***Guidance for Barristers facing prospect of a referral to the BSB due to non-attendance at court due to non-availability***

***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 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 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 and professional clients and obtaining their consent where possible.
3. Currently there is a lack of Counsel to conduct publicly funded criminal work.
4. 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 reason for non-attendance. If the reason for non-attendance is attendance in another publicly funded case which required Counsel, for which there was likely to also be non-attendance then Counsel should carefully consider which case should take priority.
5. 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 lack of availability (solicitors, co-counsel, 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. We suggest that as soon as a clash in commitments is apparent that this should be entered on the DCS.
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 finding themselves unable to attend court due to being engaged elsewhere.

***What you should say***

1. As little as possible. This is not the occasion to seek to justify taking another publicly funded case and being unavailable for a case where you hold the brief.
2. The LCJ said during the Barristers’ action that:

*“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.”*

We will shortly confirm whether this is now the position with respect to non-attendance due to engagement elsewhere.

1. 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):
2. You gave prompt notification of your non-availability to the court, the parties and your solicitor.
3. 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.
4. 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.