

Sample RESPONSE to DEMAND

(please edit/modify/simplify this sample Response according to your preference and needs)

Attorney's Name

Address

Phone number

Attorney for Plaintiff (*insert name*)

Case Number:

Plaintiff,

RESPONSE TO DEMAND FOR PHYSICAL EXAMINATION

vs.

Defendants.

_____ /

TO DEFENDANTS HEREIN AND TO THEIR ATTORNEYS OF RECORD:

COMES NOW the plaintiff (*insert client's name*), by and through Plaintiff's attorneys of record (*insert name of Plaintiff Law Firm*), and pursuant to the terms and provisions of *Code of Civil Procedure* §2032.230, herewith responds to Defendant's Demand for Physical Examination as follows:

Plaintiff agrees to submit to the demanded Defense Physical Examination on (*insert date*), at (*insert time*), to be performed by (*insert defense medical examiner's name, address and phone number*), with the following conditions and/or modifications:

1. History of the Underlying Accident:

Plaintiff will not answer any questions regarding the facts of how the underlying accident which gives rise to this litigation occurred, other than to describe it in general terms (e.g., automobile collision). Should details about the mechanics of the accident be necessary, defendants' counsel may provide a copy of the plaintiff's deposition, or summary thereof, to the defense medical examiner prior to the examination.

2. Identification and Personal Information:

Plaintiff may provide their full name and date of birth, and can show photo identification (if available) to verify identity; however, no photocopying or scanning of said identification will be permitted.

Plaintiff will not provide personal information including, but not limited to, the following: current residence address, telephone number, driver's license number, social security number, medical insurance or other insurance information, or employment history (except to specify the types of jobs held and physical requirements thereof).

Plaintiff may not be compelled to create any items of potential documentary evidence and will not fill out any paperwork, including "new patient records," intake forms, pain diagrams or questionnaires that may be requested or provided by the defense medical examiner. The basis of this objection is that it is oppressive to require the plaintiff to complete any written forms, as opposed to answering questions orally. To require the plaintiff to complete written forms would violate the plaintiff's right not to create items of demonstrative evidence for defendants' use, and since the plaintiff is not a patient of the defense medical examiner, s/he is consenting to this examination pursuant to the requirements of *Code of Civil Procedure* §2032.230.

3. Medical History:

Plaintiff will not provide a written medical history, but will orally answer questions related to persistent symptoms, restrictions and aggravating factors associated with injuries and body parts at issue in their claim.

The defense counsel is not prevented from obtaining additional information or even exploring the plaintiff's medical history concerning the injuries in controversy; however, they must do so through the plaintiff's medical records and deposition testimony. The defense medical examiner will not be allowed to depose the plaintiff in the guise of obtaining a medical history.

The defense counsel is requested to provide copies of the plaintiff's deposition and medical records, or summaries thereof, prior to the defense physical examination from which necessary details can be obtained. There is a reasonable expectation that the defense medical doctor will have read the relevant documents in advance to avoid repetitive questioning about information which has already been provided.

If the plaintiff has provided medical records to defense counsel or if defense counsel has obtained such records in any other manner (including subpoenas), the plaintiff will not answer any questions related to those medical records, as the records speak for themselves and the plaintiff lacks the medical expertise to comment on the same.

If the plaintiff has undergone a deposition in this matter, they will not answer any questions regarding medical history which was or should have been obtained by defense counsel during the plaintiff's deposition.

Plaintiff will not answer questions concerning issues irrelevant to a physical examination including, but not limited to, the following: family medical history, personal or social history, marital status, use of alcohol, drugs or other intoxicants, educational attainments, etc.

Plaintiff will not discuss their medical history before or after the subject accident, including prior or subsequent accidents, litigation, disability or worker's compensation claims, except as it pertains injuries or problems concerning to the same areas of body injured herein.

All other medical history questions will be objected to as invading the plaintiff's right of privacy, being impermissibly overbroad, oppressive, burdensome, irrelevant and does not reasonably relate to the injuries which are the subject of this action. (See: Britt v. Superior Court (1978) 20 Cal.3d 844.)

No mental evaluation will be permitted during this examination, in compliance with *Code of Civil Procedure* §2032.310.

4. Scope of the Physical Examination:

The physical examination must be limited to the plaintiff's conditions which have been placed in controversy in this action, as provided by *Code of Civil Procedure* §2032.220(a)(1). Plaintiff will not allow an examination or inquiry into any part of the body which is not at issue in the subject claim.

All portions of the physical examination must be conducted by the named doctor only, including any/all measurements and assessments. No part of the examination shall be conducted by another doctor, other professional or paraprofessional persons.

The entirety of the defense physical examination will be conducted in English with a certified (*insert language specialty requested*)-speaking interpreter provided by the defense who will be translating for both the doctor and the plaintiff at all times.

No persons other than the plaintiff, plaintiff's attorney and/or representative, plaintiff's court reporter (if requested), language interpreter (if required), and defense medical examiner are allowed to be present during the examination.

No other person may attend on behalf of any defendant. Plaintiff specifically objects to the attendance of defendant's counsel or representative at the demanded physical examination.

Any persons assisting the defense medical examiner must be identified by full name and title on the audio-recording and/or court reporter's record.

5. Limitation of X-Rays, Diagnostic Testing and Photographs:

Plaintiff, by and through the plaintiff's counsel, has already, or will authorize, access to prior x-rays of areas of body injured in the accident which gives rise to this instant action. Absent a court order compelling same, the plaintiff will not submit to any additional x-rays that may be requested by the defense medical examiner.

Pursuant to *Code of Civil Procedure* §2032.220(a)(1), the plaintiff will not submit to any painful, protracted, invasive or intrusive tests or studies and specifically refuses any X-rays, EMG/NCV testing, scans (CT, MRI, PET), blood or urine testing, injections or skin punctures.

In addition, the plaintiff will not allow any photographs, movies or video-recording to be taken of the plaintiff's person or portions of body during the demanded physical examination. The basis of this limitation is that requesting such photographs, movies or video-recording would invade the plaintiff's right of privacy, is overbroad, oppressive and burdensome to the subject matter of this action and is not designed, intended or likely to lead to the discovery of admissible evidence. (See: *Britt vs. Superior Court* (1978) 20 Cal.3d 844, *Pacific Tel. & Tel. Co. v. Superior Court*, 2 Cal.3d 161, *Reuter v. Superior Court* (1979) 93 Cal.3d 332 and *Halpern v. Halpern* (1982) 133 Cal. App. 3d 297).

6. Timing of the Defense Physical Examination:

Plaintiff will not be unduly inconvenienced by the demanded physical examination, and will not allow an unreasonably long or interrupted examination.

Plaintiff will appear at the defense medical examiner's office at the agreed upon date and requested appointment time. Total time for the defense physical examination will not exceed two (2) hours. If the defense physical examination has not commenced within 30 minutes of the agreed to time or if any period of time exceeding 30 minutes goes by when the plaintiff is not being examined by the doctor, the plaintiff will consider this protracted delay to be a waiver of defendants' right to a physical examination and will leave the medical examiner's office, pursuant to *Code of Civil Procedure* §2032.220(a)(1).

Please take further notice that should the defense medical examiner fail to start the examination promptly and conclude it within the agreed upon time frame, the defense medical examiner, defense counsel and/or defendant shall be held responsible for any costs incurred by this waste of time, including but not limited to the plaintiff, plaintiff's attorney, plaintiff's representative, paralegal, legal assistant and/or court reporter.

7. Attendance of Plaintiff's Representative and Audio-Recording:

“(a) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio-recording any words spoken to or by the examinee during any phase of the examination.” (*Code of Civil Procedure* §2032.510(a).) Our Plaintiff's representative will be Karen Magarian.

All portions of the defense physical examination will be audio-recorded, which shall remain the plaintiff's work product. Plaintiff specifically objects to any attempt by or on behalf of the defendant to observe or electronically and/or stenographically record the demanded physical examination as being in violation of *Code of Civil Procedure* 2032.510 which only vests the option of electronically and/or stenographically recording the proceeding in the plaintiff.

Plaintiff reserves the right and power of their representative to suspend the examination if defense medical examiner attempts to conduct any inquiry, testing or evaluation outside the scope of the plaintiff's injuries and/or parameters set herein as being in violation of this agreement.

The defense medical examiner agrees to neither obstruct the plaintiff representative's view or opportunity to witness all portions of the examination, nor impede representative from reminding the plaintiff to rest or take comfort breaks as needed during the examination.

Any cancellation of the defense physical examination with less than two (2) full working days notification (not including weekends or holiday) before it is scheduled, or cancellation/refusal to proceed with the examination once the plaintiff and plaintiff's representative have arrived will require the minimal repayment of \$595.00 as a cancellation fee charged by our representative before the examination can be rescheduled.

8. Defense Medical Examiner is to be provided with this Response:

The choice of doctor who conducts this defense physical examination has been the defendant's alone and this shall serve as the defendants' one physical examination as provided by *Code of Civil Procedure* §2032.210 et. seq.

Plaintiff will not allow anyone other than the specified defense medical examiner to conduct the examination and the plaintiff will not agree to another physical examination.

The parties agree to and understand that the defense counsel have confirmed the defense medical examiner is in the appropriate medical specialty and is qualified to conduct a physical examination within that area of medical specialty; the defense medical examiner has received and reviewed all necessary documents in advance to conduct this physical examination; and the defense medical examiner is aware of and will comply with all agreements herein.

The parties agree that any information acquired or learned in violation of this agreement will not be admissible in evidence for any reason. The parties further agree that the court or any arbitrator may, upon motion at arbitration or trial, strike, preclude, or limit any testimony by the defense medical examiner in the event it finds the examiner was not informed of, or willfully violated, the terms of this agreement in a material manner.

Unless expressly agreed, or altered by all counsel in writing, the terms of this Response shall be deemed to be agreed upon by the parties. Unilateral demands or arguments of defense counsel are not relevant; only the terms of the Demand, to the extent modified by this Response or subsequent written agreement, are applicable.

The defense medical examiner is to be served with a copy of this Response prior to the examination.

9. Financial Responsibility:

Plaintiff will not assume financial responsibility for any medical billings arising as a result of this defense physical examination, nor will the plaintiff execute an assignment of benefits form. Any charge for a missed appointment is not within the purview of the defense medical examiner or defense counsel to levy; therefore, there will be no stipulated damage charge.

10. Demand for Production of Report:

Plaintiff demands a copy of a detailed written report setting out the history, examination and findings, including results of all testing, medical records review, diagnoses, prognoses and conclusions of the defense medical examiner related to the demanded physical examination, in compliance with the requirements of *Code of Civil Procedure* §2032.610, within thirty (30) days following the defense physical examination. (See: *Nahabedian vs. Superior Court* (1989) 209 Cal.App 3d 396, 257 Cal.Rptr. 254 and *Kennedy v. Superior Court* (1998) 64 Cal. App. 4th 674, 678, 75 Cal. Rptr. 2d 373, 375).

Please take notice that the plaintiff will move to suppress any reports, findings, diagnoses, prognoses, conclusions and/or testimony offered by the defense medical examiner that are not timely disclosed in writing to the plaintiff, in compliance with *California Code of Civil Procedure* § 2032.610.

DATED: *(insert date)*

(insert name of Plaintiff Law Firm)

By _____

(insert Attorney's name), Attorney for Plaintiff
(insert Plaintiff client's name)