***Guidance for Criminal Defence Barristers facing prospect of a wasted costs order 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. Whilst criminal judges have a wide discretion, only in rare cases should a judge instigate a wasted costs application. The LCJ has indicated that “it will be a matter for the CPS in each case, to decide whether to make an application for wasted costs”, rather than individual judges.
2. Most CPS prosecutions do not include any instruction to make a wasted costs application against a defence barrister. Should the CPS take a different view and make a wasted costs application they must follow the procedure set out in Rule 45.9 of the Criminal Procedure Rules.
3. Pursuant to Rule 45.9 the CPS would have to show that it has incurred costs as a result of an improper, unreasonable or negligent act or omission by a legal representative.
4. Pursuant to Rule 45.9(4)(a) the CPS must apply **in writing** as soon as practicable after becoming aware of the grounds for the application, and in any event no later than the end of the case. Such application has to be served on the barrister concerned. The application **must** specify (i) the barrister responsible, (ii) the relevant act or omission, (iii) the reasons why that act or omission meets the criteria for making an order, (iv) the amount claimed and (v) those on whom the application has been served.
5. Pursuant to Rule 45.9(6)(b) the respondent barrister should respond to any application for wasted costs “as soon as practicable” but **within 5 days**. Those written representations have to be served on the applicant (the CPS) and the court. Thereafter, the judge will set a timetable for the hearing of the application.
6. Rule 45.9(5) does permit the judge to make an order on their own initiative. This possibility cannot be ruled out although it appears that the LCJ expects any application to be made by the CPS. Even if the Judge is considering making an order on their own initiative it is necessary to specify (i) the relevant act or omission, (ii) the reasons why that act or omission meets the criteria for making an order, (iii) with the help of the CPS the amount claimed. Rule 45.9(5) does not in terms require this to be in writing but, in order to deal with the same, the barrister should request that it be put in writing.
7. Barristers should insist that any application for wasted costs due to non-attendance at court for days of action is put in writing in accordance with the Criminal Procedure Rules and indicate to the court that they will seek representation at any subsequent hearing. Barristers responding to wasted costs applications are entitled to be funded by the BMIF.

***What you should say***

1. As little as possible. This is not the occasion to seek to justify the taking of action.
2. If the CPS is intending to make an application or the judge is considering making an order of their own initiative, the following can be said in an attempt to dissuade the judge from instigating the procedure:
3. If the judge is considering making an order they should be reminded that the LCJ has indicated it should be for the CPS to make an application rather than the judge.
4. Applications for wasted costs instigated by the judge should be confined to matters which are straightforward and obvious. A point you may wish to make to the judge is that in the current exceptional circumstances any application would be far from straightforward or obvious.
5. The judge should be respectfully reminded that it should be left to the CPS to decide whether it seeks compensation – just as the LCJ’s guidance envisages, and that this need not be a matter for the judge.
6. If the CPS make an application, the following brief points should be made:
7. The potential respondent is entitled to be told in writing (i) exactly what the relevant act or omission is said to be, (ii) the reasons why that act or omission meets the criteria for making an order and (iii) the amount claimed.
8. The barrister should make clear that they will want to respond to the written application once the particularised application has been served.
9. The barrister should ask for an extension of time beyond the period of 5 days for the service of any response as the matter will have to be referred to the BMIF and it is likely that any response will be a detailed one given the complexities of the reasons for their non-attendance at court.
10. The court should be informed that there must at least be the possibility that test cases will need to be litigated so as to avoid the same issue being tried by multiple judges in multiple courts all around the country, with the inevitable risk of inconsistent decisions.