

# GOING PRO: THE ADVANTAGE OF PROFESSIONAL COMMUNICATIONS

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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## I. INTRODUCTION

Insuring that all written communications are professional and accurate is extremely important in the claims handling process. That is particularly true because of the fact it is always likely said communications can and will be obtained by the other side in any litigation which develops. This not only includes litigation of the specific workers' compensation case, but could also include related litigation bearing on bad faith, penalties, or other issues beyond the primary issues in the case. As a result, some preliminary understanding of Illinois discovery rules and those adjuster communications which could be privileged is necessary.

## II. ILLINOIS DISCOVERY RULES AND ADJUSTER COMMUNICATIONS

### A. Broad Discovery Rules in Illinois

### B. Subject to a Few Narrowly Tailored Privileges

#### 1. Attorney/Client Privilege

- Common law doctrine. Purpose is to allow free and frank discussion between the attorney and the client without fear of subsequent compelled disclosure.
- Recognized by courts to be essential to the proper functioning of the adversarial system.
- Extends to agents of the attorney, including paralegals, secretaries, law clerks, stenographers.

#### 2. Insurer/Insured Privilege

- Extension of the attorney/client privilege first recognized in the Illinois Supreme Court case of *People v. Ryan*, 30 Ill. 2d 456 (1964). Essentially the Court recognized the reality of the "tripartite" relationship between insurer, insured, and defense counsel.
- Privilege applies before suit is filed and before defense counsel is retained. Similar to the attorney/client privilege, the insurer/insured privilege is of unlimited duration, even after the resolution of the suit.
- Theoretical underpinning is that the communication between the insurer and the insured is made, "for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured."
- Extends to agents of the insurer such as investigators. Courts have held it is immaterial whether the agent of the insurer is an actual employee of the insurer or an independent contractor.
- Burden is on the entity asserting the privilege to establish:
  - The insured's identity;
  - The insurance carrier's identity;

- The insurance carrier’s duty to defend the insured; and
  - That a communication was made between the insured and the agent of the insurance carrier. *Exline v. Exline*, 277 Ill. App. 3d 10 (2d Dist. 1995).
- The privilege is “strictly confined within its narrowest possible limits.”

### **3. Important Exclusions**

- Only communications that have been made for the dominant purpose of transmitting them to defense counsel to protect the interests of the insured are privileged:

Fifth District appellate case of *Holland v. Schwan’s Home Service, Inc.*, 2013 IL App (5th) 110560 found that the worker’s comp carrier’s claim file was not protected by the privilege. The court found that the communications between the insurer and insured employees regarding plaintiff’s claims and alleged injuries was done for the purpose of adjusting the claim, had nothing to do with preparing to deliver them for the purpose of legal advice.

- Waiver – the insured can expressly or impliedly waive the privilege at any time. Plaintiffs have argued that asserting certain defenses constitutes implied waiver.
- No privilege for work product from non-attorneys
- Communications disclosed to persons outside of the defense team
- Coverage and bad faith claims the presumption is the claims file will be discoverable
- Adjuster is working for more than one insured

#### **A. Practice Tips**

- Bring the attorney into the loop as early as possible
- Exclude persons from communications who may destroy the privilege
- Coordination of the defense team – identify early on if there is a document where it would be of strategic importance to claim a privilege.
- Other objections to production of the claims file exist beyond privilege such as relevance and hearsay.
- Assume the claims file will be produced in discovery.
  - The insurer-insured privilege is a narrow exception, not the rule.
  - Always be professional in entries made to the claim file.

### **III. PRACTICE POINTERS REGARDING KEEPING COMMUNICATIONS PROFESSIONAL**

Given that most communications produced in the regular handling of a claims file could become producible at some point, it is important to insure that all written communications are professional, accurate, and in a form which assumes it will ultimately be in the hands of the opposing party. As a result, there are a number of practice pointers to consider in conjunction with maintaining a professional and accurate written claims file:

- When in doubt, choose professional over casual.
- Think of your communication as a letter rather than an email or text.
- Don't text.
- Stay away from texting type abbreviations.
- Think twice on, sleep on, and ultimately refrain from sending all poison pen letters.
- Consider the balance between an immediate response, and a slower but longer, more analytical response.
- Remember the value of a phone call.
- Remember the value of a face-to-face meeting.
- Save/document all communication.



## Craig S. Young

- Partner

Craig is past Chair of the firm's workers' compensation practice group. Craig began his career at Heyl Royster as a summer clerk while in law school and became an associate in the firm's Peoria office in 1985. He has spent his entire career with Heyl Royster and became a partner in 1992. He is recognized as a leading workers' compensation defense lawyer in the state of Illinois and has handled all aspects of Illinois workers' compensation litigation including arbitrations, reviews, and appeals. He has developed expertise in the application of workers' compensation to certain industries including hospitals, trucking companies, municipalities, large manufacturers, school districts, and universities.

In addition to his expertise in litigated cases, Craig has developed a reputation for counseling employers regarding overall management of the workers' compensation risk. Through seminars and presentations to local and national industry groups, in-house meetings, regular claims review analysis, and day-to-day legal counsel, Craig assists his clients in looking beyond each individual case in an effort to reduce overall workers' compensation expense. His comprehensive approach to workers' compensation issues also includes third-party liability and lien recovery issues.

Currently, Craig is the immediate past chair of the workers' compensation committee of the Defense Research Institute. He has also chaired DRI's Program Committee, and in that role, chaired nationally acclaimed teleconferences and seminars on specific issues relating to workers' compensation defense. He has been designated as one of the "Leading Lawyers" in Illinois as a result of a survey of Illinois attorneys conducted by the *Chicago Daily Law Bulletin*. Craig is actively involved in supporting many local charitable organization and civic causes. He was the 2008 recipient of the Peoria County Bar Association's Distinguished Community Service Award.

### Publications

- "Recent Advances of the Traveling Employee Doctrine," *For the Defense* (2014)

### Public Speaking

- "*Retaliation in the Workplace: State and Federal Claims*"  
Heyl Royster Employers' Day Seminar (2016)
- "*Temporary Transitional Employment*"  
Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- "*Employee Victims of Workplace Violence: New Perspectives on Exposure and Defenses*"  
Heyl Royster's 30th Annual Claims Handling Seminar (2015)
- "*Effective Strategies for Defending Traveling Employee Claims*"  
Heyl Royster 29th Annual Claims Handling Seminar (2014)
- "*Workers' Compensation Reform in Illinois*"  
Presented in numerous locations (2012)
- "*Elements of a Winning Workers' Compensation Program*"  
Downstate Illinois Occupational Safety & Health Day (2010)
- "*Family Medical Leave Act (FMLA); Americans with Disabilities Act (ADA); and Workers' Compensation*"  
Risk Control Workshop (2010)
- "*Medical Science, Industrial Commission Science - Understanding the Industrial Commission's Approach to Medical Issues*"  
Lorman Education Services (2008)
- "*The Employee Who Can't Return to Work: Wage Differentials, Vocational Rehabilitation & Job Placement*"  
Lorman Education Services (2008)
- "*Medicare Set-Aside Agreements-The Rest of the Story*"  
Defense Research Institute (2007)
- "*Resolving (or Alleviating) the Chronic Pain Case*"  
Heyl, Royster, Voelker & Allen (2007)
- "*Definition, Statutory Employers, Self-Insureds, Insurance Non-Compliance and the Stop-Work Order: Sections 1, 3 and 4*"  
Heyl, Royster, Voelker & Allen (2006)
- "*Workers' Compensation and Illegal Aliens*"  
Defense Research Institute (2006)

- *"The Employee Who Can't Return to Work: Wage Differentials, Vocational Rehabilitation and Job Placement"*  
Lorman Education Services (2006)
- *"Medical Science, Industrial Commission Science - Understanding the Industrial Commission's Approach to Medical Issues"*  
Lorman Education Services (2006)

#### **Professional Recognition**

- Martindale-Hubbell AV Preeminent
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*.
- Peoria County Bar Association 2008 Distinguished Community Service Award

#### **Professional Associations**

- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association (Immediate Past President)
- Defense Research Institute (Past Chair, National Workers' Compensation Committee)

#### **Court Admissions**

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

#### **Education**

- Juris Doctor, University of Illinois, 1985
- Bachelor of Arts-History (*summa cum laude*), Bradley University, 1982



## Andrew J. Roth

- Partner

Andy's practice is focused on defending toxic tort and asbestos cases, and healthcare professionals in both medical malpractice litigation and federal civil rights lawsuits. Licensed in Illinois and Wisconsin, Andy also has a wide range of experience defending civil cases involving premises, auto and product liability, trucking, construction, dramshop, and insurance coverage.

Andy has tried a number of cases involving medical malpractice, personal injury, and contractual disputes. He has also represented clients in alternative dispute resolution, including mediations, settlement conferences, and arbitrations. He has deposed countless plaintiffs, experts, treating physicians, co-defendants, and witnesses.

Andy graduated *magna cum laude* from Northern Illinois University College of Law in 2003, and served as an associate editor on the school's *Law Review*. Andy began his career at Heyl Royster by clerking in the firm's Rockford office.

### Significant Cases

- Represented defendant cardiothoracic surgeon at jury trial in the defense of allegations that defendant doctor improperly operated on the wrong vessel during a coronary artery bypass surgery (CABG). Plaintiff, who had a prior history of CABG presented with unstable angina, and an angiogram showed a clogged obtuse marginal vessel (OM). Defendant doctor recommended CABG. A post-surgery angiogram showed that the bypass graft was on the left internal mammary artery as opposed to the intended OM. An additional surgery then proceeded placing a stent in the OM, resulting in plaintiff having little if any coronary symptoms at the time of trial. Plaintiff claimed the doctor bypassed the wrong vessel and that he was therefore required to undergo an additional surgery, that his damages included additional morbidity and mortality. The defense argued that significant scar tissue existed on the second CABG that obscured the features and vessels in the heart. The jury returned a verdict for defense on all counts.
- Defended pain management doctor at jury trial against claims that the doctor improperly utilized a brachial plexus injection that pierced the plaintiff's long thoracic nerve, allegedly resulting in a deformity known as a "winged scapula." Plaintiff presented to defendant doctor with a serious condition known as Reflex Sympathetic Dystrophy Syndrome (RSD). Plaintiff's theory was that when defendant doctor treated the plaintiff with brachial plexus injections, he inadvertently pierced her long thoracic nerve causing permanent injury, including a winged scapula. The defense argued that the treatment resolved the plaintiff's limb threatening RSD symptoms, and it was physically impossible for the brachial plexus needle to pierce the long thoracic nerve as alleged by plaintiff. The jury returned a verdict for defense on all counts.
- *Certain Underwriters at Lloyd's London v. Central Mutual Insurance*, 2014 IL App (1st) 133145 (2014) - Representation of Central Mutual Insurance Company (Central) and its insured (Subcontractor) in a case in which the general contractor (Builder) and its insurer, Certain Underwriters at Lloyd's London (Underwriters) claimed that Central should have been the primary insurer in regard to coverage for severe personal injuries that allegedly occurred to a worker at a home construction site. The dispute arose because, although the subcontractor was contractually obligated to maintain insurance for the builder, the subcontractor agreement was silent as to whether this additional coverage was to be primary or excess. At the trial court level, the firm succeeded in getting Underwriter's declaratory action dismissed on motion for summary judgment, and Underwriters appealed. On appeal, the first district agreed with the firm in holding that Central's insurance would be considered excess and there would be no duty to defend or indemnify unless the primary limits were exceeded.



**Public Speaking**

- “*New Cases, New Issues?*”  
Heyl Royster’s 31st Annual Claims Handling Seminar (2016)
- “*Recent Developments in Premises Liability*”  
Heyl Royster’s 30th Annual Claims Handling Seminar (2015)

**Professional Associations**

- Illinois State Bar Association
- Illinois Association of Defense Trial Counsel
- Defense Research Institute
- Winnebago County Bar Association
- Wisconsin State Bar Association
- Chicago Bar Association

**Court Admissions**

- State Courts of Illinois
- State Courts of Wisconsin
- United States District Court, Northern District of Illinois
- United States District Court, Eastern District of Wisconsin
- United States District Court, Western District of Wisconsin

**Education**

- Juris Doctor, Northern Illinois University College of Law (*magna cum laude*), 2003
- Bachelor of Science-Psychology, Western Illinois University, 1996