

# BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

HEYL ROYSTER

*A Newsletter for Employers and Claims Professionals*

*August 2012*

## A WORD FROM THE PRACTICE GROUP CHAIR



With summer coming to an end and a busy fall on the horizon we want to take a moment to reflect on the past year. Most of the amendments from the 2011 legislation have now been in place for a full year and we are just beginning to see a handful of arbitration decisions reaching the Commission and circuit court levels. We are hoping that the next twelve months see some level of appellate activity concerning the various amendments, in particular those introducing AMA ratings and the modified medical review provisions. We will continue to monitor decisions from the Commission and appellate court and will report to you as the law evolves.

In this month's issue, Toney Tomaso of our Urbana office takes an in-depth look at handling pro se settlement contracts and offers a variety of practice tips and a helpful checklist to ensure the approval process moves forward as expeditiously as possible.

On page six, we also pass along our insights into recent Commission efforts to accelerate the disposition of the Commission's "red line" docket. We have already seen some arbitrators taking these changes seriously, which should be of help as we attempt to resolve your claims promptly and successfully while they are still below the red line. If there are questions on any of the issues raised in this edition, please do not hesitate to contact us.

Craig S. Young  
Chair, WC Practice Group  
cyoung@heyloyster.com

*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.*

Please visit our website and see our updated newsletter index, which lists the four most recent newsletter editions and then takes you to our Past Editions page, where we have referenced each issue by subject matter. We hope this new format will help you more easily locate past articles concerning topics that impact your claims handling.

## THIS MONTH'S AUTHOR:

**Toney Tomaso** is a partner in the Urbana office who concentrates his practice in the areas of workers' compensation, third-party defense of employers, asbestos class action litigation, insurance coverage issues and automobile liability claims.



Toney has successfully defended hundreds of workers' compensation claims before various arbitrators throughout the State of Illinois, as well as before all three panels of the Illinois Workers' Compensation Commission.

Toney was a member of a three attorney trial team which handled a class action lawsuit arising out of a medical malpractice class action which lasted approximately eight weeks in East Central Illinois. During the course of this litigation, he was required to depose approximately one-half of the class, prepare defense experts, and participate in all phases of the eight-week trial.

## CHECKLIST FOR PRO SE SETTLEMENT CONTRACTS

*The typical settlement scenario:* you have finally convinced the *pro se* claimant to accept the reasonable settlement figure you have offered and they have agreed to your proposed amount. You are now charged with the task of putting together the file so that it can be forwarded to counsel for purposes of drafting the *pro se* settlement contracts and arranging a meeting between the defense attorney and the *pro se* petitioner. Following that meeting, the attorney and the *pro se* petitioner will appear and present the proposed contracts for approval.

In this article, we provide you with a checklist to ensure that all elements of the settlement process have been covered and the *pro se* settlement can proceed without problem.

### The Forms

The latest settlement contract forms are available online from the Illinois Workers' Compensation Commission website at [www.iwcc.il.gov](http://www.iwcc.il.gov). On the left hand margin of the IWCC home page, you will see listed under IWCC links the "FORMS" directory. Simply click into it and scroll down until you find "CASE MANAGEMENT FORMS," then go to form "IC 05" which is the settlement contract (this is available in both Word and Adobe/PDF formats). This article will be based upon the latest revision of the settlement contract form provided by the IWCC (May 2012). It would be our recommendation that every three to six months you return to the website to identify whether or not the forms have been updated, and whether you need to provide any additional information to your defense attorney in order to streamline activities and be more efficient and effective in your handling of *pro se* workers' compensation settlement files.

### Settlement Contracts Must Have a Number

In 2011 a new rule went into effect providing that *pro se* settlements need to be filed with the IWCC in order to obtain an IWCC case number. Prior to 2011 you could simply proceed without an IWCC case number. Arbitrators and Commissioners are no longer allowed to practice in this manner, but rather must insist upon seeing

an IWCC case number on the proposed settlement contract before they will even considering reviewing same. Please note the Arbitrators are all equipped with laptops which have on-line access. When they do meet your *pro se* petitioner and review the settlement contract, their first instruction is to pull up the IWCC case number and make sure it is attached to the correct case and they have the correct *pro se* petitioner before them. If they do not, they will not go forward with any settlement procedures.

A defense attorney's first task is to get the *pro se* case filed with the Commission in order to secure an IWCC case number. Without a case number on the proposed settlement contract, you cannot proceed. Thus, if your assignment to counsel is just a day or two before a proposed docket, we will need to have the file information as quickly as possible so we can physically go to the Commission offices in Chicago and obtain the case number. Heyl Royster has an office in Chicago and we can get this done on an expedited basis.

### Venue for Approval

The case will be assigned to a venue and an Arbitrator. Each zone for cases is assigned to a team of three Arbitrators (typically). Given this arrangement, you will not know until the formal assignment is made which arbitrator will be handling your *pro se* file. The Commission has indicated once the IWCC filing has been made the *pro se* settlement can proceed before an arbitrator who is *not* officially assigned to the case. This practice effectuated settlement and moves them forward without the need to wait two or three additional months until the assigned Arbitrator is in the venue closest to the injured worker. Therefore, using the example of a *pro se* petitioner being injured in Urbana, Illinois, once the IWCC filing has been made, the *pro se* contracts will need to be approved in Urbana; however, any of the three Urbana Arbitrators are eligible to review and approve the settlement contracts.

### The Checklist

Let's turn our attention to the checklist which will help guide claims professionals and risk managers in collecting the appropriate information for drafting the settlement contract.

1. Identify whether this is a Workers' Compensation Act claim or an Occupational Diseases Act claim. 820 ILCS 305/1 *et al*; 820 ILCS 810/1 *et al*.

2. Is this a fatal/death case, or not? If it is, identify the date of death.

3. Identify the name of the claimant and respondent (ensure the correct spelling). Once defense counsel obtains the required information, we will insert the IWCC case number, and proper setting/venue into the proposed contracts.

4. The petitioner's name at the time of the accident (it may be different if the petitioner is a woman and was married after the fact), and their current home address (this is important because you want to be able to confirm when you meet with the *pro se* petitioner where to send the settlement check).

5. Employer's address (this can either be the home office or corporate location, or the specific location where the petitioner was working at the time of the accident).

6. Is the petitioner a State of Illinois employee?

7. Male/female?

8. Married/single? If divorced, they will fall in the category of single.

9. Number of dependent children under the age of 18 at the time of the injury.

10. Birth date.

11. Social Security Numbers? As of 2011, there can be no references to social security numbers on any settlement contract. You no longer need to include this information in the forms, and as a matter of fact, if you do place a social security number in the forms (even if it is just the last four digits), the Commission is instructed not to approve or accept the settlement contracts until the numbers are omitted and extracted completely.

12. Average weekly wage. The Arbitrators and Commissioners are turning their focus on this issue and are making sure the *pro se* petitioner agrees it fairly represents what they were earning.

13. Date of accident(s). You may include multiple ac-

cident dates on one *pro se* settlement contract. There is not a limit, but if necessary, you can do multiple contracts in order keep the settlement language clear and concise.

14. A description of how the accident occurred. This needs to be short and concise but sufficient information needs to be provided to adequately describe the incident to the Arbitrator/Commissioner.

15. Identify the affected part (or parts) of the body. Again, if there are multiple accident dates, you need to identify each and every body part which was adversely affected and made part of this settlement. Please note this can be used in a "catch all" manner, such as when you use person as a whole, body as a whole, or man as a whole.

16. Identify the nature of the injury in question. It is best to get good descriptions of the injury or injuries involved, including whether or not surgery was conducted (including the type of procedure) so that you can specifically identify the subject matter which is included in this settlement when it comes to the injury or injuries involved. Please note, some Arbitrators will accept "catch all" phrases such as "as well as any and all other injuries, disabilities and disfigurements" as part of this aspect of the settlement contract. If you can achieve a settlement while including this additional phrase, then it would be our recommendation to do so as we use it regularly in our forms in order to cover as many unknown elements of a settlement as possible.

17. You need to identify whether the respondent/employer was notified of the accident (by the petitioner) either orally or in writing. It may be both.

18. Identify the petitioner's return to work date. This is typically one date only. You may have circumstances where the petitioner went back to work, was taken off work, and repeated this process several times before he was at maximum medical improvement. In these circumstances, identify the last date upon which the injured worker returned to work, and remained at work, after being declared at maximum medical improvement.

19. Identify the location of the accident by specific

city and state where the incident occurred. If it was a repetitive trauma claim wherein a specific trauma cannot be identified, then it is sufficient to identify a location where the injured worker was conducting his repetitive duties at or around the time sequence in question which would be listed under the date of accident section of that same settlement contract.

20. Identify whether or not the employee returned to his regular job with the employer. If they did not, you will need to provide an explanation as to why this did not take place. Again, this is a factual piece of information which needs to be passed along to the Arbitrator or Commissioner; therefore, it must be addressed with some level of specificity. In the "explanation section" included in the form, it asks for an explanation and description of where the petitioner is currently working, the wages he is earning, and the name and address of the new employer for which the injured employee is currently working.

21. Temporary total disability benefits need to be identified based upon the number of weeks, and parts thereof, for which benefits were paid, along with a confirmation of the TTD rate. Please note, the Arbitrators and Commissioners will calculate, based upon the average weekly wage you have set forth in the settlement contract, the correct TTD rate. If you do not have consistent figures based upon two-thirds of the average weekly wage, then the arbitrator will quickly point out to the *pro se* petitioner they are owed past due TTD underpayments if indeed the TTD rate was not paid out at the correct rate. Therefore, you need to make sure your calculations are accurate and correct. Arbitrators have become more and more focused on these settlement contracts to make sure they are correct, with no errors, and giving no deference to the attorneys who prepare them. The Arbitrators have taken it upon themselves to be very thorough in comparison to what the practice was like years ago. You will also need to identify the time periods when TTD benefits were paid. If there are multiple time sequences, then all time sequences need to be accounted for and will be listed in the settlement contracts. These comments apply equally temporary partial disability (TPD) benefits.

22. Medical expenses. You need to identify whether the employer has or has not paid all medical bills, and if any bills remain unpaid, they are to be listed on the face of the settlement contract or in an attached addendum if there is insufficient space to place that list of unpaid bills on the actual settlement contracts themselves.

***Please be aware, if the box is checked on the first page of a settlement contract that the employer has paid all medical expenses, that aspect of the settlement will trump any additional language noted on the second page of the settlement contract listed under the "terms of settlement" section or any subsequent settlement page, addendum or rider, which seeks to explain the settlement agreement between the parties, insofar as the respondent has a limited obligation as it pertains to payment of medical expenses.***

Therefore, it is very important to note that if any portion of your *pro se* settlement represents the fact certain medical expenses will *not* be paid by respondent, then on the first page of the settlement contract, you must have the box checked "has not" paid all applicable medical bills under the medical expenses section. This is a very important facet of any disputed settlement as to the medical aspect of a *pro se* case.

23. Previous Agreements. If this is your typical *pro se* settlement, you will probably not need to worry too much about this section. However, there are always exceptions to the rule and this portion of the settlement will come into play if an Arbitrator or Commissioner previously issued an award in regards to the injured employee's case. Under those circumstances, you will need to include information concerning when the award was made by the Arbitrator or Commissioner, specific monetary values as they pertain to those awards and relate to temporary total disability, permanent partial disability, medical expenses, and other (such as penalties, attorneys' fees, or anything that would have a monetary value attached to it). If you need assistance in regards to this aspect of the settlement, please contact us for assistance. This section also addresses whether or not you offered to an injured worker, a settlement amount in writing before they were represented by



an attorney. Again, the previous agreements section typically deals with circumstances that take you above and beyond a *pro se* situation.

24. Terms of settlement. The terms of settlement section is what your attorney will need to draft and complete in order to encompass all elements of the settlement, *pro se* or otherwise, and the expertise of your attorney really comes into play here. Your recitation of the terms of settlement will need to be explained to the attorney, and it will be counsel's responsibility to translate that information into the applicable and necessary terms of settlement.

However, there are some issues you will need to address so that you can provide the information necessary to complete a successful settlement contract. You will need to determine the injured employee's Medicare status – has he applied for benefits, been denied benefits, or is currently receiving Medicare benefits. Is the injured worker receiving Social Security disability benefits? Has he applied for the benefits or been denied the benefits? You will need to confirm the age of the injured worker, along with whether or not they are suffering from renal failure or Lou Gehrig's Disease. All of these elements will play a role in whether or not Medicare has an interest in this case. Even if Medicare does not have an interest in this case, the appropriate language still needs to be recited in the terms of settlement by your attorney in order to cover this aspect of any settlement. You will need to confirm all medical benefits are being closed as part of this settlement (if applicable). You will need to identify whether or not any portion of this settlement amount is going to be structured (versus a lump sum). The terms of the structure and any proposed annuity language will need to be included in the "terms of settlement." This information will need to be shared with counsel. You will also need to identify the percentage loss of use of a body part, or person as a whole, which was reached between yourself and the injured worker as the basis for this *pro se* settlement. If there are multiple body parts, then a percentage loss of use of each one of those body parts

needs to be accounted for as part of the settlement. If the *pro se* settlement is not based upon a percentage loss of use of a body part, or a person as a whole, then the factual information needs to be shared with your attorney if the settlement is going to be based upon a wage differential claim or a permanent total disability claim, wherein you will need to provide information regarding their prior hourly earnings, the current job they are taking (or allegedly will be taking) in comparison to the prior job for purposes of conducting a wage differential analysis, or in the case of a permanent total disability claim, we will need to identify the actual rate of disability. This information will need to be provided to your attorney so that the correct calculations can be made, because the arbitrator or commissioner will be reviewing your mathematical calculations in order to assure the *pro se* petitioner is receiving the correct amount in this settlement.

25. You will need to explain to the *pro se* worker that the proposed settlement will close out their rights as it pertains to this accident (or accidents). They would forfeit the right to a trial or an appeal, and this would preclude them, once the settlement has been finalized, from obtaining additional medical care and treatment relating to this body part (or multiple body parts) which would be paid for by their employer and which "arises out of" the accident in question. Lastly, this injured worker will need to realize they would forfeit their right to any additional benefits if their condition worsens as a result of this injury. All four of these elements will be important factors to explain to the *pro se* individual because it is exactly what the arbitrator or commissioner will identify and discuss with them at the time of approval.

26. The petitioner's medical records must be attached. What is necessary? It is best to send anything you have and let your defense attorney decide. Generally, it is best to attach an initial treatment record from around the accident date, pertinent treatment records such as surgery/operative reports, and most

**VISIT OUR WEBSITE AT [WWW.HEYLROYSTER.COM](http://WWW.HEYLROYSTER.COM)**

importantly, the essential “release” report. If there is not medical evidence of a formal release, there is a good chance the contract may not be approved.

## Insight on New Arbitrators

Lately, as noted above, the Arbitrators have spent a great deal more time discussing the proposed settlement contracts with the *pro se* petitioners and explaining the potential outcomes and repercussions if they sign and ultimately have the contracts approved. For example, most Arbitrators are telling *pro se* petitioners that if they settle their case, they are inquiring as to whether or not the *pro se* petitioner has group health medical plans/coverage. If they do not, the Arbitrators and Commissioners are explaining that after the settlement is achieved, any additional care and treatment would have to come out of their own pocket as far as expenses for medical. In the cases where the *pro se* petitioner does have group health coverage, the Arbitrators and Commissioners are still noting that their medical plans could balk at providing coverage since it is a pre-existing condition. They are taking an extraordinarily conservative approach and making sure that the eyes of the *pro se* petitioner are wide open when it comes to all elements of agreeing to this settlement and ultimately having it approved by the Arbitrator or Commissioner.

With the proper information, the attorney handling this case on your behalf will be able to expedite and move this matter forward correctly and efficiently. This in turn will allow you to process a *pro se* file quickly so that your *pro se* petitioner does not change their mind about settlement. Moreover, it will keep your costs/expenses down since you would have done a great deal of the necessary leg work in putting together all appropriate information so that the attorney can then take that outline and transfer it into a *pro se* settlement contract format quickly and efficiently.

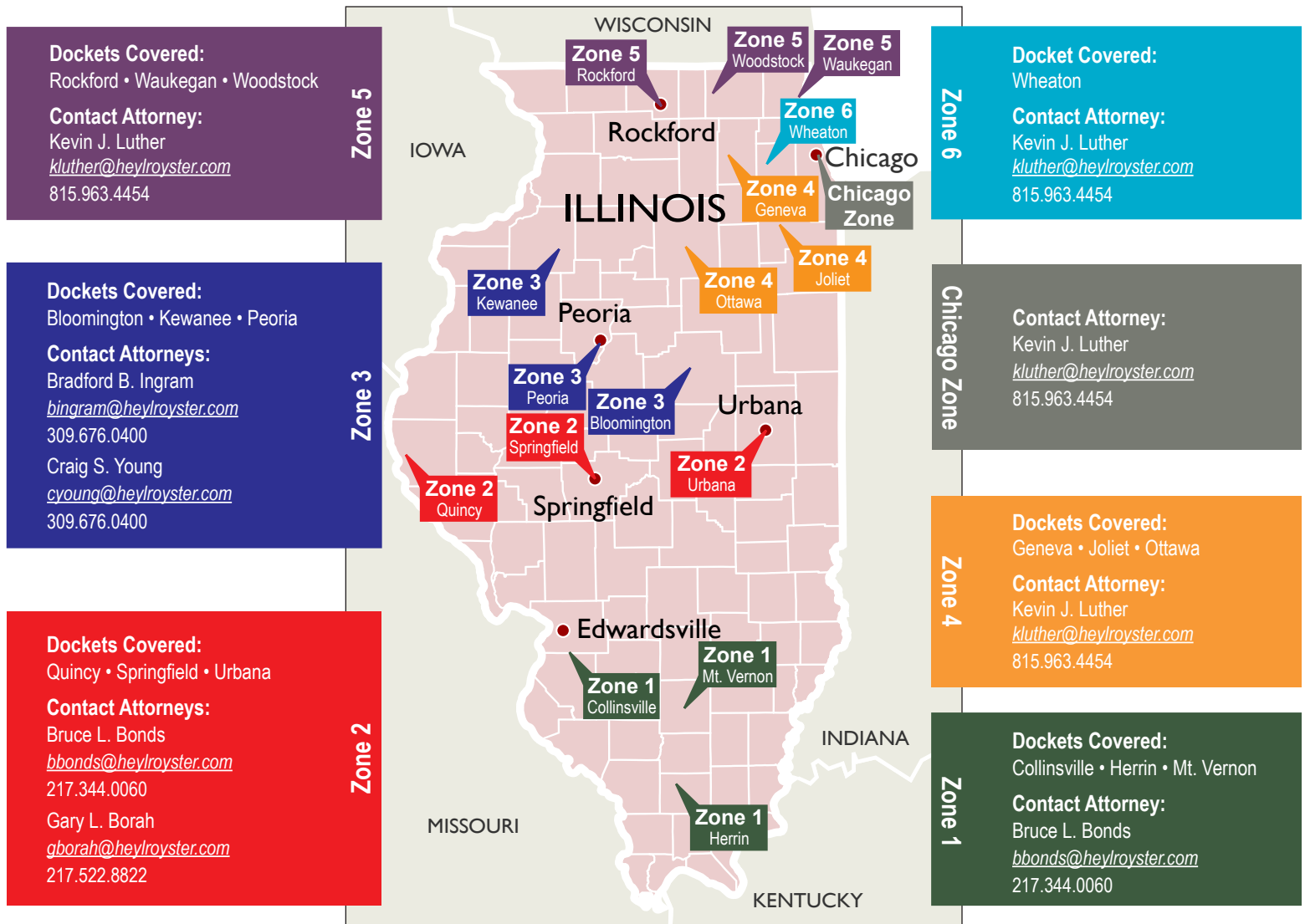
We look forward to any new *pro se* file assignments and stand ready to take care of your needs in order to process these matters on your behalf.

On August 2, 2012, Arbitrator Robert Falcioni of the Joliet Docket Call passed along a message courtesy of Chairman Mitch Weisz. The Chairman, at certain dockets, would like the Arbitrator's focus on the resolving the ever-expanding Red Line docket in order to reduce the number of such cases. While each Arbitrator has the discretion to do what he/she needs to do to make that happen, these are some actions which are set to begin as of September 1, 2012:

1. No Red Line cases on the first two pages of the call (first 25 to 35 cases typically) will be continued for any reason. No matter what, a Status Conference/Settlement Conference will need to be set. Both attorneys will need to appear in order to explain the latest update on the file, and Respondent's counsel is to bring any and all settlement authority he/she has because the hearing will also be treated as a Settlement Conference. This will happen without exception.
2. Petitions to Reinstate will not be granted unless a full Status Hearing/trial setting takes place. Even if the parties agree to the Petition, the Arbitrator will not simply sign it. Counsel will need to appear at one of the trial setting dates and provide a detailed history of the case and then the Arbitrator will make a decision regarding reinstatement.
3. All possible options are being considered to resolve this problem and the Commission will entertain any proposals made on this point.

# Workers' Compensation Zone Coverage & Contact Attorneys

Heyl, Royster, Voelker & Allen



## Missouri Workers' Compensation Coverage

### Contact Attorney:

James A. Telthorst - [jtelthorst@heyloyster.com](mailto:jtelthorst@heyloyster.com)

HEYL...  
ROYSTER

## Statewide Appellate

### Contact Attorney:

Brad A. Elward - [belward@heyloyster.com](mailto:belward@heyloyster.com)

## Office Locations

### Peoria

Suite 600  
124 SW Adams St.  
Peoria, IL 61602  
309.676.0400

### Springfield

Suite 575  
1 N. Old State  
Capitol Plaza  
PO Box 1687  
Springfield, IL 62705  
217.522.8822

### Urbana

102 E. Main St.  
Suite 300  
PO Box 129  
Urbana, IL 61803  
217.344.0060

### Rockford

Second Floor  
120 W. State St.  
PO Box 1288  
Rockford, IL 61105  
815.963.4454

### Edwardsville

Mark Twain Plaza III  
Suite 100  
105 W. Vandalia St.  
PO Box 467  
Edwardsville, IL 62025  
618.656.4646

### Chicago

Theater District  
Business Center  
60 W. Randolph St.  
Suite 220  
Chicago, IL 60601  
312.762.9237



**Appellate Advocacy**

Craig Unrath  
[cunrath@heyloyster.com](mailto:cunrath@heyloyster.com)



**Business and Commercial Litigation**

Tim Bertschy  
[tbertschy@heyloyster.com](mailto:tbertschy@heyloyster.com)



**Business and Corporate Organizations**

Deb Stegall  
[dstegall@heyloyster.com](mailto:dstegall@heyloyster.com)



**Civil Rights Litigation/Section 1983**

Theresa Powell  
[tpowell@heyloyster.com](mailto:tpowell@heyloyster.com)



**Class Actions/Mass Tort**

Patrick Cloud  
[pcloud@heyloyster.com](mailto:pcloud@heyloyster.com)



**Construction**

Mark McClenathan  
[mmcclenathan@heyloyster.com](mailto:mmcclenathan@heyloyster.com)



**Employment & Labor**

Tamara Hackmann  
[thackmann@heyloyster.com](mailto:thackmann@heyloyster.com)



**Insurance Coverage**

Patrick Cloud  
[pcloud@heyloyster.com](mailto:pcloud@heyloyster.com)



**Liquor Liability/Dramshop**

Nick Bertschy  
[nbertschy@heyloyster.com](mailto:nbertschy@heyloyster.com)



**Long Term Care/Nursing Homes**

Jana Brady  
[jbrady@heyloyster.com](mailto:jbrady@heyloyster.com)



**Mediation Services/Alternative Dispute Resolution**

Brad Ingram  
[bingram@heyloyster.com](mailto:bingram@heyloyster.com)



**Product Liability**

Rex Linder  
[rlinder@heyloyster.com](mailto:rlinder@heyloyster.com)



**Professional Liability**

Renee Monfort  
[rmonfort@heyloyster.com](mailto:rmonfort@heyloyster.com)



**Property**

Dave Perkins  
[dperkins@heyloyster.com](mailto:dperkins@heyloyster.com)



**Railroad Litigation**

Steve Heine  
[sheine@heyloyster.com](mailto:sheine@heyloyster.com)



**Tort Litigation**

Gary Nelson  
[gnelson@heyloyster.com](mailto:gnelson@heyloyster.com)



**Toxic Torts & Asbestos**

Lisa LaConte  
[llaconte@heyloyster.com](mailto:llaconte@heyloyster.com)



**Truck/Motor Carrier Litigation**

Matt Hefflefinger  
[mhefflefinger@heyloyster.com](mailto:mhefflefinger@heyloyster.com)



**Workers' Compensation**

Craig Young  
[cyoung@heyloyster.com](mailto:cyoung@heyloyster.com)



Scan this QR Code  
for more information about  
our practice groups and attorneys

**Peoria**  
Suite 600,  
Chase Building  
124 S.W. Adams Street  
Peoria, IL 61602  
309.676.0400

**Springfield**  
Suite 575,  
PNC Bank Building  
1 North Old State Capitol  
Plaza  
PO Box 1687  
Springfield, IL 62701  
217.522.8822

**Urbana**  
Suite 300  
102 E. Main Street  
PO Box 129  
Urbana, IL 61803  
217.344.0060

**Rockford**  
2nd Floor,  
PNC Bank Building  
120 West State St.  
PO Box 1288  
Rockford, IL 61105  
815.963.4454

**Edwardsville**  
Suite 100, Mark Twain  
Plaza III  
105 West Vandalia Street  
PO Box 467  
Edwardsville, IL 62025  
618.656.4646

**Chicago**  
Theater District  
Business Center  
60 W. Randolph St.  
Suite 220  
Chicago, IL 60601  
312.762.9237