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PROMOTING PROFESSIONALISM AND CIVILITY IN THE WORKERS' COMPENSATION PRACTICE

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I. INTRODUCTION

The work of a Pennsylvania workers' compensation practitioner requires the ability to handle a number of matters throughout a fairly large geographic region while mastering a variety of highly technical statutes, rules and regulations as well as vast universe of medical issues and concepts.

The practitioner is also confronted with the harsh reality that the workers' compensation litigation is a means to an end – it is a professional endeavor – it is the way he or she earns a living.

Over the years the political climate impacting the system has in some respects gauged the success of workers' compensation administration by the speed in which litigated claims are either adjudicated or resolved.

At the same time, the individuals charged with adjudicating workers' compensation disputes, the Workers' Compensation Judges are not only responsible for performing the normal role of judicial tribunals – ruling on objections, making evidentiary rulings, assessing witness credibility - but are also charged with expediting the disposition of a large assignment

of petitions in accordance with the terms of the Act, its Rules and Regulations and the official and perhaps unofficial policies of the Office of Adjudication.

Of course, all of the participants in the Pennsylvania workers' compensation system require time to develop, investigate, digest and ultimately present to the tribunal the relevant facts and applicable law.

They also have families and non-work-related responsibilities that occupy much of their time.

And, they require a full opportunity to simply decompress as they seek to navigate what is a technical, high volume and competitive business.

This presentation seeks to highlight all of the above while encouraging the participants in the system to be ever mindful of the concerns, schedules and personal lives of the lawyers, legal assistants and judges who allow the system to operate.

II. A REQUEST FOR AN EXTENSION OF TIME

Included in the materials below is a letter that I forwarded to a Workers' Compensation Judge last spring requesting an extension of time to file a Brief and Proposed Findings of Fact and Conclusions of Law, addressing a Review/Reinstatement/Penalty Petition prosecuted by an injured worker.

The circumstances surrounding the submission of the letter will hopefully prompt discussion of the subject matter of this presentation.

III. EFFORTS TO EXPEDITE THE DISPOSITION OF WORKERS' COMPENSATION LITIGATION

The incorporation of the Special Rules of Administrative Practice and Procedure before Judges represented a collective effort on the part of the Bureau of Workers' Compensation and

the Bar to promote uniformity in the litigation process and to promote expeditious dispositions of litigated claims.

Most recently, by Act 147 of 2007 the Pennsylvania Legislature promulgated Section 401.1 of the Act, which instructs as follows:

> "Sec 401.1 The department shall, in fulfillment of its responsibilities under this act, enforce the time standards and other performance standards herein provided for the prompt processing of injury cases and payment of compensation when due by employers and insurers both upon petition by a party or on its own motion. In any case in which compensation has not been timely paid, or in which notice of denial of compensation has been given, the department shall hear and determine all claim petitions for compensation filed by employes or their dependents. The department shall also hear and determine all petitions by employers or insurers to suspend, terminate, reduce or otherwise modify compensation payments, awards, or agreements and petitions by employes or their dependents to increase, modify or reinstate compensation payments, awards, or agreements. **Hearings shall be scheduled forthwith upon receipt of the claim petition or other petition, as the case may be, and determinations thereon shall be made promptly and in conformity with time standards herein or hereunder established.** Such hearings shall be conducted by a workers' compensation judge or other hearing officer designated by the secretary. (emphasis supplied)
>
> **Each workers' compensation judge assigned to conduct hearings shall set forth a mandatory trial schedule at the first hearing.** This trial schedule shall include specific deadlines for the presentation of evidence by the parties and dates for future hearings**. Judges shall strictly enforce their schedules, and no party will be excused from honoring the schedule absent good cause shown**. Every trial schedule shall include a specific date and time for a mediation conference. Mediations shall take place no later than thirty (30) days prior to the date set for filing proposed findings of fact and conclusions of law or legal briefs or memoranda unless, upon good cause shown, the workers' compensation judge determines mediation would be futile. Within one hundred twenty (120) days of the effective date of this paragraph, the Office of Adjudication shall create a resolution hearing procedure to hear compromise and release agreements in an expedited manner. The hearing shall be held within fourteen (14) business days of notice of a commutation or compromise and release. (emphasis supplied)
>
> The workers' compensation judge conducting a resolution hearing will not be required to have received formal assignment by the Workers' Compensation Bureau of the compromise and release petition prior to conducting the resolution hearing. At the time of hearing, the parties shall submit proof of filing a petition to the workers' compensation judge hearing the compromise and release matter.

> A workers' compensation judge shall render a decision within five (5) business days of the hearing.
>
> **Delays in hearings will be granted according to rules established by the department, and any party who unreasonably delays a hearing will be subject to a penalty as provided in section 435.** Subject to the provisions of the act of July 31, 1968 (Act No. 240), known as the "Commonwealth Documents Law," the department shall adopt such rules and regulations as it finds necessary or desirable for the enforcement of this act."(emphasis supplied)

There has been, therefore, a concerted effort on a regulatory basis and legislative basis to promote the expeditious dispositions of litigated matters.

And, in recent years, that addition of Mandatory Mediation to the practice has established an new sub-workers' compensation practice that requires the practitioner to perform a number of tasks that have made the practice more complicated and more time consuming.

The insistence that all cases be tried quickly has been affixed to a system that requires the typical workers' compensation attorney to handle a large volume of cases – enough to generate sufficient revenue - and to regularly appear before WCJs in Philadelphia and in the surrounding counties including Berks, Dauphin, Schuylkill and Lackawanna Counties.

With compressed trial schedules, extensive travel requirements and a heavy case volume, today's workers' compensation attorney is forced to work in an intense practice environment that often requires the attorney and the attorney's staff to spend more time addressing scheduling issues than the merits or substance of the particular case.

IV. EXAMPLES OF PRACTICAL PROBLEMS

The speed with which the system now functions, has caused various irregularities that have arguably made the practice a difficult one in which to maneuver.

There are a number of examples of the foregoing:

1. Hearing Notices circulated less than two weeks before the scheduled WCJ hearing.

2. Mandatory Mediation Notice circulated just days before the Mediation date or well before the facts of the case have been developed by the parties.

3. Trial Scheduling Orders that afford the parties less time to present evidence than the time limits prescribed by the Judges Rules.

4. Strategic objections to requests for extensions for testimony, Independent Medical Examinations, Briefs and Proposed Findings of Fact/ Conclusions of Law.

V. PA RULES OF PROFESSIONAL CONDUCT

The Rules of Professional Conduct describes the lawyer's responsibilities as follows:

> [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
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> ***
>
> [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Section 3.5(d) of the Professional Rules instructs that a lawyer shall not "engage in conduct intended to disrupt a tribunal."

The Explanatory Comment to Section 3.5(d) offers the following:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

The Explanatory Comment also states that "[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m)."

VI. PA. CODE OF CIVILITY, ART. I, 42 PA.C.S.A.

An authoritative source that addresses the manner in which attorneys and judges should interact but that is rarely reviewed is the Pennsylvania Code of Civility.

The preamble to the Code instructs as follows:

> The hallmark of an enlightened and effective system of justice is the adherence to standards of professional responsibility and civility. Judges and lawyers must always be mindful of the appearance of justice as well as its dispensation. The following principles are designed to assist judges and lawyers in how to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession. These principles are intended to encourage lawyers, judges and court personnel to practice civility and decorum and to confirm the legal profession's status as an honorable and respected profession where courtesy and civility are observed as a matter of course.
>
> The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Integrity and courtesy are indispensable to the practice of law and the orderly administration of justice by our courts. Uncivil or obstructive conduct impedes the fundamental

> goal of resolving disputes in a rational, peaceful and efficient manner.
>
> The following principles are designed to encourage judges and lawyers to meet their obligations toward each other and the judicial system in general. It is expected that judges and lawyers will make a voluntary and mutual commitment to adhere to these principles. These principles are not intended to supersede or alter existing disciplinary codes or standards of conduct, nor shall they be used as a basis for litigation, lawyer discipline or sanctions.

Article I of the Code sets forth the duties that a judge owes to lawyers and other judges as follows:

1. A judge must maintain control of the proceedings and has an obligation to ensure that proceedings are conducted in a civil manner.

2. A judge should show respect, courtesy and patience to the lawyers, parties and all participants in the legal process by treating all with civility.

3. A judge should ensure that court-supervised personnel dress and conduct themselves appropriately and act civilly toward lawyers, parties and witnesses.

4. A judge should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

5. A judge should always refer to counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or by the professional title of attorney or counselor while in the courtroom.

6. A judge should not employ hostile or demeaning words in opinions or in written or oral communications with lawyers, parties or witnesses.

7. A judge should be punctual in convening trials, hearings, meetings and conferences.

8. A judge should be considerate of the time constraints upon lawyers, parties and witnesses and the expenses attendant to litigation when scheduling trials, hearings, meetings and conferences to the extent such scheduling is consistent with the efficient conduct of litigation.

9. A judge should ensure that disputes are resolved in a prompt and efficient manner and give all issues in controversy deliberate, informed and impartial analysis and explain, when appropriate, the reasons for the decision of the court.

10. A judge should allow the lawyers to present proper arguments and to make a complete and accurate record.

11. A judge should not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which he or she represents.

12. A judge should recognize that the conciliation process is an integral part of litigation and thus should protect all confidences and remain unbiased with respect to conciliation communications.

13. A judge should work in cooperation with all other judges and other jurisdictions with respect to availability of lawyers, witnesses, parties and court resources.

14. A judge should conscientiously assist and cooperate with other jurists to assure the efficient and expeditious processing of cases.

15. Judges should treat each other with courtesy and respect.

Article II of the Code sets forth the lawyer's duties to the court and to other lawyers as follows:

1. A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat all participants in the legal process in a civil, professional and courteous manner at all times. These principles apply to the lawyer's conduct in the courtroom, in office practice and in the course of litigation.

2. A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel, and other lawyers.

3. A lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom.

4. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom.

5. A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration.

6. A lawyer should not bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon counsel and, absent good cause, should not attribute improper motive or conduct to other counsel.

7. A lawyer should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

8. A lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

9. A lawyer should be punctual and prepared for all court appearances.

10. A lawyer should avoid ex parte communications with the court, including the judge's staff, on pending matters in person, by telephone or in letters and other forms of written communication unless authorized. Communication with the judge on any matter pending before the judge, without notice to opposing counsel, is strictly prohibited.

11. A lawyer should be considerate of the time constraints and pressures on the court in the court's effort to administer justice and make every effort to comply with schedules set by the court.

12. A lawyer, when in the courtroom, should make all remarks only to the judge and never to opposing counsel. When in the courtroom a lawyer should refer to opposing counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or the professional title of attorney or counselor.

13. A lawyer should show respect for the court by proper demeanor and decorum. In the courtroom a lawyer should address the judge as “Your Honor” or “the Court” or by other formal designation. A lawyer should begin an argument by saying “May it please the court” and identify himself/herself, the firm and the client.

14. A lawyer should deliver to all counsel involved in a proceeding any written communication that a lawyer sends to the court. Said copies should be delivered at substantially the same time and by the same means as the written communication to the court.

15. A lawyer should attempt to verify the availability of necessary participants and witnesses before hearing and trial dates are set or, if that is not feasible, immediately after such dates have been set and promptly notify the court of any anticipated problems.

16. A lawyer should understand that court personnel are an integral part of the justice system and should treat them with courtesy and respect at all times.

17. A lawyer should demonstrate respect for other lawyers, which requires that counsel be punctual in meeting appointments with other lawyers and considerate of the schedules of other participants in the legal process; adhere to commitments, whether made orally or in writing; and respond promptly to communications from other lawyers.

18. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.

19. A lawyer should be cognizant of the standing of the legal profession and should bring these principles to the attention of other lawyers when appropriate.

VII. CASE LAW STUDY

In re Cmty. Bank of N. Virginia, 418 F.3d 277, 320 (3d Cir. 2005)

This case dealt with appeal of approval by the District Court of a proposed settlement of some class actions suits. In Footnote 37, the Court cautioned the attorneys regarding the conduct of the litigation:

> We note as well that the District Court was besieged by opposing groups of lawyers who flooded it with numerous motions, arguments, and counter-arguments, which undoubtedly made it difficult for the Court to engage in the reflection needed to exercise its fiduciary duty to assure that the settlement process was procedurally fair. We have seen with dismay that some, if not many, of the attorneys on both sides of what has become the class action industry have, **"in derogation of their professional and fiduciary obligations, placed their pecuniary self-interest ahead of that of the class**." Reynolds, 288 F.3d at 279. We believe it is the responsibility of counsel, consistent with their obligations to their clients, to assist the district courts in their difficult tasks of managing often unwielding class actions by eliminating unnecessary motions, exercising restraint in filing objections, and **treating opposing counsel with the civility that should characterize attorney relations.**

Johnson v. White, 964 A.2d 42, 49-50 (Pa. Cmwlth. 2009)

This case was a personal injury suit stemming from a SEPTA motor vehicle accident; the facts are irrelevant here. What is interesting is the lengths to which the Commonwealth Court went to point out and discuss counsel's behavior.

This is the excerpt from the Court's opinion that deals with civility:

"It must be noted that argument on the instant appeal was duly scheduled for Tuesday, November 11, 2008, at 1:00 p.m. Defendants' counsel appeared as scheduled and waited in the courtroom for this case to be called. At approximately 12:54 p.m., however, Johnson's counsel (Counsel) faxed a letter to this Court's Prothonotary stating the following:

> Dear Sir/Madam:
>
> I am not able to travel to Philadelphia today for the oral argument scheduled in the above-referenced matter. I would respectfully therefore submit my case, on behalf of the appellant/plaintiff, on the briefs.
>
> Thank you for your consideration.

The letter was printed on firm letterhead indicating that Counsel's firm is located approximately four blocks from the designated courtroom. Counsel offered no explanation as to

why he was unable to travel to Philadelphia for the scheduled argument, and no explanation as to why he waited until six minutes before argument to notify the Court. Further, we note that Counsel failed to inform opposing counsel that he would not be appearing for argument, and apparently failed to so much as provide a courtesy copy to opposing counsel of the letter Counsel faxed to the Court.

We find that Counsel's conduct in this matter has been violative of Pennsylvania's Code of Civility ….

For future reference, Counsel is instructed to be "**cognizant of the standing of the legal profession" and to be more attentive to the principles outlined in the Code of Civility.** *See* Code of Civility, Article II, para. 19. **We hold that, in failing to comply with the Code of Civility, Counsel has done a disservice to his client, to opposing counsel, to opposing counsel's clients, to the judiciary, and to the general public, as significant resources were wasted in preparation for an argument that would not take place.**

Grider v. Keystone Health Plan Cent., Inc., CIV.A.2001-CV-05641, 2004 WL 902367 (E.D. Pa. Apr. 27, 2004)

"In Footnote 7 to Keystone's response to plaintiffs' motion to preclude as well as in Exhibit 12 attached to the response, counsel for Keystone makes very serious allegations involving the conduct of unnamed members of the team of attorneys for plaintiffs. Specifically, it is alleged that at a January 6, 2004 meeting of counsel for plaintiffs and Keystone, while counsel for Keystone, Cheryl A. Krause, Esquire was attempting to discuss discovery issues, unnamed counsel for plaintiffs "threw darts at a dart board containing pictures of Ms. Krause and her colleague Mr. Summers, and also placed in front of Ms. Krause plastic dolls identified as Mr. Summers and Kenneth Jacobson, Esquire, that urinated on each other."

We consider the allegations of defense counsel regarding the conduct of plaintiffs' counsel a very serious matter. **Specifically, this type of conduct violates both the letter and the spirit of Article II, Sections 5[16] and 6[17] of the Pennsylvania Code of Civility and constitutes inappropriate conduct for members of the bar of this court.**

Moreover, if the allegations are without merit, we would consider defense counsel's allegations a serious violation of Rule 11 of the Federal Rules of Civil Procedure. While we do not pass on the veracity of these allegations, neither scenario is appropriate conduct by any member of the bar of this court.

Because this issue revolves around the conduct of counsel during discovery, we refer the matter to United States Magistrate Judge Arnold C. Rapoport for disposition at his discretion.

Finally, we note that certain counsel for the parties in this action have had great difficulty in amicably dealing with other counsel in this matter. While we respect the adversarial process and recognize that each counsel has certain obligations to their respective clients, the tone and tenor of the communications between counsel and the arguments made to the court have become increasingly inappropriate.

The undersigned has previously admonished counsel to deal with each other in a respectful and courteous manner. Magistrate Judge Rapoport has previously required counsel to appear before him with their respective clients on otherwise routine discovery matters in order to demonstrate to the clients the acrimonious banter back and forth between certain of their counsel in this case.

We are very concerned about the continuing animosity and counsels' inability to resolve seemingly simple issues. Counsels' continuing failure to act in accordance with proper etiquette, in all phases of this case, based upon the Federal Rules of Civil Procedure, the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, the Pennsylvania Rules of Professional Conduct and the Pennsylvania Code of Civility will be dealt with in an appropriate fashion upon any party's application or on the court's own motion."

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Philadelphia Gear Corp. v. Swath International, Ltd., 200 F. Supp. 2d 493, 494-98 (E.D. Pa. 2002)

"On January 29, 2002, the Court issued a Memorandum and Order that, *inter alia,* granted Swath's motion to dismiss Count III of PGC's Complaint . . . [but] granted PGC leave to amend its Complaint.

. . . On February 18, 2002, PGC's counsel prepared the First Amended Complaint. (Hirsch Decl. ¶ 5.) The next day, he printed the document, proofread it, and instructed his secretary to add the date and a certificate of service. (Hirsch Decl. ¶¶ 5, 6.)

'For reasons which she cannot recall,' instead of printing out the amended complaint, his secretary instead retrieved the original Complaint from the computer system, changed its title to "First Amended Complaint," and added the date and a certificate of service. (Hirsch Decl. ¶ 6.) PGC's counsel then signed the document without proofreading it again. (Hirsch Decl. ¶ 7.) Thus, the allegations of the pleading filed with the Court on February 19, 2002 were inadvertently identical to those in the original Complaint.

On March 11, 2002, Swath filed an Answer and this Motion to Dismiss, arguing that Count III should again be dismissed, this time with prejudice, because "despite the Court's clear and definite instructions, PGC failed to make any changes to its original Complaint except to change the title from 'Complaint' to 'First Amended Complaint.' " (Mem. Supp. Mot. Dismiss at 3.) When counsel for PGC received a copy of the Motion to Dismiss on March 18, 2002, he sent an electronic mail message to Swath's counsel:

> I am not sure why the mail took so long, but this morning I received Swath's Answer and Counterclaim and its Motion to Dismiss Count III of the First Amended Complaint. From that motion, I take it that you have been asking yourselves why [I] filed the same pleading with a change of title. The answer is that I am a victim of sophisticated word-processing, self-editing of documents on the system and my own inattention. I write to inquire whether we can reach agreement on resolving the error on my part....

> Having finished banging my head against the wall, I turned to how the situation might be rectified. Ordinarily one could file an amended pleading in response to a Rule 12 motion as Rule 15 allows an as of course amendment until a responsive pleading is filed. You have, however, also answered the First Amended Complaint, which eliminates that option. I could, of course, respond to the Rule 12 motion by explaining the erroneously filed pleading and cross-moving for leave to file a second amended complaint. I would like to avoid that for obvious reasons and therefore request that we stipulate to allow PGC to file the amended pleading under the "consent of the adverse party clause" of Rule 15(a).
>
> I have attached the first amended complaint I intended to file for review and consideration. As you will see, there are a few changes to the facts and Count III is very different from the original pleading. You may still want to move to dismiss Count III as amended, but it now rests on different facts and a different legal theory. As I believe a motion for leave to amend would be successful under these circumstances and there will not be a need for you to substantially rewrite your answer, please let me know if you will stipulate to the amendment.
>
> I truly apologize for any inconvenience. Should you have any questions, please do not hesitate to call and I will sheepishly try to answer.

(Mot. Leave File Second Am. Compl. Ex. C.)

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…counsel for Swath agreed to the amendment, but only on condition that PGC pay Swath $12,750 [subsequently reduced to $6000]…

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. . . Because the law is a profession in which civility must be an essential element, the Court agrees with PGC's suggestion that "**a simple telephone call to counsel for PGC would have disclosed the error, avoided the motion to dismiss Count III presently pending before the Court and eliminated the need for PGC to request leave to file a second amended pleading.**" (Mem. Supp. Mot. Leave File Second Am. Compl. at 4–5.)(emphasis supplied) In response, Swath states as follows:

> PGC's counsel attempts to blame his mistake on Swath's counsel, claiming that Swath's counsel should have contacted him to ask him if he had made a mistake. This is patently absurd. Given the importance that is associated with a pleading in Federal court and the time and attention with which most lawyers scrutinize a Federal pleading before it is filed, it is a reasonable assumption that a lawyer has, at the very least, read the document which he is

> required to sign under Rule 11 of the Federal Rules of Civil Procedure. Swath's counsel reasonably assumed that the document entitled "First Amended Complaint," which was formatted differently, bore a different date and word processing number, was accompanied by a new certificate of service, and was signed by PGC's lawyer, had been filed intentionally by PGC. Since the substantive allegations had not changed, Swath's counsel assumed that PGC had elected to stand on its pleadings. In good faith, Swath therefore prepared an answer and motion to dismiss in response to that filing. PGC's counsel should not be permitted to blame Swath's counsel for his negligence.

(Resp. Mot. Leave File Second Am. Compl. at 6.)

Although Swath's contention is technically correct, it ignores the code of civility that once distinguished our profession.

"Civility is courtesy, dignity, decency and kindness." Robert C. Josefsberg, *Civility,* International Academy of Trial Lawyers Dean's Address, March 30, 1996, at 2. Moreover, "[c]ivility is not inconsistent with zealous advocacy." *Id.* "[C]ivility is the trademark of a winner." *Id.* at 12. In adopting a Code of Civility, the Pennsylvania Supreme Court recently stated that "[t]he hallmark of an enlightened and effective system of justice is the adherence to standards of professional responsibility and civility.... Uncivil or obstructive conduct impedes the fundamental goal of resolving disputes in a rational, peaceful and efficient manner." In re: Adoption of Code of Civility, No. 258, Supreme Court Rules, Docket No. 1, Code of Civility at 1 (Pa. Dec. 6, 2000).

The controversy that is the subject of this Memorandum could have been entirely avoided with the exercise of the slightest bit of civility. Although the Court does not condone, and certainly does not encourage, errors such as the one made by PGC's counsel, it finds that the conduct of Swath's counsel was unnecessarily harsh under all the circumstances and should also be discouraged. Simply put, it is not in keeping with the concept of civility to take unfair advantage of an adversary's obvious and non-prejudicial mistake.

PGC's First Amended Complaint was so clearly the product of a clerical error that the Court rejects Swath's contention that it filed the Motion to Dismiss "[i]n good faith." In the interest of civility, Swath's counsel should have called PGC's counsel to alert him of the obvious mistake and agree on a way to correct it as expeditiously and economically as possible. Instead, Swath chose to file a Motion to Dismiss. Because Swath had no need to respond to PGC's pleading in this totally inflexible manner, there is no basis for its request that PGC be required to pay its self-inflicted attorneys' fees.

The principles of civility are not mere ideals; they have practical benefits, as well. In over thirty-eight years of trial practice, the undersigned learned that lawyers who treat other lawyers with civility can expect the same when they inevitably find themselves in similar situations. In the long run, such behavior not only is totally consistent with zealous advocacy, but also inexorably promotes the interests of justice.

VII. "I AM A RECOVERING LITIGATOR"

There are a variety of reasons why individuals choose to become litigators.

The legendary coach of the Green Bay Packers, Vince Lombardi once observed that "the most competitive games draw the most competitive men."

It is probably true that litigation, by its very nature, draws individuals who enjoy competition or relish the opportunity to engage in a profession where there is a contest, rules of the game and a winner and loser.

In his famous "opening statement" towards the end of the movie "And Justice For All" the criminal defense attorney, played by Al Pacino observed that our legal system seeks the "truth" while pursuing "justice for all." He notes however an inherent problem with the system – "both sides want to win."

The tension between "wanting to win" and playing the game honestly, decently and by the rules - while affording the opponent the appropriate degree of "civility" – exists in many walks of life and in many professions.

Many will recall that Thanksgiving Day a few years ago when the Pittsburgh Steelers played the Detroit Lions in a highly competitive game. The game ended in a tie forcing overtime play. Before the beginning of the overtime session, during the coin flip – that would decide which would first possess the ball - Jerome Bettis of the Steelers called "heads." Although Bettis clearly called "heads", the presiding Referee announced while the coin was in the air that he had called "tails." When the coin landed on "heads" the Referee awarded the Lions the ball.

Although the Detroit Lions player who was standing across from Jerome Bettis clearlyl heard the Steeler fullback call "heads" and understood immediately that the Referee had made a mistake, he did nothing to correct the error but quickly chose the football and ran back to his team's sideline.

How often have we seen something like that occur in a sporting event? A football receiver pretend to catch a ball that he obviously trapped on the ground? A major league batter pretend to be hit by a pitch when the baseball actually struck the bat?

In the world of athletics, except in the game of golf, the paradigm is clear - that the participant should attempt to extract whatever advantage he or she can gain in the context of a judgment call to be made by an official even where the player is fully aware that the call he or she is seeking is not the correct call.

In our profession, we are confronted, on an almost daily basis, with a fundamental conflict – the desire to win versus the facts and the law that say we should lose.

The rules of civility set forth above and the common sense observations of practitioners that litigators and Judges should treat each other professionally are all worthwhile observations that litigators should consider as they pursue their career in litigation.

What practical steps can the litigator take to help facilitate a professional and civil approach to attorneys, parties, and Judges?

In a Pennsylvania Bar Institute Ethics presentation that I made many years ago entitled "I Am A Recovering Litigator", I described the daily challenge I face as I try to balance my goal of obtaining a good result while affording my opponent and the presiding Judge with the professional and civil interaction that they deserve.

In my piece I listed a series of practical steps that I take in achieving the balance that I seek to achieve while avoiding the pitfalls of "falling off the wagon":

(1) Address opposing counsel in a formal manner e.g., "Good Morning Mr. Jones" or "Good Afternoon Ms. Evans" or "Yes, sir" or "No, Ma'am." Although most attorneys will tell me "hey, call me Dan" they generally like the demonstration of respect that comes with a formal greeting;

(2) Eliminate the use of coarse language or profanity even in casual conversations or off-the-record telephone conversations. It is a substitute for logical, understandable interaction with the opposing counsel. Disparaging an argument advanced by the other attorney by exclaiming "that statement is pure BS" does nothing to explain my client's position or the deficiency in the other attorney's position;

(3) Never address a pending matter with an opposing attorney that I happen to see at a social event or while appearing before a WCJ on an unrelated matter. Doing so is almost a form of public ambush and oftentimes prompts needless argument or wasted discussion while the opposing attorney attempts to recall the case or issue while other listen to the discussion. It is best to engage discussions while both attorneys are in their offices with their files and while prepared to address the particular issue;

(4) Try not to disparage a settlement demand no matter how silly or unreasonable it might be. When I ridicule a settlement proposal I am in effect presenting a personal challenge to or attack upon the opposing attorney. It makes the settlement process "personal" and prompts needless antagonism or encourages the other side to be more and more obstinate;

(5) Never refer to the litigated case as "**my** case" and never refer to an expert witness or a fact witness as "**my** witness." I try very hard not to speak in terms of what "**we** believe" or "what amount of money **we** are willing to submit for settlement." If the case is "**my** case" I necessarily become personally invested in the outcome. That forces me to become emotional about the prospects of victory or defeat or about certain actions taken by the other attorney or the Judge. Indeed, I must constantly remind myself, my opponents and the presiding Judge that the case is not "my case" but is my client's case. By doing so, I divest myself, as much as possible, of any emotional attachment I might otherwise have to the litigation process.

(6) Minimize letter writing or email communications or telephone calls that involve or that prompt argument between counsel. It might "feel good"emotionally to argue, but it wastes

time and money. And, it is highly unlikely that I will, through argument, convince my opponent that he or she is wrong or that he or she is being unreasonable;

(7) Limit objections. During depositions or during hearings, I try as best I can to limit objections. They generally have little impact on the outcome of the case. They waste time. And, they signal to the Judge that my client fears the testimony. They also prompt the other attorney to feel a level of frustration as he or she attempts to present his or her client's case;

(8) Make "offers of proof" without being asked to do so. When my client is presenting fact testimony I normally offer to opposing attorney a quick summary of what the witness will say. I do not use meaningless language such as "he will testify that the injury did not occur in the course of employment" or "he will dispute the claimant's testimony" or "she will respond the claimant's medical expert." Rather, I try to present detailed factual summaries of what my client's will say. By doing so I will afford the opposing attorney a chance to digest what will be said and to feel as if he or she is being afforded a full opportunity to respond to the testimony during cross-examination. By giving a full offer of proof I reduce surprise and reduce the chance that the opposing attorney will feel ambushed by the evidence.

(9) Where I "fall off the wagon" and engage in behavior that is not professional, I force myself to write a letter to the opposing attorney and/or the presiding Judge acknowledging my mistake and promising to avoid such behavior in the future. The fact is that I remain a "Recovering Litigator" who, from time to time must acknowledge my professional deficiencies.

(10) Agree to Extensions – Unless the opposing attorney has demonstrated a complete disregard for my client's time or has failed repeatedly to take action, I always agree to continuances or to extensions. An extra thirty days or sixty days will have no real impact on the claim. And, I want to demonstrate to the opposing attorney and the Judge that my client is quite content to have the case adjudicated on the merits not on a scheduling error or deficiency. Finally, I want to assure that my client will be afforded the same courtesy when I face either a difficult schedule or for whatever reason fail to schedule a deposition or fail to complete a Brief.

VIII. SAMPLE LETTER

THE CHARTWELL
LAW OFFICES, LLP

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Sunday, April 08, 2012

Via fax
The Honorable John J. Johnson
Workers' Comp Office of Adjudication
110 North Eighth Street
Philadelpia, PA 19107

RE: <u>Smith, William v. Employer Inc.</u>
Bureau Claim Number: 3000000
Date of Injury: January 1, 2010
Our File Number: 444444

Dear Judge Johnson:

As Your Honor knows, my law firm, The Chartwell Law Offices, LLP represents defendant, Employer, Inc. in the above-captioned workers' compensation matter.

Your Honor has directed that the parties submit their Briefs and Proposed Findings of Fact and Conclusions of Law on or before March 17, 2012.

When the mail arrived in my office last Saturday, March 31, 2012, I received a copy of claimant's Brief and Proposed Findings of Fact and Conclusions of Law that was purportedly filed with Your Honor's office – by hand delivery – eight days earlier on March 23, 2012. The packet I received also included a letter from claimant's counsel to Your Honor dated March 27, 2012 submitting various Exhibits for Your Honor's review.

I have been in the process of preparing defendant's submission. My office received the transcript from the final hearing conducted in the case on March 1, 2012, this past Monday, April 2, 2012.

I have had difficulty completing defendant's submission because of a series of personal matters that have arisen.

On Monday, March 26, 2012 I was required to travel to Syracuse, New York in order to accompany my mother for surgery at Crouse Hospital on the campus of Syracuse University. The surgery – the removal of melanomas in my mother's lymph nodes, located in her groin region – was to take place early Tuesday morning.

During the preparation process that morning – March 27, 2012 – the surgeon discovered increased growth of the melanoma, prompting him to cancel the surgery and to direct me and my mother to her oncologist for a consult.

We met with the oncologist later that day at about 5 pm.

Following his examination, he advised us that my mother required a consultation with a cancer specialist at the Sloan-Kettering Memorial Hospital in New York City – Dr. Mary Brady.

Accordingly, on Thursday, March 29, 2012 I drove my mother and father to New York City and accompanied them while my mother consulted Dr. Brady and her associates at Sloane-Kettering for nearly seven hours. During the consultation it was determined that my mother would undergo surgery at Sloan-Kettering on Friday, April 6, 2012.

At the conclusion of the consultation I drove my parents back to Syracuse, New York – a trip of nearly five hours - and stayed with them that night.

The following day – on Saturday, March 31, 2012 - I returned to Pennsylvania and worked in my office. I also worked in my office on Sunday, April 1, 2012.

On Monday, April 2, 2012 I underwent a colonoscopy that had been scheduled months earlier and that required that I remain out of work the entire day.

On Tuesday, April 3, 2012 I underwent surgery to remove a basil carcinoma on my right shoulder – the procedure required me to miss some of my work day.

On Friday, April 6, 2012 I again traveled to New York City in order to meet my mother and father at the Sloan-Kettering Hospital for my mother's surgery. The process of admitting my mother, waiting for the surgery to be completed, waiting for a post-surgery consult with the doctor and waiting for my mother to be transferred from the recovery room to her hospital room took nearly eight hours.

I returned to Pennsylvania that night and attended a Sedar later that evening and another Sedar last night.

I have worked much of the day today, but will now drive to New York City in order to attend to my mother - and my father who at the age of 84 years has his own health problems that require my attention.

It appears that I will be required to stay in New York City tonight and for the next few days. Hopefully, my mother's condition will improve to the point where she and my father can handle the situation without me.

I have drafted much of defendant's submission.

I do not know if I will complete it in the next few days.

I am respectfully requesting Your Honor's indulgence. If Your Honor would afford my client a few days to complete and submit its Brief and Proposed Findings of Fact and Conclusions of Law for Your Honor's review and consideration, I would be most grateful.

Thank you very much for Your Honor's courtesy and cooperation.

Respectfully yours,

THE CHARTWELL LAW OFFICES, LLP

By: _____
Andrew E. Greenberg, Esquire

AEG/slf
cc: Robert Wilson, Esquire (via e-mail)