

IME "Watchdog" Companies: Challenging the Scope of Their Services and Ability to Testify at Trial

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IME “watchdog” companies offer services to plaintiffs in connection with independent medical examinations (IMEs). A watchdog – typically not a licensed attorney or medical professional – will accompany the plaintiff to an appointment and observe the IME. The extent of a watchdog’s role and ability to testify at trial has been the subject of recent appellate review.

NY CPLR 3121(a) permits defendants to designate a physician to perform an IME when a plaintiff’s physical condition is at issue. Section 3121(b) requires disclosure of the physician’s report regarding the IME. CPLR 3122 requires plaintiffs to raise any objection to the defendant’s IME notice within 20 days.

A plaintiff’s right to have counsel present during an IME is well established. In *Jakubowski v. Lengen*, 86 A.D.2d 398 (4th Dept. 1982), and *Ponce v. Health Ins. Plan of Greater New York*, 100 A.D.2d 963 (2nd Dept. 1984), the Fourth and Second Departments of the Supreme Court of New York Appellate Division extended the right to allow representation by non-attorney legal staff (e.g., law clerk, paralegal and intern) so long as there was no unreasonable interference with the examination.

Recently, the Appellate Division found that the same principles apply to representation by an IME watchdog. See *Guerra v. McBean*, 127 A.D.3d 462 (1st Dept. 2015) (finding that a defendant has the burden to show that the watchdog prevented the physician’s meaningful examination); *Henderson v. Ross*, 147 A.D.3d 915 (2nd Dept. 2017); *Marriot v. Cappello*, 151 A.D.3d 1580 (4th Dept. 2017) (holding that plaintiffs are legally entitled to reasonable representation during IMEs and neither defendant nor its physician can preempt this right absent good cause); *Santana v. Johnson*, 154 A.D.3d 452 (1st Dept. 2017); *but see Kattaria v. Rosado*, 146 A.D.3d 457 (1st Dept. 2017) (plaintiff may waive the right to have a watchdog attend an IME if they fail to timely object to defendant’s IME notice containing explicit statement that non-attorney representation was prohibited). Trial courts have held that defendants may forego the right to an IME if they refuse to conduct the examination where plaintiff has properly asserted the right to have a watchdog present. See *Steinbok v. City of New York*, 246 N.Y.S.3d 477 (Sup. Ct. NY County 2016).

Although permitted to attend the examination, the watchdog’s role should be limited to observing and

taking notes. See *Guerra, Tucker v. Bay Shore Store*, 69 A.D.3d 609 (2nd Dept. 2010) (preventing plaintiff from answering physician's questions constituted unreasonable interference); *Katz v. 260 Park Ave.*, 2016 WL 1597770 (Sup. Ct. NY County) (finding further IME was appropriate where a watchdog prevented physician from performing diagnostic tests); *Bermejo v. NYC Health and Hosp.*, 135 A.D.3d 116 (2nd Dept. 2015) (recording audio or video of IME was improper without prior court approval).

Following an IME, defendants may subpoena the watchdog for a non-party deposition. See *Santana* (although the watchdog's report to counsel may constitute confidential work product). The deposition allows defendants to make a record of the watchdog's observations in the event the watchdog is called to challenge (from a non-medical standpoint) the credibility of the IME physician at trial. Plaintiffs may be precluded from calling a watchdog to testify at trial if the watchdog did not appear for a noticed deposition.

The Appellate Division has found that the essential function of a watchdog is to observe the examination and be available to testify about these observations at trial. See *Bermejo*. In contrast, a plaintiff's attorney would not be able to offer similar testimony without the risk of becoming a fact witness and likely being disqualified from further representing the client.

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