologist, or licensed health care practitioner.

169 If a party who has demanded and received delivery of medical reports under subdivision (h)
170 fails to deliver existing or later reports of previous or subsequent examinations, a party who has
171 complied with subdivision (h) may move for an order compelling delivery of medical reports. This
172 motion shall be accompanied by a declaration stating facts showing a reasonable and good faith
173 attempt at an informal resolution of each issue presented by the motion.

174 The court shall impose a monetary sanction under Section 2023 against any party, person, or
175 attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless
176 it finds that the one subject to the sanction acted with substantial justification or that other
177 circumstances make the imposition of the sanction unjust.

178 If a party then fails to obey an order compelling delivery of medical reports, the court may
179 make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or
180 a terminating sanction under Section 2023. In lieu of or in addition to the sanction, the court may
181 impose a monetary sanction under Section 2023. The court shall exclude at trial the testimony of any
182 health care practitioner whose report has not been provided by a party ordered to do so by the court.

183 (k) Nothing in this section shall require the disclosure of the identity of an expert consulted by
184 an attorney in order to make the certification required in an action for professional negligence under
185 Sections 411.30 and 411.35.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

Existing Law: There is no time limit for filing a motion for an order compelling compliance with the demand for physical examination.

This Resolution: Adds a time limit of 45 days after the service of the plaintiff's response to file a motion compelling compliance with the demand for physical examination.

The Problem: All of the other discovery device statutes include time limits to file motions to compel discovery compliance. Currently, a motion concerning a dispute about a physical examination procedure can be filed at any time, even months after the examinee attends an examination. This can result in needless waste of time and money to the examinee, the doctor, and the parties, if a court grants such a motion after an examination has occurred and requires an examinee to attend a second examination procedure. Adding a 45 day time limit for such a motion and staying the examination pending resolution of the motion removes the uncertainties presently in the examination procedure

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND PERMANENT CONTACT: Russell S. Kohn, Esq., Kohn Law Office, 2170 El Camino Real, Suite 206, Oceanside, CA 92054; voice (760) 721-8182

RESPONSIBLE FLOOR DELEGATE: Russell S. Kohn