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FOIL Scotland Update – Revised FOIL/APIL Agreement

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[FOIL and APIL reach a new agreement on best practice for mutual cooperation during Covid-19](#)

In 2020, early on in the pandemic, FOIL Scotland, APIL and MASS reached agreement on best practice, in response to the problems that had been created for practitioners and their clients. Following further detailed discussions, an amended agreement has now been drafted, a full version of which is set out below. This has moved on substantially from the first agreement.

The new agreement inevitably reflects the steps taken by the courts in Scotland to address the problems created, not least through the increased use of telephone facilities and technology.

Members are encouraged to maintain good communications with their counterparts, by ensuring that, wherever possible, they may be contactable by telephone and/or email. It is also recommended that members agree to serve and accept service of documents by email.

Just as the NHS is turning to remote medical examinations, the agreement recommends that practitioners should consider whether these are feasible in claims, where, by proceeding in this way, it may be possible to maintain existing timetables and resolve claims more efficiently.

Parties should also recognise the difficulties thrown up by the pandemic in regard to timetables and time limits and adopt a reasonable and realistic approach, particularly in relation to service of an Initial Writ or Summons, and the lodging of a Notice of Intention to Defend, or Defences. The previous agreement dealt only with limitation.

A reasonable approach is recommended when considering adjournments, particularly where required due to non-availability of clients, witnesses or experts. Similarly, parties ought to adopt a

reasonable approach to requests for interim payments and avoid the risk of added distress to pursuers. These and other payments should, wherever possible, be made by BACS.

Where a form of authority is required, parties should recognise the difficulties that may be faced in obtaining 'wet' signatures.

Finally, there are updated guidelines for best practice where limitation is an issue.

The New Agreement in full

COVID19 – APIL and FOIL Best Practice for Mutual Co-Operation

As is to be expected, the current COVID-19 crisis is affecting all aspects of commercial and administrative life. As lawyers working in the claims sphere, the current requirements for self-isolation; the non-availability of our own staff, together with our clients, counsel and experts; and restrictions on travel and contact with others, are all creating significant challenges.

We are supportive of the aims of maintaining a functioning court system, to continue to deliver access to justice. It is clear that it will not be possible to continue with 'business as usual' and we welcome the steps that have been taken over the last year to mitigate the problems. The statements of policy from the Court of Session, Sheriff Appeal Court, All-Scotland Personal Injury Court and various Sheriff Courts are appreciated. In particular, we welcome greater use of telephone facilities, the submission of electronic documents, and the use of written submissions, as well as web-ex facilities to allow substantive hearings to proceed and to avoid the need to physically attend court.

The current crisis requires all those involved in civil litigation to take account of the current circumstances in delivering upon the overriding objective.

APIL and FOIL have set up a working party to discuss various aspects of our members' work, which have been affected during the coronavirus outbreak. We have agreed a set of best practices that we recommend their members consider and adopt where possible.

We would like to emphasise that parties and their representatives are expected to behave sensibly in the current crisis and that we would hope that the judiciary will take a dim view of behaviour that seeks to abuse the situation.

• **Telephone calls/Email**

Good communication is very important, particularly now that many offices have closed and are unable to access their post on a daily basis. Practitioners should engage with their counterparts by telephone and/or email with a view to resolving disputes effectively and efficiently. Many members' fee earners are able to make and receive telephone calls even while home working. Email signatures should be updated to indicate the correct contact numbers if they have changed due to remote working. Similarly, individual email addresses should be provided.

- **Service by email, including new proceedings**

It is our view that it is in the best interests of all clients and the effective conduct of claims to agree that firms, where possible, agree to accept service by email.

- **Medical examinations**

It is inevitable in the current circumstances face -to-face examinations will be difficult to arrange. It will often be in the client's best interests to agree to use some form of video conferencing for experts' 'examinations' of the injured person.

The BMA has issued guidance to medics indicating that the NHS is turning to remote consultations in order to minimise the risk of infection for staff and patients. Its guidance for medics is here: <https://www.bma.org.uk/advice-and-support/covid-19/adapting-tocovid/covid-19-video-consultations-and-homeworking>

Inevitably some appointments with experts will have to be postponed or rescheduled. Practitioners should try to adopt a consensual approach to the impact this will have on case timetables.

- **Progression of cases**

Parties should take a consensual approach in relation to time limits, and the progression of cases and not seek to take unfair advantage of a party not complying with a procedural requirement. Particular regard should be had to service of an Initial Writ or Summons, and the lodging of a Notice of Intention to Defend, or Defences.

- **Adjournments**

It is also inevitable that some adjournments will be required due to non- availability of clients, witnesses or experts. We recommend that you take a consensual approach should it be necessary to seek an adjournment of either a procedural hearing or trial.

- **Interim payments**

Parties ought to adopt a reasonable approach to requests for interim payments. In the current climate, interim payments are likely to be of vital importance, and any unnecessary applications to the court ought to be avoided.

- **BACS payments**

To enable a more efficient and effective transfer of funds for damages and costs firms should use BACS payments wherever possible. Note that in light of the increased information security and financial crime risks associated with BACS payments, please ensure that you only make payments by BACS to the account details provided by your COLP, providing appropriate evidence to validate the bank account details provided.

- **Forms of authority**

We recommend that parties should try not to insist on 'wet' signatures on signed forms of authority before the release of damages.

- **Limitation**

Where the effects of the Covid-19 outbreak mean that limitation becomes an urgent issue, then best practice is that, subject to any general deferment of deadlines: to 1. Enter a standstill agreement to extend the limitation period or 2. Raise and serve the proceedings

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