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4 Signs A Med Mal Defense Atty Should Switch Sides

By **Y. Peter Kang**

Law360, Los Angeles (June 20, 2017, 5:29 PM EDT) -- Attorneys defending health care providers and insurance companies against medical malpractice suits usually aren't given a choice of which cases to take and often grapple with insurance companies disputing bills or otherwise second-guessing them, prompting some to consider making the switch to the plaintiff's side.

Earlier this month, an insurance defense boutique in Florida made a rare announcement: the entire firm was switching sides to represent medical malpractice plaintiffs, citing a "chaotic" U.S. health care system. The managing partner of the 14-attorney firm told Law360 the decision wasn't motivated by money or pressure from competitors, but rather a desire to help people who have been wrongfully injured by health care providers.

"After you've done this for a really long time, there is just something that is attractive to switching sides," said Haliczzer Pettis & Schwamm PA's James Haliczzer. "There is something gratifying about helping people who need it."

Here, one-time defense attorneys who successfully took the leap to representing plaintiffs share four signs it was time for a change.

When you get sick of billing guidelines

Every doctor has medical malpractice insurance, which means in most cases the insurance companies are the ones who actually hire and pay defense attorneys to defend against cases brought by patients.

Sometimes this relationship can become strained when the insurance company's claims specialist, also known as an adjuster, starts to question whether the hours the defense attorney billed were necessary to get the job done, according to Joseph Balesteri of Power Rogers & Smith in Chicago and former medical malpractice defense lawyer at Hinshaw & Culbertson LLP.

"You'll submit bills and they will be cut because some person at an insurance company who usually isn't a lawyer thinks that the time spent wasn't necessary," he said. "It's super-frustrating because a defense lawyer is trying to do everything the plaintiff's side is doing but someone else decides it's too much."

Balesteri said it becomes a numbers-crunching game for the insurers as they see the hours billed on one case and try to extrapolate those figures to your case, which may have widely different circumstances.

"That's where the industry gets competitive in a bad way because it's not about the client or the case, it's about keeping the billing down so as not to keep the insurer angry," he said. "None of that stuff applies to plaintiffs' work because it only matters if you win."

Elliot Olsen, a shareholder at Siegel Brill PA in Minneapolis and former insurance defense lawyer, said insurance auditors would sometimes come in after the case was completed and try to cut the amount of hours billed, despite knowing nothing about the specifics of the case.

"You try to be scrupulously honest with how much you are billing to the insurance carrier and to have them almost accuse you of fraud in billing or second-guessing in terms of how much time you spent, that was very frustrating," he said. "That really sent the wrong message to me as a lawyer and to my law firm. It soured the relationship you had with the carrier. It was a real morale killer; it just didn't feel as good doing work for that company."

Jeff Bennion, a solo practitioner in San Diego and former insurance defense attorney, said there were so many occasions in which he and his team got terrific results for an insurance company only to have them try and shave \$20,000 off the bill, despite having just saved the company hundreds of thousands of dollars.

"It's such a nasty, thankless game," he said.

Defense attorneys must also keep the insurance company in the loop on the status of the case, which requires providing frequent, labor-intensive reports to the adjuster that Bennion said are a waste of time, particularly when you are in the thick of a trial.

"When you're on the defense side in trial, you waste so much time writing reports for the defense insurer, that is just something I do not miss," he said. "If I had to write some stupid, meaningless book report, it would be a huge waste of time and throw me off my game."

When you want to pick your own cases

As a defense lawyer, you generally can't choose which cases are assigned to you, which proved problematic for Bennion when he was assigned a case where a woman had a miscarriage. He said it was a sensitive topic for him at the time since he and his wife had gone through the same ordeal.

"All things equal, I would've preferred not to work on that case," he said. "When you're on the plaintiff's side, you have more freedom to negotiate which cases you get."

Not having the ability to pick and choose which cases to handle was high on the list of reasons to switch sides for Slade McLaughlin of McLaughlin & Lauricella in Philadelphia.

"I didn't like the fact that you got what came through the door, no matter how crappy it was," he said. "We were assigned cases by the insurance companies — it might be great or terrible, but you had to take it. I always envied the guys who were able to decide to take a case."

McLaughlin said on many occasions he would have physicians as clients who he believed totally botched an operation or treatment but were either unwilling or unable to acknowledge that they made a mistake, and he disliked representing them.

"They thought they never could be wrong. Their attitude was like, 'I'm the best, I know what I'm doing, you're paid to defend me so just do it,'" he said. "After a while I became disgruntled and disillusioned with working with these people. Many of them were more interested in making money than helping people."

Balesteri said it was tough to represent a doctor who you believed was probably in the wrong in treating a patient, so having the freedom to choose his own cases was liberating for him.

"I enjoy picking a case, choosing the family that I'm going to help, making the decisions on what experts I hire and not having any limitations or guidelines from an insurance carrier on how much time I can spend representing someone," he said. "It's a liberating feeling to spend what you want, pick how you want to prosecute, choose any expert across the country and try and prove your case. That is not occurring with much frequency for the defense bar. They have to obtain permission to work extra hard on cases because they aren't going to get paid for doing it."

When an opportunity makes switching less risky

Once the defense attorney decides to make the switch, he or she can't just start a solo practice and expect business to roll in, Balesteri said, because not only are you unknown on the plaintiffs side, but it is prohibitively expensive to front the money for any given case if you don't have the capital. He

says the best approach is to seek out a firm with a track record of success with cases that you can work on right away.

Balesteri said he never considered switching until he was approached by Power Rogers & Smith, where he served as a clerk during law school.

"Every defense lawyer just can't be a plaintiffs' lawyer, you have to have an opportunity," he said. "The people who have made the switch are switching to an established firm with significant medical cases."

For McLaughlin, his firm was in decline in the early 1990s when he decided to make the jump after 10 years on the defense side.

"I saw the writing on the wall and I decided to go somewhere else," he said. "The first seven to eight years [of defense work] were rewarding but towards the end I was disgusted with it and decided to make a move to the other side. The money played into it as well, I knew I was better than some plaintiffs' lawyers getting million-dollar verdicts. Some of these guys were mediocre on their best days."

Through connections, he landed at a small plaintiffs firm, where he worked for two years learning the trade before getting hired at prominent personal injury firm The Beasley Firm, where he eventually became a partner. McLaughlin and fellow partner Paul Lauricella left to open their own shop in 2011.

He said he frequently receives resumes from younger defense attorneys looking to switch sides, but in recent months has received queries from established partners on the defense side who are tired of insurance company billing and are "looking to get out."

When past cases haunt you

An unexpected victory in a personal injury case Bennion worked on while on the defense side serves as a constant reminder that the California attorney made the right decision to switch sides, he said. The case was so one-sided that even the insurance company recommended that they concede defeat and just challenge the amount of damages, but Bennion and his colleagues decided to fight it on liability and somehow won.

"Everyone was surprised we won, but the bottom line is, and I think about this case all the time, somewhere out there in the Central Valley, there is some grandma who isn't able to get the medical care she needs — she can't play with her grandkids, she's in pain every day and she can't sleep at night," he said. "But after the verdict we were high-fiving each other. I thought, this is wrong. If I'm going to work on a case, I would much rather work on a case to make people's lives better than to make people's lives worse."

He added, "If you're going to work 18-hour days, you don't want to do it to make people's lives more miserable."

Olsen said at one point during his nearly 12-year tenure on the defense side, he realized that doing good work simply meant saving insurance companies money.

"If I kept doing the work I was doing, what would I be able to say? That I saved an insurance company a bunch of money over the years?" he said. "That was in the back of my mind. I thought it would be more satisfying when I retire to look back on a career that I spent helping people who needed it. Not to sound too altruistic, though, I also thought I could make more money on this side, which did turn out to be true."

--Editing by Philip Shea and Kelly Duncan.