

What Are an Attorney's Obligations When a Client Has Had a Brain Injury?

Shana De Caro, Esq. and Michael V. Kaplen, Esq., BrainLine

What are an attorney's obligations when a client is not able to fully understand his options? In this situation, the attorney is pushing for settlement of a workers' compensation claim, which we feel is not in the client's best interest. It's hard because the client doesn't understand what he doesn't understand.

In most states, ethical rules govern the conduct of attorneys. These rules regulate the attorney-client relationship and impose considerable obligations upon attorneys and provide for significant rights for clients.

Generally, the rights of clients are codified in some form. For example, in New York, the following statement is contained within the client's bill of rights: "You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge)." The client's bill of rights further specifies: "You are entitled to have your legitimate objectives respected by your attorney; including whether or not to settle your matter (court approval of a settlement is required in some matters)."

Workers compensation matters are generally governed by specific rules promulgated by each state and set forth in each state's workers compensation law. These cases are generally processed in specific tribunals set up solely for the purpose of adjudicating workers compensation matters.

Attorneys should not agree to represent a client in matters in which they do not have adequate expertise. In workers compensation cases involving claims of a traumatic brain injury, this requires that the attorney must first be well versed in the specific rules relating to issues involving workers compensation and appearances before the workers compensation board, but further necessitates that he or she must also have knowledge in the area of traumatic brain injury.

If an individual does not believe that his attorney is properly representing his best interests, or if a client no longer trusts or has confidence in his legal representative, then it is time to retain a new lawyer. A client always has the right to change attorneys and may do so at any time.

Before clients agree to settle any case, the terms of the settlement must be disclosed and explained in full to them. If the client does not understand the terms of the settlement, he has a right to ask questions and gain a full appreciation of the settlement's ramifications before it is accepted. Frequently, settlements are reached in court or at the workers compensation board at which the litigant must appear before a Judge to formally accept the terms of the settlement. During this proceeding, it is important for the client to inform the Judge if he is not satisfied with his legal representation.

Further, clients should inform the judge if they do not understand the terms of the settlement, do not want to settle their case, or believe that they are being improperly coerced into a settlement. Unfortunately, if they do not speak up at this juncture or pose any questions, the court will assume

that they understand the terms of the settlement and are satisfied, and it may be impossible to invalidate the settlement at a later time.

One of the best ways to assure that an individual receives proper legal representation is to choose a brain injury lawyer with care. Family members can assist an individual in this process by accompanying the individual when he or she interviews a potential attorney and by screening an attorney in regard to his or her knowledge, education and experience in this area of litigation.

Since the results of your law suit will have important and long term impact upon the quality of your life, it is important to determine who the best lawyer is for your brain injury case.

- Here are some questions to ask any attorney who you are considering retaining in a brain injury case:
- How many cases, similar to mine, have you been involved with as the principal attorney over the past three years?
- What percentage of your practice is devoted to representing persons with a traumatic brain injury?
- Will you be handling my case personally or will you be referring it to another lawyer or law firm?
- What have been your results in representing persons with cases similar to mine?
- Have you written and published any articles on traumatic brain injury?
- Have you lectured to any bar associations, brain injury associations or other groups about the effective legal representation of persons with traumatic brain injury?
- Do you actively participate in your state's brain injury association?
- Do you regularly attend conferences and read textbooks and articles about traumatic brain injury?
- Have you ever received any professional honors and awards concerning your representation of persons with a brain injury?

The ability of family members or close friends to intervene on behalf of an individual they believe is not receiving adequate legal representation is extremely limited since this third party is not part of the legal relationship between attorney and client and does not have "legal standing" in the eyes of the law. However, if it can be shown to a Court that the individual is not capable of making an informed decision and cannot adequately protect his or her rights, then proceedings may be instituted and a court order can be sought for the appointment of a legal guardian. The court appointed legal guardian can then substitute his or her judgment in place of the impaired individual, as to matters regarding the lawsuit.

A more practical approach is for a family member to speak candidly with the injured person and discuss the need to obtain a written "power of attorney" from the injured individual. Such "power" will allow the designated person the legal right to substitute his or her judgment on the other's behalf. In order for this "power of attorney" to be legally valid, it must be shown that the individual who executes the document has the ability to make an informed decision. It cannot be entered into by an individual who lacks the mental capacity to understand the nature and effect of this legal instrument. Each State has very strict rules as to how this document must be executed, the language that must be used, how it is to be witnessed, and specifically, the powers that may be shared.