



**BRAIN INJURY
ASSOCIATION
OF NEW JERSEY**

825 Georges Road, Second Floor
North Brunswick, NJ 08902
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Helpline: 1-800-669-4323

No Brain Injury is
Too Mild to Ignore,
or Too Severe to
Lose Hope

Guide to Selecting Legal Representation for Brain Injury Cases

By Mary S. Reitter, MS

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 people with traumatic 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; and 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 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 medical and rehabilitation services, also can be awarded 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 the fee for service basis (an attorney is paid either hourly or through a negotiated retainer), personal injury



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attorneys frequently work on a contingent basis, which means that their fee depends upon obtaining a judgement or settlement for their client. The attorney and client usually negotiate the attorney's fee before begins. Expenses necessary to investigate, prepare and resolve the case may be advanced 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 traumatic 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. It is a decision which requires serious consideration of many factors. Among these are the attorney's education and training, legal experience, knowledge of the consequences and treatment of traumatic brain injury, knowledge of how to structure and manage awards, and experience with similar cases. 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 an individual may have. Without careful planning, valuable benefits may be lost. 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.

Despite the advent of specialized traumatic brain injury education and training opportunities led by the Brain Injury Association's Annual Trial Attorney's Seminar, relatively few attorneys have specific specialized knowledge or training about the nature of brain injury and its sequelae. In particular, attorneys often may know little about the more subtle cognitive, emotional, physical, behavioral and social difficulties which can occur



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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

BIA's *National Directory of Brain Injury Rehabilitation Services* lists individual service providers, including attorneys. Attorneys from your state listed in the National Directory are available through BIA's Information and Resource Department if you do not have access to a copy of the directory. In addition, the BIA State Association in your area, the Association of Trial Lawyers of America (ATLA) and state and national Bar Associations can provide names of attorneys. An attorney 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. Finally check your local library for a copy of the *Martindale-Hubbell Law Directory*, which provides descriptions of attorneys. This multi-volume directory does not, however, identify attorneys by specialty.

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.



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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 function as a note taker. This frees you to listen and fully participate in the discussion.

Ask the attorney to suggest other people with similar cases 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 decline to 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 initiates 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, in concert with your attorney, 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.

Taking full advantage of vehicles like these may prepare you to provide for expected as well as unanticipated needs the person with brain injury may have, regardless of the amount awarded. The attorney should be knowledgeable about and/or explore applicable Social Security asset and resource regulations as the case is prepared.

Questions Which May Help

You will likely 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 a response either at the time you meet with the attorney or later, do not



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hesitate to request clarification. You may wish to verify 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.

During the time you spend with each potential attorney, be observant. Pay attention to the manner in which 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. During your information gathering, 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.

Question A - Understanding of 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?

Question B - Resources

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?

Question C - Legal Experience (Credentials and experience)

How much of your practice is devoted to personal injury?

How much of your personal injury cases are devoted to brain injury cases?

What are the results?

What is your involvement with legal associations, local, state or national brain injury associations or other organizations?



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Question D - Experience with brain injury

Look for someone who is experienced and stays up to date with personal injury law and brain injury issues.

Ask what he/she has worked on in the past six months.

What special training or education do you have specific to brain injury or benefits you can get after brain injury?

Question E – References

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

Mary S. Reitter, CAE, is the Executive Vice President and Chief Operating Officer at the Brain Injury Association of America.

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*Additional information can be found at: Helpline: 1.800.444.6443
www.biausa.org*