

GUIDANCE ON 'DAYS OF ACTION' & 'NO NEW INSTRUCTIONS'

20th JUNE 2022

WHAT TYPE OF WORK DO 'NO NEW INSTRUCTIONS' AND 'DAYS OF ACTION' APPLY TO?

1. As per the wording of the ballot, both types of action apply to instructions for AGFS work only.

WHAT DOES 'NO NEW INSTRUCTIONS' MEAN?

2. 'No New Instructions' is defined relative to the barrister being asked to accept the instructions, not relative to the case/ brief/ date of the representation order. Consequently, 'No New Instructions' both subsumes 'No Returns' and applies to new cases.
3. Put very simply, it means, from 27th June onwards, not accepting instructions for cases in which you are not already instructed ('new instructions') but continuing to accept instructions concerning cases in which you are already instructed (ongoing instructions).
4. You are entitled to refuse instructions (Rule C30.8¹) if you have not been offered a 'proper fee for your services', as long as you communicate that within a reasonable time and have regard to gC90. Once you have accepted instructions in a case, your usual professional obligations apply.
5. Consistency of approach is important. If you refuse all new instructions on the basis that all AGFS fees no longer constitute a 'proper fee', you would be taking a consistent approach. By taking a consistent approach and adhering to the Code of Conduct, then as per No Returns, the risk generated by this type of action is low.

¹ Code of Conduct

WHAT DOES 'DAYS OF ACTION' MEAN?

6. Days of Action means an escalating series of days, each successive week, when those who participate in the action do not attend court.
7. The Days of Action are:

Week 1: Monday 27th and Tuesday 28th June 2022

Week 2: Monday 4th, Tuesday 5th and Wednesday 6th July 2022

Week 3: Monday 11th, Tuesday 12th, Wednesday 13th and Thursday 14th July 2022

Week 4: Monday 18th, Tuesday 19th, Wednesday 20th, Thursday 21st and Friday July 22nd 2022.

In w/c 25th July: the days of action are suspended for 1 week.

In w/c 1st August: the days of action recommence for a further full week.

The patten of alternating weeks then continues, with no end date, remaining under review and subject to the response from Government.

WHAT ARE THE RISKS OF PARTICIPATING IN 'DAYS OF ACTION'?

8. Your professional obligations always remain a personal duty, not a collective one and as such, it is an individual decision, not a collective one, whether or not to participate in a Day of Action.
9. In the event of a complaint being made to the BSB about your conduct, whether or not any harm had been generated by your actions would be an important consideration.
10. Relative to 'No Returns' and 'No New Instructions', a decision to participate in Days of Action therefore carries a higher level of risk, primarily of wasted costs by the court and/or regulatory sanction.
11. In summary, the level of risk will vary from individual to individual according to your professional duties and commitments on the day of action, and according to any harm your non-attendance at court may generate and what you have done to mitigate that harm.

12. There is cover under the Bar Mutual Policy for Disciplinary Proceedings (subject to the full terms and conditions of the Policy). However, this is limited to those disciplinary matters where there is an actual or potential connected civil claim.
13. The Policy does however also allow for the extension of discretionary cover under Part 1.3, subject to the application of the test for discretionary cover.
14. Any claim for cover arising from disciplinary action would therefore be assessed on its merits by BMIF, taking into account the particular circumstances of the claim.
15. There is a specific exclusion in the Terms of Cover in respect of BSB fines.

IF I AM PARTICIPATING IN 'DAYS OF ACTION', HOW DO I MITIGATE THE RISK OF HARM?

16. If you are not scheduled to be in court, then you are entitled to book into your professional diary that you are not available for work in the ordinary way.
17. However, once you have accepted instructions in a case, your professional duties apply in the usual way.
18. If you are intending to participate in 'days of action', in order to mitigate the risk of harm being caused by your decision, you should consider taking the following actions:
 - a) Review your diary immediately in order to identify which of your cases may be impacted.
 - b) Give prompt notification of your intended action to your professional (and through them your lay) client, and, where possible, take instructions on whether they wish you to make an application to adjourn the affected hearing.
 - c) Notify the Judge / Court with conduct of the case of your intention, making any applications that accord with your instructions, for example, to adjourn or not to sit on particular days.

- d) Give particular consideration to the vulnerabilities of any person who may be impacted by your intended course of action and the potential for harm, to any person, generated by your action.
- e) Obvious considerations include, but are not limited to:
 - Youth
 - Vulnerabilities that attach to either the defendant or a complainant / witness (including but not limited to those who require an intermediary)
 - Length of remand
 - Consequences of adjourning or delaying a trial

It is not possible to provide an exhaustive list of potential vulnerabilities and relevant considerations. Exercise your professional judgement on the facts of each affected case.

- f) A barrister who is already instructed in a matter must carefully consider any duties that are owed to the court, as well as to their client, before making themselves unavailable, including a consideration of whether any failure to attend at court might have serious consequences for the administration of justice or the interests of third parties.
 - g) Any barrister seeking to rely (in the event of disciplinary proceedings) on a client consenting to their absence from a hearing should be prepared to demonstrate that the client gave the consent on a fully informed basis and was made aware of the potential consequences of doing so, including the potential for and/or any actual harm to the client's interests.
19. You are therefore encouraged to triage your cases carefully, exercise your own professional judgement to identify vulnerabilities and the potential for harm, take instructions in the usual way, and seek to mitigate the potential for harm wherever possible.
20. Your guiding principle at all times should be to give notice and seek to minimise harm, to any affected person, in order to mitigate the risk of regulatory proceedings in the event that a complaint is made against you.
21. Ultimately, you will need to come to a considered view about whether to attend at court on each day of the scheduled days of action, on a case specific, day by day basis. Any vulnerabilities / potential for harm that

you identify will inform your personal decision about whether or not to participate, on any given date.

22. If, in your considered opinion, it is your professional duty to attend at court on a day of action because of vulnerabilities / harm that you have identified in a particular case, you should do so.

WHO CAN I SPEAK TO IF I NEED ASSISTANCE OR SUPPORT?

23. The CBA panel is now restricted to Silk membership only and continues to be available to provide support and assistance for any member participating in action.

24. Members can continue to email their enquiries to the panel (as they have done since action in the form of No Returns began on 11th April) using the email address courts@criminalbar.com.

25. Please provide the following details:

- a) Phone number
- b) Circuit / Court
- c) Short summary of the enquiry
- d) Timeframe / urgency.

26. The email helpline will continue to be available from 8am-6pm on weekdays for the duration of the action. Wherever possible, your enquiry will be answered on the same day. However, enquiries will be triaged on the basis of urgency and therefore a same day response may not always be possible.

RESPECT FOR EACH OTHER

27. In accordance with your professional duties it is important to continue to respect your colleagues. You may decide that it is advisable, for this reason, to decline to comment on, or seek to influence (directly, indirectly, publicly, or privately) their decisions, whether or not they are your opponent, and whether or not they are participating in a day of action.

Lucie Wibberley
Secretary

Mark Watson
Assistant Secretary

20th June 2022