

Outside Counsel

Expert Analysis

Who Watches the Watchdogs? The Use of Non-Party IME Watchdogs

In any New York state personal injury lawsuit, when a plaintiff makes their physical or mental condition an issue of controversy, the defendant can require the plaintiff to submit to a physical or mental examination by a designated physician, which is popularly known by litigators as an Independent Medical Examination, or IME for short. See CPLR §3121(a); *Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952 (1998); *Torelli v. Torelli*, 50 A.D.3d 1125 (2d Dept. 2008). The examining doctor (i.e., the defendant's medical expert) must then prepare a report of their findings and conclusions as it relates to the extent of the plaintiff's injuries, plaintiff's permanency of disability, and the causation of those injuries. See CPLR §3121(b). The defendant then must disclose the IME report to

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plaintiff's counsel so that the plaintiff's counsel has sufficient notice as to the scope of the testimony of defendant's medical expert at trial. See *Ruzycki v. Baker*, 9 A.D.3d 854 (4th Dept. 2004).

CPLR §3121 does not restrict the number of medical examinations a plaintiff may be subjected to, but a defendant must demonstrate need for multiple examinations; hence, a plaintiff can be required to submit to examinations by doctors of differing specialties such as an orthopedist, neurologist, plastic surgeon, etc., depending on the nature of plaintiff's alleged injuries. See *Heary v. Hibit*, 138 A.D.3d 1385 (4th Dept. 2016); *Gitto v. Scamoni*, 62 A.D.3d 1232 (3d Dept. 2009); *Streicker v.*

Adir Rent A Car Inc., 279 A.D.2d 385 (1st Dept. 2001). Although, a court will deny additional medical examinations if they are deemed "cumulative." *Rosenberg v. Scaringi*, 279 A.D.2d 389 (1st Dept. 2001).

Plaintiff's Counsel at IME

There has been a long-standing tradition of plaintiff's attorneys (or their representatives) accompanying their clients to the defendant's IME, with the provision that they not interfere with the conduct of the IME. See *Jakubowski v. Lengen*, 86 A.D.2d 398 (4th Dept. 1982); *Ponce v. Health Ins. Plan*, 100 A.D.2d 963 (2d Dept. 1984); *Nalbandian v. Nalbandian*, 117 A.D.2d 657 (2d Dept. 1986); *Lamendola v. Slocum*, 148 A.D.2d 781 (3d Dept. 1989). Reasons for a plaintiff's attorney to be present at their client's IME have been described as: "to reduce the possibility of misleading medical reports" and that the plaintiff's attorney may obtain information

about how the IME was conducted which may be helpful on cross-examination of the IME expert. *Jakubowski*, 86 A.D.2d at 399-400, quoting 3A Weinstein-Korn-Miller, N.Y.Civ.Prac. para. 3121.07. The *Jakubowski* court held:

The presence of plaintiff's attorney at such examination may well be as important as his presence at an oral deposition. A physician selected by defendant to examine plaintiff is not necessarily a disinterested, impartial medical expert, indifferent to the conflicting interests of the parties. The possible adversary status of the examining doctor for the defense is, under ordinary circumstances, a compelling reason to permit plaintiff's counsel to be present to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to seek damaging admissions. *Id.* at 400-01.

As one can imagine, the presence of plaintiff's counsel at an IME can inflame an already contentious adversarial situation. Perhaps the most notorious and infamous example of a plaintiff's counsel attending an IME was the case of *Bermejo v. New York City Health & Hosps. Corp.*, 135 A.D.3d 116 (2d Dept. 2015). In *Bermejo*, the plaintiff's attorney and a paralegal attended two IMEs of plaintiff conducted by

the defendant's orthopedic expert, Dr. Michael J. Katz. At trial, while Katz was being cross-examined by plaintiff's counsel, there were several questions regarding the length of time Katz spent on the examinations of plaintiff. Katz apparently testified that his first examination lasted 45 minutes, but was unsure how long his second examination took, although he testified that his custom and practice would be between 10 and 20 minutes for such

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an examination. As the trial continued, it was revealed that plaintiff's counsel had secretly video recorded the examination with his phone, and plaintiff's counsel had not disclosed this video recording to defense counsel before trial. The video allegedly revealed the second examination lasted one minute and 56 seconds. As a result of this video, the trial judge, the late Justice *Duane Hart*, accused Katz of giving false testimony, and declared a mistrial.

The appellate court in *Bermejo* explicitly exonerated Katz stating "the record does not reflect Dr. Katz committed perjury." *Id.* at 148.

Furthermore, the appellate court issued specific guidelines if plaintiff's attorneys intended to send representatives to IMEs. First, the *Bermejo* court held that although a plaintiff's counsel is entitled to send a representative to attend the IME, it cannot be videotaped or recorded without prior court approval upon a showing of special or unusual circumstances. Second, if such a recording were allowed by the court, it would have to be disclosed prior to trial. Additionally, the appellate court also stated that by making the recording of the IME, plaintiff's counsel could have become a potential witness in the case and been disqualified as counsel. Hence, this raises the possibility that plaintiff's attorneys could become disqualified witnesses if they are the ones who attend defense IMEs.

IME Watchdogs

In recent years, it has become more commonplace for plaintiff's attorneys to use their non-attorney staff and outside legal service providers known as "IME Watchdogs" to accompany plaintiffs to their IMEs. See *Henderson v. Ross*, 147 A.D.3d 915 (2d Dept. 2017); *Marriott v. Cappello*, 151 A.D.3d 1580 (4th Dept. 2017); *Markel v. Pure Power Boot Camp*, 2017 N.Y. Misc. LEXIS 444 (N.Y. County 2017); *Steinbok v. City of New York*, 53 Misc.3d 1205(A)

(N.Y. County 2016); *Ferrell v. Doe*, 2016 N.Y. Misc. LEXIS 2656 (Bronx County, 2016). Indeed, there is a legal support provider advertised as “IME Watchdog” which provides services to plaintiff’s attorney firms to have a representative accompany the plaintiff at their IME. Among the services provided is to send a representative who will attend the IME with the plaintiff, take notes of the examination, advise plaintiffs not to fill out any unnecessary paperwork, and instruct plaintiffs not to answer questions allegedly unrelated to the physical examination. The representative who attends the IME can then be called as a witness at trial without the threat of the plaintiff’s attorney being disqualified at trial.

While the use of IME Watchdogs appears to be expanding, defense firms are making some efforts at fighting to prevent IME Watchdogs from attending IMEs, with limited success. For example, in *Kattaria v. Rosado*, 146 A.D.3d 457 (1st Dept. 2017), the First Department, Appellate Division, held that the lower court properly barred plaintiff’s nonlegal representative from attending an IME because the plaintiff did not timely object to the defendant’s IME notice which presumably stated that the presence of a watchdog was prohibited. However, a subsequent panel of the First Department, Appellate

Division, stated that “to the extent that [*Kattaria*] has implicitly suggested that a representative can be barred from an examination...that is not the current state of the law. *Santana v. Johnson*, 60 N.Y.S.3d 831, 832 (1st Dept. 2017).

Other ways defense counsel can respond to the use of IME Watchdogs is to demand that the plaintiff’s counsel disclose any notes taken by the representative, and/or conduct a deposition of the IME Watchdog so as to prevent surprise testimony at trial. See *Gelvez v. Tower 111*, 2017 N.Y. Misc. LEXIS 141 (N.Y. County, 2017). Moreover, if the defendant can show that the conduct of the IME Watchdog somehow “deprived defendants of the ability to conduct meaningful examinations,” then a court can order the plaintiff to appear for a second round of IMEs. *Guerra v. McBean*, 127 A.D.3d 462 (1st Dept. 2015); *Tucker v. Bay Shore Stor. Warehouse*, 69 A.D.3d 609 (2d Dept. 2010) (“While we strongly disapprove of the plaintiff’s counsel instructing the plaintiff to refuse to respond to questions relating to her relevant past medical history, there was no indication by the defendants’ examining physician that his prior examination was hindered, or that he required additional information.”)

Additionally, there is the intriguing case of *IME Watchdog v. Baker*,

McEvoy, Morrissey & Moskovits, 145 A.D.3d 464 (1st Dept. 2016). In that case, IME Watchdog sought a temporary restraining order against a defense law firm from excluding non-attorneys from IMEs. While the plaintiff did initially obtain the temporary restraining order, the appellate court reversed the lower court holding that the defense law firm was acting within its professional duty to defend its clients by seeking to bar non-attorneys from attending the IMEs. Also, the appellate court held that if a lower court issued a decision barring the use of an IME Watchdog, the proper remedy would be to appeal that ruling. Finally, the court noted that the plaintiff’s claims of irreparable injury were contradicted by the fact that the IME Watchdog business has grown every year.

Conclusion

Interestingly, CPLR §3121 neither authorizes nor prohibits the use of IME Watchdogs, although it appears the courts have settled on allowing their use. Alas, critics may argue that their increased use will only serve to increase the contentious nature of the adversarial process of civil litigation.