

Guide to Selecting Legal Representation for Brain Injury Cases

By Mary S. Reitter

Introduction

Persons who sustain brain injury resulting from motor vehicle crashes, pedestrian injuries, falls, defective products, negligence and other causes often find it beneficial to consider consulting an attorney with experience in personal injury cases involving brain injury. Given the expensive and extensive need for medical, rehabilitation and long-term services that people with brain injury and their families may face, any and all possible financial resources should be vigorously pursued.

In addition to a personal injury case, other issues which may require legal assistance after brain injury include:

- competency and guardianship
- determination of eligibility for federal and state entitlement programs and appeals, if necessary
- estate planning
- powers of attorney
- separation and divorce
- criminal matters

Depending upon the complexity of the issues, the attorney you select to represent you in a personal injury case also may provide guidance in some or many of these areas, or help you find an attorney who specializes in the particular area of law required.

Personal Injury Cases and Brain Injury

Personal injury cases may afford a person whose brain injury resulted from the negligence of others with the financial resources necessary to maximize recovery and/or provide for long-term care and support needs. Tort law, which includes personal injury cases, is intended to encourage safety and discourage wrongful acts which cause injury. It attempts to provide fair and full compensation for the losses of individuals who have been wrongfully injured or killed. Lost income is an obvious loss. Other damages including pain, suffering, loss of earning capacity and enjoyment of life, as well as the cost of medical and rehabilitation services, also can be awarded as compensation when a judgment is made or a settlement reached.

Consider an Attorney Soon After the Injury Occurs

Important evidence may be lost if an attorney is not involved in the early days following the injury. An attorney can investigate and prepare the case while the person with brain injury and family focus their energies on the process of recovery.

Many people are reluctant to involve an attorney because they feel they cannot afford one. In addition to paying an attorney either hourly or through a negotiated retainer (known as the fee for service basis, personal injury attorneys frequently work on a contingent basis, which means that their fee depends upon obtaining a judgment or settlement for their client. The attorney and client usually negotiate the attorney's fee before representation begins.

Expenses which are necessary to investigate, prepare and resolve the case may be paid in advance by the attorney but are usually paid out of the consumer's portion of the total award. This allows individuals to have competent legal representation since they can select the attorney they feel is best qualified to represent them, provided the attorney agrees to accept their case.

Who's the Defendant?

Perhaps one of the most compelling reasons to consider legal representation following a brain injury is the complexity of determining just who may bear some legal responsibility for the injury. For example, in a motor vehicle crash, the driver of an automobile, the automobile manufacturer, the local government and/or its employees and the owner and/or bartender at a local bar all may be liable for the same injury.

The attorney can determine the merit of a variety of possibilities and recommend which cases should be against one or more of the potential defendants.

Choose Your Attorney Carefully

The selection of an attorney can have significant long-term implications. The attorney should assist not only in obtaining and preserving any funds resulting from litigation, but also help obtain and preserve any entitlement to federal and state benefits which an individual may have. Without careful planning, valuable benefits may be lost.

It is a decision which requires the serious consideration of many factors. Among these are the attorney's:

- education and training
- legal experience
- knowledge of the consequences and treatment of brain injury
- knowledge of how to structure and manage awards
- experience with similar cases

In addition, the attorney should be admitted to practice in the state in which the litigation will be filed.

While medical professionals are rapidly becoming more specialized, attorneys usually are still trained to be generalists. Nevertheless, they usually specialize in one area of the law (such as personal injury) soon after beginning practice. A small percentage of

all attorneys have specialized knowledge, training, and experience with brain injury and its consequences.

In particular, attorneys may know little about the more subtle cognitive, emotional, physical, behavioral and social difficulties which can occur following brain injury, whether severe or mild. It is important to collect as much information as possible about a prospective attorney before making your selection.

Attorneys Also Choose Their Cases Carefully

Be aware that the attorney has an important decision to make as well. Attorneys will often invest substantial time and money during the investigation, preparation and resolution of the case at their own expense. Under a contingent fee arrangement, the attorney usually receives no fee if there is no recovery for the client. Because of the obvious financial risk involved, attorneys may decline cases if they do not believe there is a reasonable likelihood of success, or if there is limited availability of funds from the defendant(s). Frequently, attorneys conduct a preliminary evaluation before agreeing to accept a case.

Getting Started

The Brain Injury Association of America's (BIAA) *National Directory of Brain Injury Rehabilitation Services* (National Directory) lists individual service providers, including attorneys with experience with brain injury cases. These listings are also available online in BIAA's searchable National Directory at www.biausa.org.

Attorneys who are listed in the National Directory are also available through BIAA's National Brain Injury Information Center at (800) 444-6443. You may also find attorneys through the American Association for Justice (formerly Association of Trial Lawyers of America (AAJ, formerly ATLA) and state and national Bar Associations.

An attorney whom you have used in the past for other matters, or other well-known attorneys in your area, may be able to suggest attorneys who primarily handle cases involving brain injury. Asking physicians and rehabilitation professionals as well as people with brain injury and their families may prove helpful as well.

Lastly, the Martindale-Hubbell Law Directory, provide names of attorneys. While you may search for personal injury attorneys, it does not specify those attorneys with specific brain injury expertise. It may be accessed online at www.martindale.com or your local library may have a copy of the print directory.

Once you have a list of attorneys, schedule a telephone or in-person meeting with each. Be prepared to answer the attorney's questions about the injury as well as ask your own. You may find it useful to compile a written list of questions for each attorney to complete by mail before you meet with them, particularly if the list is lengthy. Include a space for the attorney to sign and date the form.

During the first meeting, you will want to learn about the attorney's legal background and experiences and his/her experience with cases involving brain injury. This information will be valuable as you compare and contrast the expertise and knowledge of various attorneys in order to make a well informed decision.

The topic areas and specific questions suggested below can help you structure your information gathering. Keep written notes about each of your interviews which include the names of those with whom you talk, the date and time, and maintain copies of all correspondence. You may wish to tape record your interviews for future reference, with permission from those present, or you may wish to ask a friend to accompany you specifically to take notes. This frees you to listen and fully participate in the discussion.

Ask the attorney to suggest other people with similar cases that the attorney has represented (within the limits of attorney/client confidentiality). This means the attorney will need permission from the individual before giving out his/her name. You can benefit from their experiences, both with the attorney and with the legal process you are about to undertake. Bear in mind that some people may not give permission, although they were very satisfied with the representation the attorney provided.

Signing the Attorney-Client Contract

Once you have narrowed your search to a few selected attorneys, you may find it helpful to meet with them once again before an attorney-client contract is signed. This contract formally begins representation in the case. Be sure it clearly spells out the financial and other agreements you have made with the attorney and that you understand your rights and responsibilities as well as those of the attorney.

Protecting Your Funds

Early in the process, be sure to ask the attorney to help you make arrangements to protect whatever funds you are awarded in a settlement or judgment. The attorney should explore options including structured settlements, trusts and annuities which may enable the person with brain injury to maintain eligibility for government benefits such as Social Security and Medicaid. The attorney should be knowledgeable about and/or explore applicable Social Security asset and resource regulations as the case is prepared.

Taking full advantage of benefits like these may prepare you to provide for expected as well as unanticipated needs that the person with brain injury may have, regardless of the amount of money that may later be awarded.

Questions Which May Help

You will have many questions to ask a prospective attorney. The topics and specific questions suggested below are intended as a guide for your information gathering.

- Try to ask the same questions of each potential attorney
- Write down the responses you receive
- If you are not clear about something the attorney said, either at the time you meet with the attorney or later, do not hesitate to ask for clarification.
- Verify the information the attorney has provided by checking with the state bar association, college or university he/she attended, organizations which sponsor education/training the attorney has attended, reading articles written by the attorney and/or other means

Be observant during the time you spend with each potential attorney. Pay attention to how the attorney, office personnel and staff interact with you and your family and determine if it is comfortable for you. Trust your instincts. Many personal injury cases take years to resolve, so the rapport between you and the attorney can be very important.

Keep in mind that you do not need to know everything about every potential attorney. You will develop more in-depth knowledge about the individual attorney you select as you work together over time.

Questions about How Well the Attorney Understands the Case

- Based on the information you have about my situation, what are the strengths and limitations of my case?
- What additional information about my case do you need and how do you propose to obtain it?
- What is your opinion of (theory of) my case?

Questions to Understand the Resources Available to the Attorney

- Who else in your practice would you involve in my case? What role(s) would these people have? Describe their background and expertise.
- Who will be my primary contact with your practice?
- Are you or your law firm able and willing to advance as much as \$50,000 in the investigation, preparation and presentation of my case?

Questions to Understand the Attorney's Legal and Brain Injury Experience

- How much of your practice is devoted to personal injury?
- Of your personal injury cases, how many are devoted to brain injury?
- What results have you achieved?

- What is your involvement with legal associations, local, state or national brain injury associations or other organizations?
- How did you first become involved in brain injury cases?
- How do you stay up to date with personal injury law and brain injury issues?
- What have you worked on in the past six months?
- What special training or education do you have specific to brain injury or benefits that people can get after brain injury?

Questions to Find References for the Attorney

- Would you suggest three people you have represented that I might contact as references?

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