



**DOES A  
HEALTHCARE  
PROVIDER SUED  
FOR MALPRACTICE  
NEED A PERSONAL  
LAWYER?**

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# Does a Healthcare Provider Sued for Malpractice Need a Personal Lawyer?

Medical malpractice suits are a major concern for healthcare providers, who must take care to ensure they are properly represented during such cases. In most circumstances, healthcare providers will have counsel assigned to them by their employer or insurer. Sometimes, however, a potential conflict of interest may arise, prompting the need for a healthcare provider who has been the target of a malpractice suit to consider retaining personal counsel.

## When Does a Conflict of Interest Arise?

A conflict of interest arises when the interests of the assigned counsel and the healthcare provider they represent diverge, potentially compromising the lawyer's ability to represent their client effectively.<sup>1</sup> In the context of medical malpractice suits, conflicts of interest can take several forms:

- Differing interests between the healthcare provider and the employer/insurer: When a hospital and a healthcare provider are both named in a lawsuit, conflicts of interest may arise if the same attorney

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<sup>1</sup> See Model Rules of Professional Conduct (RPC) 1.8 (a) (stating that “[a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client”).



represents both parties. In such cases, the hospital's financial interests may take precedence over the healthcare provider's professional reputation, potentially leading to suboptimal representation or other inadvertent consequences (e.g., a report to the National Practitioner Data Bank). Although every situation is unique, healthcare providers in malpractice lawsuits should consider hiring personal counsel—or otherwise request the employer/insurer assign independent counsel—to ensure that their interests are protected.

- Cases involving multiple defendants: If an insurance carrier insures several defendants in the same case, they may want to assign a single attorney or law firm to avoid duplication and reduce fees. However, this can lead to conflicts of interest if the co-defendants' interests are not aligned. For example, misalignment can occur when co-defendant A has strong evidence and arguments that could potentially exonerate them from the charges, but presenting this evidence would be detrimental to the cause of co-defendant B.<sup>2</sup> In such cases, providers should request separate counsel and, if necessary, hire personal counsel to ensure their interests are being adequately protected.

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<sup>2</sup> See *United States v. Carver*, 114 F. Supp. 2d 519 (S.D. Miss. 2000) (explaining that a “conflict of interest is present when defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to cause of codefendant whom counsel is also representing”).



- Cases involving the tripartite relationship<sup>3</sup>: A potential issue may arise when a healthcare provider believes their attorney is more interested in satisfying the insurance company than defending them. Different states have different rules regarding an attorney's ethical obligations in these situations. Hiring personal counsel can help ensure that the healthcare provider's interests are prioritized.

## How can a Personal Lawyer Help in a Malpractice Case?

In the face of a medical malpractice case, a healthcare provider may wonder why they should consider retaining a personal lawyer instead of relying solely on legal assistance provided by their employer or insurance company. There are several distinct advantages to having a personal lawyer handle your case, such as follows:

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<sup>3</sup> See Insurance Defense in the Twenty-First Century: The Florida Bar's Proposed Statement of Insured Client's Rights--A Unique, 28 FLA. ST. U.L. REV. 855, 859 (2001) ("Tripartite relationship involves, not surprisingly, three parties: (1) the insurance company that issues the liability insurance policy; (2) the insured against whom a claim is filed that is covered under the insurance policy; and (3) the attorney hired by the insurance company to defend the claim and represent the aligned interest of the insurer and insured. An important point, all too frequently ignored, is that these relationships are creatures of contract. The relationship between an insurer and a defense attorney arises from two separate, yet interrelated, contractual relationships. The first contract is the insurance policy between the insurer and the insured. The second contract is the retainer agreement between the insurer and the defense attorney.").



- Focused Representation and Protection of Healthcare Provider's Interests: One of the main benefits of retaining a personal lawyer is their undivided loyalty to the healthcare provider's interests. Unlike counsel assigned by the employer or insurer, a personal lawyer has no conflicting obligations and can prioritize the healthcare provider's needs in the case.
- Confidentiality and Attorney-Client Privilege: Hiring a personal lawyer ensures that all communications and legal advice remain confidential and protected under attorney-client privilege. This safeguard allows the healthcare provider to openly discuss their concerns and seek candid advice from their lawyer without the risk of disclosure to opposing parties or the insurer.
- Tailored representation: With a personal lawyer, healthcare providers benefit from a customized legal strategy tailored to their specific situation and needs. This personalized approach ensures that the healthcare provider's unique concerns and objectives are considered and addressed throughout the case.
- Unbiased Advice on Settlement Offers: In cases where the healthcare provider's interests diverge from those of the employer or insurer, a personal lawyer can provide unbiased advice on



settlement offers. This guidance can help healthcare providers make informed decisions that protect their interests, even when those interests conflict with the employer or insurer.

## **What Services Can an Independent and Personal Lawyer Provide a Healthcare Provider in a Malpractice Case?**

Beyond the general advantages, the specific services offered by a personal lawyer are instrumental in the successful handling of a malpractice case. These services, which may not be readily available or as comprehensive when working with employer-assigned or insurer-assigned counsel, include a broad range of actions. An independent personal lawyer can offer a range of services tailored to the unique needs of their clients including:

- Comprehensive Case Evaluation: A personal lawyer can provide a thorough evaluation of the healthcare provider's case, examining the facts, evidence, and legal issues involved. This comprehensive assessment helps the provider understand the strengths and weaknesses of their case, allowing them to make informed decisions about their legal strategy.
- Expert Advice on Legal Issues: Personal counsel can provide expert advice on the legal issues surrounding medical malpractice, ensuring that the healthcare provider is aware of the relevant laws,



regulations, and standards of care. This guidance can be invaluable in navigating the complexities of malpractice litigation.

- Representation in Court: Personal counsel can represent the healthcare provider in court, presenting a compelling case to the judge or jury. Experienced malpractice lawyers can skillfully argue the facts, question witnesses, and present evidence to support the provider's defense.
- Negotiation and Settlement: Personal counsel can also play a crucial role in negotiating settlements on behalf of the healthcare provider. Their experience in medical malpractice cases can help them secure favorable settlement terms that address the provider's concerns and minimize potential liability.
- Alternative Dispute Resolution: In some cases, personal counsel can assist healthcare providers in pursuing alternative dispute resolution methods, such as mediation or arbitration. These processes can potentially result in a faster and less adversarial resolution to the malpractice case.



- Appeals and Post-Trial Matters: If necessary, personal counsel can represent the healthcare provider in appeals and other post-trial matters, such as enforcing judgments or negotiating payment plans. Their expertise in malpractice law can be invaluable in navigating these complex legal proceedings.

Unsure if you need personal counsel in your medical malpractice case? Don't hesitate to contact Athan Law at (509) 215-4679.

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