***Guidance for Criminal Defence Barristers facing prospect of a referral to the BSB due to non-attendance at court in order to participate in Days of Action called for by membership of the CBA***

***What you should know***

1. Criminal barristers will be well aware of the Code of Conduct and the ten Core Duties:

*1: You must observe your duty to the court in the administration of justice.*

*2: You must act in the best interests of each client.*

*3: You must act with honesty and integrity.*

*4: You must maintain your independence.*

*5: You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.*

*6: You must keep the affairs of each client confidential.*

*7: You must provide a competent standard of work and service to each client.*

*8: You must not discriminate unlawfully against any person.*

*9: You must be open and co-operative with your regulators.*

*10: You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations.*

1. It is clear that should a barrister not attend court when a case is listed in order to participate in a day of action they would potentially be in breach of the Code of Conduct.
2. The BSB statement on deliberately failing to attend at court sets out what is expected and how the BSB will view any potential misconduct:

*“Barristers who deliberately fail to attend a hearing at which they are due to represent a client may face regulatory action. In deciding whether to take action, the BSB will consider all the circumstances, but will have particular regard to any harm caused by the barrister’s actions.”*

1. This would include harm to the particular defendant involved and the court administration. Also consider the potential for harm to any person, generated by your action.
2. Barristers not attending court should therefore have considered their professional duties and take a harm avoidance approach. This should include, where possible, discussing the matter with the lay client and obtaining their consent.
3. Through the careful exercise of professional judgment, they should balance all the factors of non-attendance and the potential for harm that may be caused, against the purpose of the days of action, which are in the wider public interest to ensure the survival of an independent criminal Bar and to protect the integrity of the Criminal Justice System.
4. Some examples of matters to be taken into account in the process of considering harm include (please refer to paragraph 18 (e) of the CBA guidance):
* 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 (consider custody time limits)
* the consequences of adjourning or delaying a trial (including article 6, right to a fair trial).

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

1. A brief note should be kept by the barrister recording the factors they have taken into account and the basis for their conclusion.
2. In addition, barristers should have informed all parties of their intention to take action (solicitors, co-counsel and prosecution) and the court in order to minimize the impact on the administration of justice insofar as this would comply with taking reasonable steps to manage your practice in accordance with Core Duty number 10.
3. It should be noted that representation funded by the BMIF at any disciplinary hearing is discretionary.
4. If BMIF funding is not provided, pro-bono representation by a Silk can by accessed through the CBA by any barrister facing disciplinary action for participating in a day of action.

***What you should say***

1. As little as possible. This is not the occasion to seek to justify the taking of action.
2. The LCJ has said,

 *“All cases in which there is non-attendance should be referred to the Senior Presiding Judge’s Office to consider whether to involve the Bar Standards Board.”*

1. Check the DCS file, you may find a form reflecting the above.
2. If the judge intends to follow the LCJ’s guidance there is very little that can or should be said at this stage. If you are in court, you may wish to make the following clear (refer to paragraph 18 of the CBA guidance):
3. You gave prompt notification of your intended action to the court, the parties and your solicitor.
4. Where possible, you took instructions from your lay client in relation to their consent or, if so instructed, to adjourn or not to sit on particular days.
5. You took this decision only after having carefully considered your professional duties and the BSB’s guidance.

4. How the judge proceeds is a matter for them, and if they consider it appropriate to refer the matter to the Senior Presiding Judge’s Office or the Bar Standards Board:

(i) You do not intend to say anything to seek to dissuade the judge from that course, but

(ii) You would however be grateful for confirmation one way or the other so that you can inform the CBA and BMIF.