Solicitors Regulation Authority

Warning notice
Warning notice
Holiday sickness claims

Holiday sickness claims

Updated 25 November 2019 (Date first published: 6 September 2017)

Status

This guidance is to help you understand your obligations and how to comply with them. We may have regard to it when exercising our regulatory functions.

Who is this warning notice relevant to?

This warning notice is relevant to all those we regulate who act in personal injury cases, particularly holiday sickness claims.

The SRA Standards and Regulations

The principles [https://www.sra.org.uk/solicitors/standards-regulations/principles/] and codes of conduct are underpinned by our Enforcement Strategy [https://www.sra.org.uk/sra/strategy/sub-strategies/sra-enforcement-strategy.page] , which explains in more detail our approach to taking regulatory action in the public interest. The following principles are most relevant to this warning notice, however other principles and codes may apply.

- Principle 1: You act in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice.

  You have obligations not only to clients but also to the court and to third parties with whom you have dealings on your clients' behalf.

- Principle 2: You act in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons.

  You must behave in a way that maintains the trust the public places in you and in the provision of legal services. Members of the public should be able to place their trust in you. Any behaviour either within or outside your professional practice which undermines this trust damages not only you, but also the ability of the legal profession as a whole to serve society.

- Principle 4: You act with honesty

  Acting honestly in all your dealings with everyone is fundamental.

- Principle 5: You act with integrity.

  Personal integrity is central to your role as the client's trusted adviser and should characterise all your professional dealings with clients, the court, other lawyers and the public.

- Principle 7: You must act in the best interests of each client.

  You should always act in good faith and do your best for each of your clients

Our concerns

Following an increase in compensation claims since 2013, we have seen some behaviours that give us cause for concern such as:

- taking on matters whilst lacking competence and skill in the area of law
- failing to make sure they do not accept cases from introducers who are cold calling or failing to verify the source of the referral
- entering into improper referral arrangements and allowing their independence to be compromised by, for example favouring the interests of the referrer
- failing to properly identify clients and confirm client instructions including the verification of relevant documentation to support a claim
- bringing a claim without first investigating whether it is valid
- making unreasonable requests for disclosure from the defendant or their lawyers
- failing to objectively assess and investigate adverse evidence
- failing to properly advise clients about what is expected of them when making a claim
- submitting false or dubious claims in the hope of a settlement without further investigation by the defendant
- seeking unreasonable costs – either from the client or the defendant.

Those who conduct cases demonstrating one or more of these features may face regulatory action for breach of our Principles, Standards and Regulations. Our investigations involving holiday claims, have included

improper links with claims management companies and payment for referrals of holiday sickness claims. We have also seen firms pursuing claims without the proper instructions from claimants.

Our expectations

Clear instructions

You must not pursue claims or continue with claims where you do not have the claimant's clear and express authority to do so (paragraph 3.1 of the code of conduct for solicitors, RELs and RFLs and paragraph 4.1 code of conduct for firms).

Merits of a claim

You must engage properly with all the merits of your clients' cases. Where there is evidence suggesting a claim is false or dubious in some way you must not act for them. We are clear that you must not bring cases, or continue with them where there is a serious concern about the honesty or reliability of the evidence (paragraphs 2.2, 2.4 and 2.6 of the codes of conduct for solicitors, RELs and RFLs and 7.1(a) of the code of conduct for firms). See further below on dishonest claims.

The extent to which you should verify a client's case is risk specific. Examples of risk factors in holiday sickness claims include:

- The claim is made some time after the alleged incident
- There was no report of the claim to the hotel
- There was no extensive sickness amongst others in the same accommodation – see *Wood v TUI Travel [2017] EWCA Civ 11*
- The claim comes from or involves people that have actively sought out/farmed for claims in a resort
- The client's contemporaneous report of the holiday was positive
- The client drank or ate excessively before or after becoming ill

The difficulties found in establishing holiday sickness claims is explained in the case of *Wood v TUI Travel [2017] EWCA Civ 11* in which the Court of Appeal commented:

"...it will always be difficult (indeed, very difficult) to prove that an illness is a consequence of food or drink which was not of a satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded…"

We expect you to engage with this and properly assess all the evidence before submitting claims.

Evidence

We have seen failures to make sure all documentary evidence is analysed. We have also seen highly improper advice to clients to delete evidence such as social media updates or pictures of the holiday.

In all litigation, we expect you to immediately inform clients of their duty to preserve evidence and allow you to review it fully and impartially. This is a critical duty to the administration of justice in ensuring unmeritorious claims are not made. You must therefore be rigorous in storing, retrieving, analysing and acting on evidence, including seeking and making appropriate disclosure. Claims should not be filed until your client has been properly advised on all relevant evidence, including the merits of their case and after your client has given clear instructions and authority, on a fully-informed basis to pursue their claim or not.

If you take a narrow approach you may be treated as 'turning a blind eye' which can amount to dishonesty. In *Barlow Clowes v Eurotrust [2005] UKPC 37* it was noted that a dishonest state of mind "may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge". Dishonest claims are the most serious of all for you and your client. As well as disciplinary proceedings they can lead to costs against your client and even criminal proceedings.

If there are issues about a case that concern you, you must not turn a blind eye. You must properly engage with the issues and assess objectively if the case can properly be pursued.

An example of this might be allegations that claims are being generated or co-ordinated by organised criminals, as we have seen in 'cash for crash' cases. You cannot simply ignore such allegations, and nor can you simply assert that they consider them unproved or unfounded. We expect you to engage properly with them and bear in mind their duty to the administration of justice.

Cold calling

We have seen evidence of introducers and claims farmers approaching holiday makers to generate sickness claims. You have duties not to make unsolicited approaches to members of the public with the exception of current or former clients in order to advertise legal services (paragraph 8.9 of the code of Conduct for solicitors, RELs and RFLs and paragraph 7.1(c) of the code of conduct for firms). You remain accountable for compliance with our regulatory arrangements where your work is carried out through others, including managers, those you employ or contract with (paragraph 2.3 of the code of conduct for firms).

You should not have an arrangement with another party to cold call on your behalf since any client referred to you must not be referred in a way that

breaches **our** regulatory arrangements (paragraph 5.1 (e) of the code of conduct for solicitors, RELs and RFLs and as applied by paragraph 7.1(b) in the code of conduct for firms.

Referral arrangements

You should take steps to make sure that you verify the source of any referral.

You should terminate any arrangement with an introducer or fee-sharer which causes or may cause you to breach the Principles or the Standards and Regulations, and/or that puts you in breach of the law.

Please see our previously published guidance on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) [https://www.sra.org.uk/solicitors/guidance/referral-fees-laspo-sra-principles/] .

Where you have a referral arrangement that is not in breach of LASPO, you must still comply with paragraphs 5.1-5.3 of the code for conduct for solicitors, RELs and RFLs and/or paragraphs 7.1(b) of the code of conduct for firms. We have seen referrals made to a third party, such as a medical expert, when it is not in the client's best interests or where it is unlikely the claim can be properly progressed because the referral is made after a significant time has passed.

Further help

If you require further assistance, please contact the Professional Ethics helpline [https://www.sra.org.uk/contactus] .