

DELAWARE STATE BAR ASSOCIATION

PRESENTS

# FUNDAMENTALS OF LAW PRACTICE MANAGEMENT 2022

**LIVE SEMINAR AT DSBA WITH ZOOM OPTION**

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SPONSORED THE DELAWARE STATE BAR ASSOCIATION  
AND THE OFFICE OF DISCIPLINARY COUNSEL

**WEDNESDAY, SEPTEMBER 23, 2022 | 9:00 A.M. TO 4:00 P.M.**

5.8 hours of CLE credit in Enhanced Ethics for Delaware Attorneys  
5.5 hours of CLE credit in Enhanced Ethics for Pennsylvania Attorneys



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# FUNDAMENTALS OF LAW PRACTICE MANAGEMENT 2022

## ABOUT THE PROGRAM

This course, which is one of the seven Fundamentals courses offered by DSBA, focuses on the important relationship between lawyers and their clients. A comprehensive curriculum looks at the decisions lawyers must make in dealing with their clients, in working within the rules of ethics, and in seeking assistance when situations become difficult.

## MODERATORS

David A. White, Esquire  
*Office of Disciplinary Counsel*

Kathleen M. Vavala, Esquire  
*Office of Disciplinary Counsel*

## PROGRAM

9:00 a.m. – 10:00 a.m.

### **Law Office Practice**

Gregory P. Skolnik, Esquire  
*Heckler & Frabizzio, P.A.*

Samuel D. Pratcher III, Esquire  
*Pratcher Krayner LLC*

Meghan Butters Houser, Esquire  
*Weiss, Saville & Houser, P.A.*

James R. Donovan, Esquire  
*Doroshow Pasquale Krawitz & Bhaya*

10:30 a.m. – 10:45 a.m. | Break

10:45 a.m. – 12:15 p.m.

### **Lawyer-Client Relations**

Rachel D. Allen, Esquire  
*Weik, Nitsche & Dougherty*

Michael G. Owen, Esquire  
*Morris James LLP*

Catherine M. Cramer, Esquire  
*Marshall Dennehey Warner Coleman & Goggin*

Lisa M. Grubb, Esquire  
*Marshall Dennehey Warner Coleman & Goggin, P.C.*

12:15 p.m. – 1:00 p.m. | Lunch (on your own)

1:00 p.m. – 2:00 p.m.

### **Avoiding a Disciplinary Complaint**

David A. White, Esquire  
*Office of Disciplinary Counsel*

Kathleen M. Vavala, Esquire  
*Office of Disciplinary Counsel*

Charles Slanina, Esquire  
*Finger & Slanina, LLC*

2:00 p.m. – 2:15 p.m. | Break

2:15 p.m. – 3:15 p.m.

### **Wellness and Work/Life Balance**

Carol Waldhauser  
*Delaware Lawyers Assistance Program*

3:15 p.m. – 4:00 p.m.

### **Technology and Ethical Practices**

Margaret M. (Molly) DiBianca, Esquire  
*Clark Hill PLC*

This will be a HYBRID CLE. You may register for this event as a live participant or by Zoom. Even if you register as a live participant, you will receive a Zoom link by email immediately which you may disregard if not attending by Zoom. (Check spam folders if you do not.) If you are going to attend the live session, you will report to the venue and check in. Only live attendees will receive live CLE credits after 12/31/2022. If you do not receive your Zoom link upon registration, please contact [reception@dsba.org](mailto:reception@dsba.org)

#### REGISTRATION INFORMATION AND RATES

This CLE will be conducted live and via Zoom. To register, visit [www.dsba.org/cle](http://www.dsba.org/cle) and select this seminar, choosing whether you wish to attend live or by Zoom. If registering for EITHER method, you will receive an email back from Zoom immediately providing you with the correct login information. If attending by zoom and you do not receive this email, contact DSBA via email: [reception@dsba.org](mailto:reception@dsba.org). The Supreme Court of the State of Delaware Commission on Continuing Legal Education cannot accept phone conferencing only. You must attend through a device that allows DSBA to obtain your Bar ID in order to receive CLE Credit. Your attendance will be automatically monitored beginning at the scheduled start time and will be completed when the CLE has ended. If you enter or leave the seminar after or before the scheduled start/end time, you will receive credit only for the time you attended. Your CLE credits will be submitted to the Delaware and Pennsylvania Commissions on CLE, as usual.

Naturally, if you attend the seminar live, you must sign in and we will use your attendance as the means for reporting the live credit.

# Moderators

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David A. White, Esquire  
*Office of Disciplinary Counsel*

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*Office of Disciplinary Counsel*

# Law Office Practice

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James R. Donovan, Esquire  
*Doroshow Pasquale Krawitz & Bhaya*



**GREGORY P. SKOLNIK (Firm Tenure 2012; Position: Workers' Compensation Attorney)**, born Philadelphia, Pennsylvania, April 1, 1986; admitted to bar 2011, Delaware and New Jersey. Education: Pennsylvania State University (B.A., 2008); Widener University School of Law (J.D., *cum laude*, *pro bono* distinction, 2011). Member: Delaware State Bar Association (Workers' Compensation and Young Lawyers Sections); Randy J. Holland Workers' Compensation Inn of Court. Practice Areas: Workers' Compensation and Insurance Defense.

## Biography:

Greg focuses his practice exclusively on representing employers and insurance carriers in workers' compensation litigation in Delaware. He is licensed to practice law in Delaware and New Jersey. He is a graduate of Penn State University, earning a B.A. in Political Science. He attended law school at the Delaware Law School, and graduated *cum laude*, in the top 10% of his class, and with *pro bono* distinction. Following law school, he served as a Judicial Law Clerk for the then five Judges of the New Castle County Court of Common Pleas. After his clerkship, he joined Heckler and Frabizzio.

Greg maintains an active membership in the Workers' Compensation Section of the Delaware State Bar Association. He serves as Treasurer for the Randy J. Holland Workers' Compensation Inn of Court. He is an Attorney Coach for the Mount Pleasant High School Mock Trial Team for the yearly Delaware State High School Mock Trial Competition. He is a Peer Mentor and frequent speaker in a Delaware Bar review program offered by the Minority Judges and Lawyers Section of the Delaware Bar.

Greg lives in Wilmington, Delaware. He enjoys running and kayaking.

Samuel D. Pratcher, III is a partner at Pratcher Krayner, LLC. Samuel was born in Wilmington, Delaware and graduated from Salesianum High School. He graduated *with honors* from Hampton University in 2005 with a Bachelor of Science degree in Political Science. In 2009, he received his law degree from Thomas M. Cooley School of Law. While in law school, Samuel served as judicial extern to the Honorable Joseph J. Farnan, Jr., in the United States District Court of Delaware. He gained valuable experience researching and writing court opinions on civil rights and employment law matters.

After law school, Samuel completed a year clerkship with The Honorable Charles H. Toliver, IV of the Superior Court of the State of Delaware. As a law clerk, he conducted research and assisted in writing court opinions in business litigation, personal injury and criminal law matters.

Attorney Pratcher has received recognition from his peers as a top personal injury lawyer in the State of Delaware (Delaware Today Magazine, Top Lawyer 2013, 2016, 2019-2021). Attorney Pratcher has gained national recognition from National Academy of Personal Injury Attorneys (NAOPIA) in being selected as a Top 10 personal injury attorney in Delaware in 2013, 2016 - 2022. Super Lawyers selected Mr. Pratcher as a 2017 and 2018 Rising Star in the practice of law for the State of Delaware. No more than 2.5% of Delaware attorneys are selected for this honor. Super Lawyers selected Mr. Pratcher as a top personal injury attorney in 2021 and 2022.

Mr. Pratcher is admitted to practice in Delaware, New Jersey, the United States District Court of Delaware, and the Supreme Court of the United States of America.

### **Past Employment Positions**

The Honorable Charles H. Toliver, IV, Superior Court of the State of Delaware, Law Clerk

The Honorable Joseph J. Farnan, Jr., U.S. District Court of Delaware, Judicial Extern

Delaware Department of Justice, Law Clerk

### **Professional Associations and Memberships**

- Million Dollar Advocates Forum Member
- Randy J. Holland Delaware Workers' Compensation American Inn of Court
- Torts and Insurance Section of Delaware State Bar Association, Chair 2013-2016
- The American Association of Justice, Leaders Forum
- Delaware State Bar Association, Multicultural Judges and Lawyers Section
- Delaware Trial Lawyers Association, Board of Directors 2015-Present
- Vice President, New Castle County Small Firm & Solo Practitioner Chair, Executive Committee of DSBA (2016-21)
- Delaware Trial Lawyers Association, Minority Caucus Representative to The American Association of Justice

## **Recognition**

- DSBA, Community Service Award 2020
- The National Black Lawyers, Top 40 Under 40 (2017-2022)
- Super Lawyers, Rising Star Award (Delaware 2017, 2018)
- Super Lawyers, Super Lawyer (Delaware 2021, 2022)
- 40 under 40 Award Winner, Chains, Inc. (2014)
- Delaware Today Magazine – Delaware Top Lawyers-Litigation (2013)
- Delaware Today Magazine – Delaware Top Lawyers-Torts and Insurance Practice (2013)
- Delaware Today Magazine – Delaware Top Lawyers – Personal Injury (2020, 2021)
- Top 10 Attorney, Under the age of 40, by National Academy of Personal Injury Attorneys (Delaware 2014-2022)
- Martindale-Hubbell, Client Distinction Award 2015

## **Classes/Seminars**

- Cyber Security in Law Firms and The Pitfalls of Social Media, February 13, 2018
- National Institute of Trial Advocacy (NITA), Faculty Member (2017)
- Delaware State Bar Assoc., Workers' Compensation Conference, Ethics, May 6, 2015
- Delaware State Bar Assoc., Workers' Compensation Conference, The "But For" Causation Standard, January 19, 2016
- The 21st Annual Rubenstein-Walsh Seminar on Ethics and Professionalism, Effective and Ethical Mediation Techniques, February 5, 2016
- Delaware Trial Lawyers Assoc., Worker's Compensation Claim with a Potential Third Party Claim, June 11, 2016
- Delaware Bench and Bar Conference, Civil Litigation, June 17, 2016

## **MEGHAN BUTTERS HOUSER**

Ms. Houser is a Director at the law firm of Weiss, Saville & Houser, P.A. She joined the firm in 2010 and practices in the areas of plaintiff's civil litigation, personal injury, and workers' compensation. She was admitted to practice law before the Delaware Supreme Court in 2010, the U.S. District Court for the District of Delaware in 2011 and the United States Supreme Court in 2017. Ms. Houser graduated summa cum laude from Canisius College in 2007 with a B.A. in History and Political Science. She received her J.D. from Villanova University School of Law in 2010.

Ms. Houser has been a member of the Delaware Trial Lawyers Association since 2010, having served as President in 2019-2020. Additionally, Ms. Houser is a member of the Randy J. Holland Workers' Compensation Inn of Court where she serves as Co-chair of the Service Committee. Ms. Houser has also volunteered with the Combined Campaign for Justice, participated in the first annual Law Day in 2012, and presented the End Distracted Driving program at two Delaware high schools.

Since 2010, Ms. Houser has served as an active member of the Delaware State Bar Association, and has recently served as Chair of the Workers' Compensation Section. Ms. Houser is also a member of the Women & the Law section and previously served as a member of the DSBA's Nominating Committee. Ms. Houser is also a member of the American Bar Association and the American Association for Justice.





**James R. Donovan, Esquire**

A partner at the firm Doroshow, Pasquale, Krawitz, and Bhaya, James attended Salesianum, the University of Delaware, and Widener University. James practices in the areas of workers' compensation and personal injury in DPKB's Smyrna, Dover, and Milford Offices. James is a member of the Randy Holland Worker's Compensation Inn of Court and is currently serving as President Elect for the Delaware Trial Lawyers Association. He can be reached at [JamesDonovan@dplaw.com](mailto:JamesDonovan@dplaw.com)

## **FUNDAMENTALS OF LAW PRACTICE**

### **MANAGEMENT AND TECHNOLOGY**

#### **Case Management: Plaintiff's perspective**

##### **1. Calendaring**

- **Who sets the schedule? If staff set the schedule, make sure to notify that staff member of dates/times you are unavailable or on vacation. If the attorney does his/her own scheduling, make sure to place it on an office-wide calendar so everyone can access it and see what is being scheduled for cases or time off.**
- **Try to coordinate with other attorneys in the office, so that everyone is not taking vacation at the same time.**
- **Try to find out if another attorney in the office will be out for a prolonged period of time (long vacation, medical issues, trial, etc.) to try to accommodate coverage during that period for other ongoing matters.**
- **Plan well in advance for any conferences and/or vacation time.**
- **Block off time on the calendar for not only work matters, but also personal matters, to avoid scheduling during a date/time you are unavailable.**
- **Have a system in place to keep track of when depositions need to be scheduled. Make sure to schedule expert reports or depositions in accordance with Court deadlines.**

##### **1. Conflicts**

- **Prior to retaining a new client or even agreeing to mediate/arbitrate a case for other attorneys, always run the names of the parties involved through a computer-wide conflicts check.**
- **In the event of a conflict, as long as your firm does not currently represent one of the parties for an ongoing matter, disclose the conflict to counsel for both parties and ask if they still consent to proceed.**
- **If you currently represent a client/plaintiff for a matter against another person/defendant and that person/defendant wants to hire you to represent them for another matter, the conflict still exists. You cannot represent that person/defendant until after the pending case involving your client/plaintiff concludes.**
- **Make sure that if you represent several people involved in the same matter that there is no inherent conflict in doing so. For example: Mom, Dad (driver) and child are involved in a motor vehicle accident and want you to represent the whole family. If the defendant can make any allegations that Dad (driver) was at all at fault for causing the collision, then you cannot represent the whole family at once. You have a conflict because passengers Mom and child may need to sue both the defendant and Dad for their injuries. In that situation, you should refer either Mom and child or Dad to another attorney for representation.**

## **1. Billing**

- **If working based on a contingency fee, routine billing to clients is not done; instead, your fee comes at the time of settlement at the end of the case.**
- **Routine office bills should be paid by your office manager or managing attorney to ensure they are processed and mailed in a timely manner. Have a system in place that works for your office to accomplish this.**
- **From time to time, do not be hesitant to seek pricing from different vendors or review your current services. Ask colleagues at other firms what vendors they use and trust. Get quotes and shop around, especially if having difficulty with a current vendor or needing additional services.**
- **Make sure whoever handles the bills, reviews them for accuracy. You would be surprised how many bills come in that have incorrect charges.**

## **1. Tickling/Suspense**

- **Our practices operate on deadlines. This is THE most important part of law practice management.**
- **Have a computer diary AND a paper diary for suspense.**
- **As soon as a trial scheduling order or hearing date is available, set up a diary for all deadlines. If possible, have those deadlines come up periodically to remind you. Once the task is complete, have a way to check off that deadline from your diary.**
- **Give yourself ample time to meet deadlines. Having a buffer period in place allows you to ask for extensions, if needed.**
- **Make staff aware of impending deadlines. If they do not know of the deadline, it will not be a priority.**

## **Succession Planning**

- 1. Consult with a lawyer to set up succession plans**
  - 2. Useful to have in place in the event of death, disciplinary action, disability, retirement, etc.**
  - 3. Discuss with shareholders what happens in the event one shareholder cannot continue to practice or leaves the firm**
  - 4. Make sure to properly designate the attorney who will succeed you and/or your firm and report that information during your Annual Registration with the Supreme Court**
  - 5. Recommendations from the ABA:**
    - Written instructions concerning how and where client information is stored, including bank and other account details (e.g., operating and trust account information );**
    - Information concerning disposition of closed client files, information about law office equipment leases or other contracts;**
    - Information regarding payment of current liabilities;**
    - Instructions to gain access to computer and voicemail passwords;**
    - Information detailing how the successor will be compensated**
- 
- 1. Important to have succession plans in place in order to comply with Delaware Rules of Professional Conduct 1.3 Diligence, 1.17 Sale of Law Practice and 1.17A Dissolution of Law Firm**
    - Comment 5 to Rule 1.3 states to prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action**

2017 WL 3396488

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of Delaware.

Elisha BALLARD, Plaintiff,

v.

TAKEDA PHARMACEUTICALS AMERICA,  
INC.; Takeda Pharmaceuticals U.S.A., Inc., f/  
k/a Takeda Pharmaceuticals North America,  
Inc.; [Takeda Pharmaceutical Company Limited](#);  
and Eli Lilly and Company, Defendants.

No. N16C-10-177 JRJ

Date Submitted: June 16, 2017

Date Decided: August 7, 2017

*Upon Plaintiff's Motion for Order Extending, for Cause, the  
Time Limit for Service of Process Under Rule 4(j) of the  
Superior Court Civil Rules: DENIED.*

## Attorneys and Law Firms

[James D. Heisman](#), Esquire, Napoli Shkolnik, LLC, 919  
North Market Street, Suite 1801, Wilmington, Delaware,  
Attorney for Plaintiff.[Philip A. Rovner](#), Esquire, and [Jonathan A. Choa](#), Esquire,  
Potter Anderson & Corroon, LLP, Hercules Plaza, P.O. Box  
951, Wilmington, Delaware, Attorneys for Defendants.

## OPINION

[Jurden](#), P.J.

## I. INTRODUCTION

\*1 Plaintiff Elisha Ballard filed a Complaint in this Court against Defendants Takeda Pharmaceuticals America, Inc., Takeda Pharmaceuticals U.S.A., Inc., f/k/a Takeda Pharmaceuticals North America, Inc., Takeda Pharmaceutical Company Limited, and Eli Lilly and Company (collectively "Defendants") on October 21, 2016 (the "Elisha Ballard

Action"), alleging causes of action related to Plaintiff's use of the prescription drug [Actos](#)®. Plaintiff's counsel failed to serve Defendants within 120 days as required under [Rule 4\(j\) of the Superior Court Civil Rules](#). Almost two months after the 120-day time limit had run, Plaintiff's counsel filed a "Motion for Order Extending, for Cause, the Time Limit for Service of Process Under [Rule 4\(j\) of the Superior Court Civil Rules](#)." For the reasons set forth below, Plaintiff's Motion is **DENIED**.

## II. BACKGROUND

The Elisha Ballard Action is one of a number of [Actos](#) cases filed in this Court by Plaintiff's counsel. Elisha Ballard and plaintiffs in the other [Actos](#) cases allege that the use of [Actos](#) caused the plaintiffs to develop bladder cancer.<sup>1</sup> The relevant background is as follows. Plaintiff's counsel is the managing partner of his firm's Delaware office and is responsible for office operations including the filing and service of complaints.<sup>2</sup> Plaintiff's counsel delegated responsibility for the filing and service of pharmaceutical complaints, including the Elisha Ballard Complaint, to a paralegal acting under his direction.<sup>3</sup>

On August 30, 2016, the paralegal filed a complaint in this Court on behalf of Jerry Ballard against Defendants, alleging personal injuries as a result of ingesting [Actos](#) (the "Jerry Ballard Action").<sup>4</sup> Attached to the Jerry Ballard Complaint were praecipes requesting the issuance of process.<sup>5</sup> The Prothonotary issued the requested writs, directing the Sheriff of New Castle County to serve two of the four Defendants, Takeda Pharmaceuticals America, Inc. and Takeda Pharmaceuticals U.S.A., Inc. (the "Delaware Defendants"), and directing Plaintiff's counsel to serve the non-Delaware Defendants in accordance with [10 Del. C. § 3104](#), Delaware's long-arm statute, and in accordance with Article 5 of the Hague Convention when appropriate.<sup>6</sup> On October 17, 2016, the Sheriff filed Sheriff's Returns attesting that he had served the Delaware Defendants.<sup>7</sup> It is not clear from the record whether the non-Delaware Defendants were properly served because Plaintiff's counsel did not file any proof of service under [§ 3104](#) for the non-Delaware Defendants.<sup>8</sup> Nevertheless, on November 2, 2016, the Defendants filed an answer in the Jerry Ballard Action.<sup>9</sup>

\*2 On October 21, 2016, the paralegal filed the Elisha Ballard Complaint,<sup>10</sup> and on November 28, 2016, the paralegal began the process of obtaining the writs necessary for service of process in the Elisha Ballard Action by ordering checks payable to the New Castle County Sheriff from the firm's accounting department.<sup>11</sup> Having received the checks, on December 7, 2016, the paralegal confused the Elisha Ballard Action with the Jerry Ballard Action and “mistakenly printed and delivered the earlier filed [Jerry] Ballard case to the [P]rothonotary to obtain writs for service.”<sup>12</sup> On January 18, 2017—more than 120 days after Jerry Ballard Complaint was filed—the Prothonotary issued the requested Jerry Ballard Action writs, including writs directed to Plaintiff's counsel to complete long-arm and Hague Convention service.<sup>13</sup> Again, the Sheriff served the Delaware Defendants and filed Sheriff's Returns attesting to service,<sup>14</sup> and again, the record is not clear regarding service of the long arm writs. In her affidavit, the paralegal explains that the second set of Jerry Ballard long arm writs were “internally misfiled” due to an unspecified clerical error.<sup>15</sup> As a result, the long arm writs were not served until the clerical error was discovered.<sup>16</sup>

On April 11, 2017, the Court held a scheduling conference to consolidate seven of the *Actos* cases filed by Plaintiff's counsel, not including the Elisha Ballard Action, for pre-trial purposes.<sup>17</sup> After this conference, Plaintiff's counsel asked the paralegal to review his *Actos* cases to ensure that service on Takeda Pharmaceutical Company Limited, a Japanese entity, was consistent with the Case Management Order.<sup>18</sup> At this point, Plaintiff's counsel learned of his failure to serve Defendants in the Elisha Ballard Action.<sup>19</sup>

On April 21, 2017, Plaintiff's counsel filed the instant Motion seeking an enlargement of time for service of process in the Elisha Ballard Action. In support of the Motion, Plaintiff's counsel included an affidavit from his paralegal in which the paralegal acknowledges that she confused the Elisha Ballard Action with the Jerry Ballard Action, leading to the initial failure to request issuance of service writs in the Elisha Ballard Action.<sup>20</sup> However, the paralegal does not explain in her affidavit what, if any, oversight or support she received from attorneys at the firm in connection with the filing and serving of the complaints.<sup>21</sup>

\*3 On May 24, 2017, the Court held oral argument and asked Plaintiff's counsel how something like this could have happened.<sup>22</sup> Plaintiff's counsel stated, without any further explanation, that a good faith effort was made to serve the Defendants and that internal checks were in place to track service.<sup>23</sup> In response, defense counsel suggested that, in “putting the blame on this paralegal,” Plaintiff's counsel failed to account for an apparent lack of institutional procedure that should have caught and corrected the mistake within 120 days of the filing of the Elisha Ballard Complaint.<sup>24</sup> Conspicuously, Plaintiff's counsel's only response to defense counsel's allegation of “a firm-wide institutional deficiency” was reasserting that “[i]t was an honest, good faith mistake,” and “[w]e tried to make service.”<sup>25</sup> When the Court specifically pressed Plaintiff's counsel on his failure to realize that something had gone awry despite multiple occasions upon which he should have been alerted either to the double process in the Jerry Ballard Action or to the lack of process in the Elisha Ballard Action, Plaintiff's counsel agreed that there were opportunities to discover the mistake, but offered no explanation of what efforts he, the attorney responsible for service of process, undertook to track service of process.<sup>26</sup>

Troubled by, and not satisfied with, Plaintiff's counsel's failure to account for his own actions in this case, the Court ordered Plaintiff's counsel to submit an affidavit explaining what measures he took to ensure timely service of process.<sup>27</sup> In his affidavit, Plaintiff's counsel avers that “service events were tracked by [the paralegal] to ensure timely service and reported to me” and that he had regular meetings with the paralegal “to discuss service tracking issues.”<sup>28</sup>

### III. PARTIES' CONTENTIONS

Plaintiff argues that good cause exists to extend the *Rule 4(j)* 120 day window to effect service because the error in service was “an honest mistake.”<sup>29</sup> Plaintiff further argues that none of the Defendants in the Elisha Ballard Action will be prejudiced if the Court grants Plaintiff's Motion.<sup>30</sup>

Defendants counter that Plaintiff's counsel has failed to show good cause as required under *Rule 4(j)*.<sup>31</sup> Specifically, Defendants contend that, at a minimum, Plaintiff's counsel should have noticed the error in service when the Sheriff did not file returns of service in the Elisha Ballard Action for the Delaware Defendants and when no Defendant answered the

Complaint in the Elisha Ballard Action.<sup>32</sup> Defendants further contend that Plaintiff's counsel's inaction and inattention preclude a finding of good faith.<sup>33</sup>

#### IV. STANDARD OF REVIEW

Superior Court Civil Rule 4(j) allows service to be perfected after the 120-day window has closed only if the requesting party shows “good cause” why service was not made within 120 days. Rule 4 does not define good cause, but Delaware courts interpret good cause to require a showing of excusable neglect, meaning a showing of “good faith” and a “reasonable basis for noncompliance.”<sup>34</sup> Stated differently, excusable neglect is that “neglect which might have been the act of a reasonably prudent person under the circumstances.”<sup>35</sup> “In determining whether the moving party's neglect was ‘excusable,’ all surrounding circumstances may be considered.”<sup>36</sup> Delaware public policy favors allowing a litigant their day in court, and “[R]ule [4(j)] seeks to balance the need for speedy, just and efficient litigation” with this public policy.<sup>37</sup>

\*4 Dismissal of a claim is a severe penalty, and courts are reluctant to apply dismissal except as a last resort.<sup>38</sup> However, Rule 4(j) provides no option other than dismissal when a plaintiff cannot show good cause, and the Court has denied motions to enlarge time made after the 120-day time limit has run even when the denial would preclude a cause of action against a defendant because the statute of limitations has run.<sup>39</sup> A plaintiff cannot rely on the prejudice they will suffer if their claims are dismissed as a substitute for good cause,<sup>40</sup> nor can a plaintiff rely on lack of prejudice to a defendant.<sup>41</sup>

#### V. DISCUSSION

In this case, it is clear there was neglect. The question is whether that neglect is excusable. In general, “[d]iligent efforts to comply with the Rule demonstrates excusable neglect, whereas delays resulting from half-hearted efforts by counsel to perfect service do not.”<sup>42</sup> Delays resulting from “mistake or inadvertence of counsel” do not establish excusable neglect,<sup>43</sup> and mere negligence without a valid reason does not constitute excusable neglect.<sup>44</sup>

Plaintiff cites to *Jackson v. Minner*<sup>45</sup> in support of her argument that counsel's conduct constitutes excusable neglect.<sup>46</sup> In *Jackson*, Richard Jackson, an inmate in the Sussex Correctional Institute in Sussex County, was being transported to a Board of Parole hearing at, what was then, the Delaware Correctional Center in Kent County.<sup>47</sup> Upon entering a transport van at the Delaware Correctional Center, Jackson fell to the ground and was injured.<sup>48</sup> Jackson brought negligence claims and attempted to serve the defendants, Department of Correction employees, at what he believed was their Sussex County office.<sup>49</sup> However, the defendants worked in Kent County, and the Sheriff of Sussex County was unable to serve them within 120 days.<sup>50</sup> The Court gave Jackson an additional 120 days to effect service.<sup>51</sup>

\*5 Although *Jackson* is similar to this case in that the plaintiff mistakenly believed that service was made, there are a few key differences. Plaintiff's counsel is an experienced attorney in a law firm with the resources and ability to verify that each stage of service of process has occurred in accordance with the Superior Court Civil Rules, and if an error or delay in service occurs, Plaintiff's counsel has the resources and ability to discover the error or delay within 120 days after the filing of the complaint and to immediately request an enlargement of time under Rule 6(b) “for cause shown.” Jackson was a *pro se* prison inmate, not at liberty to research his defendants in order to properly direct service and unable to verify whether the Sheriff had successfully served the defendants.

Plaintiff also relies on *Fluharty v. Richeson*.<sup>52</sup> In *Fluharty*, the plaintiff filed a complaint against “Earl” Richeson, rather than “Karl” Richeson.<sup>53</sup> The Sheriff was unable to serve “Earl” Richeson at the address provided and returned the writ “non est.”<sup>54</sup> The plaintiff then filed an amended complaint correcting “Earl” to “Karl” less than two months after the complaint was filed, but service was not perfected until 127 days after the filing, in part because there was roughly a six-week delay within the Sheriff's office.<sup>55</sup> The Court found that good cause existed specifically citing “the reasonable lapse of time in which the [p]laintiff acted to correct these errors and the [Sheriff's] delay in service.”<sup>56</sup>



As with *Jackson*, there are several key differences between *Fluharty* and this case. Counsel in *Fluharty* noticed that an error was made when the Sheriff filed a Sheriff's return "non est," and counsel attempted to correct the error, all within 120 days after the complaint was filed. In this case, Plaintiff's counsel did not notice the error in service despite multiple events which should have alerted him to the lack of service in the Elisha Ballard Action.

For sixth months, the only entry in the Elisha Ballard Action docket was the Complaint. The Prothonotary did not docket the issuance of any writs; the Sheriff did not file any Sheriff's Returns; Plaintiff's counsel did not file any proof of service on the non-Delaware Defendants; the Defendants did not file an answer or a motion to dismiss; and the Elisha Ballard Action was not noticed for the April scheduling conference. Even assuming Plaintiff's counsel reasonably mistook the repeat service in the Jerry Ballard Action for service in the Elisha Ballard Action, Plaintiff's counsel should have expected and anticipated that Defendants would respond to the Elisha Ballard Complaint in mid-February.<sup>57</sup> But, it was not until April 16, 2017—almost two months after the 120-day window for service had closed—that Plaintiff's counsel directed the paralegal to verify service on Takeda Pharmaceutical Company Limited in his Actos cases.<sup>58</sup>

Meanwhile, in the Jerry Ballard Action, service events were being docketed even though more than 120 days had passed since the filing of the Jerry Ballard Action and despite the fact that Defendants had already filed an answer.<sup>59</sup>

\*6 To find excusable neglect, the Court must find "neglect which might have been the act of a reasonably prudent person under the circumstances." In this case, the paralegal made a mistake when she confused the Jerry Ballard Action with the Elisha Ballard Action and requested writs for a second time in the Jerry Ballard Action. However, as the Court stated during oral argument, what is troubling in this case is not that a mistake occurred, but that there were multiple opportunities where counsel should have figured out that something had gone awry.<sup>60</sup>

At oral argument, Plaintiff's counsel expanded on his argument that his neglect is excusable by highlighting the fact that the Elisha Ballard and the Jerry Ballard Actions have "identical defendants, identical injuries,... identical spelling names and pronunciation ...identical defense counsel."<sup>61</sup> This argument is unavailing. The similarity between the cases

was known or should have been known to Plaintiff's counsel at the time he filed the Elisha Ballard Action.<sup>62</sup> A reasonably prudent attorney should and would have been sensitive to the possibility of confusion given the number of *Actos* cases and the fact that there were two *Actos* plaintiffs with the same last name.<sup>63</sup>

In light of the foregoing, the question becomes whether Plaintiff's counsel's failure to timely discover that service had not occurred precludes a finding of good cause. This question was answered in *Desantis v. Chilkotowsky*.<sup>64</sup> In *Desantis*, the plaintiff filed a complaint on December 20, 2002.<sup>65</sup> On December 30, 2002, the plaintiff attempted to serve a "David Chilkotowsky" through the New Jersey Secretary of State.<sup>66</sup> However, the defendant David Chilkotowsky was a resident of Delaware, and the attempt at service failed.<sup>67</sup> No further action was taken by plaintiff until June 10, 2003, when the Prothonotary mailed a letter advising plaintiff that service must be made within 120 days of filing the complaint.<sup>68</sup> The plaintiff requested an enlargement of time, and the Court denied that request stating "although [p]laintiff had attempted to serve the incorrect [defendant] ... through the Long-Arm Statute, no return receipt or affidavit were filed as an amendment to the complaint."<sup>69</sup> Thus, "it appears [p]laintiff should have been aware that service was not properly perfected."<sup>70</sup> In this case, as in *Desantis*, Plaintiff's counsel should have been aware that service was not perfected—at a minimum—when no service returns were filed.

\*7 As to Plaintiff's counsel's argument that Delaware public policy "favors permitting a litigant a right to a day in court" and Defendants will not be prejudiced if this Court enlarges the 120 day window,<sup>71</sup> the Court does not find that these considerations change the outcome under *Rule 4(j)*. Public policy should not tip the balance unless there were sufficient diligent efforts on the part of Plaintiff's counsel to comply with the rule. This comports with the Court's statement in *Desantis* that "*Rule 4(j)* must be strictly construed unless plaintiff can establish good cause for its failure to comply."<sup>72</sup>

As to Plaintiff's prejudice argument, the Delaware Supreme Court has explained that "there is nothing in [*Rule 4(j)*] that excuses noncompliance when it is alleged that a defendant is not prejudiced by the failure of service."<sup>73</sup>



The record before the Court demonstrates that Plaintiff's counsel failed to act as a reasonably prudent attorney should and would have acted under the circumstances. Therefore, Plaintiff's counsel has failed to show good cause, and the Elisha Ballard Action must be and is dismissed without prejudice.<sup>74</sup>

For the foregoing reasons, Plaintiff's Motion for Order Extending, for Cause, the Time Limit for Service of Process Under [Rule 4\(j\) of the Superior Court Civil Rules](#) is **DENIED**.

**IT IS SO ORDERED.**

#### All Citations

Not Reported in A.3d, 2017 WL 3396488

#### VI. CONCLUSION

#### Footnotes

- 1 *E.g.*, Complaint (Trans. ID. 59731526).
- 2 Affidavit of James D. Heisman ("Pl.'s Counsel Aff.") ¶¶ 1–2 (Trans. ID. 60744707).
- 3 *Id.* ¶ 3; Motion for Order Extending, for Cause, the Time Limit for Service of Process Under [Rule 4\(j\) of the Superior Court Civil Rules](#) ("Pl.'s Mot."), Ex. B Affidavit of Elizabeth Bonfiglio ("Paralegal Aff.") ¶ 1 (Trans. ID. 60504882).
- 4 Paralegal Aff. ¶ 2; Jerry Ballard Action Complaint (Trans ID. 59493087). The Jerry Ballard Action case number is N16C–08–253 JRJ.
- 5 Jerry Ballard Action New Castle County Praecipe, [10 Del. C. § 3104](#) Praecipe, and Hague Convention Praecipe (Trans. ID. 59493087).
- 6 *Id.*; Jerry Ballard Action Writs Issued (Trans. ID. 59634096).
- 7 Jerry Ballard Action Sheriff's Return (Trans. ID. 59705210); Jerry Ballard Action Sheriff's Return (Trans. ID. 59705209).
- 8 See [Rule 4\(h\)](#) ("In an action in which the plaintiff serves process pursuant to [10 Del. C. § 3104](#), [§ 3112](#) or [§ 3113](#), the defendant's return receipt and the affidavit of the plaintiff or the plaintiff's attorney of the defendant's nonresidence and the sending of a copy of the complaint with the notice required by the statute shall be filed as an amendment to the complaint within 10 days of the receiving by the plaintiff or the plaintiff's attorney of the defendant's return receipt ....").
- 9 Jerry Ballard Action Defendants' Answer (Trans. ID. 59779728).
- 10 Pl.'s Mot. ¶ 3; Paralegal Aff. ¶ 4.
- 11 Pl.'s Counsel Aff. ¶ 4; Paralegal Aff. ¶ 5.
- 12 Paralegal Aff. ¶ 6.
- 13 Jerry Ballard Action Writs Issued (Trans. ID. 60098688).
- 14 Jerry Ballard Action Sheriff's Return (Trans. ID. 60098688); Jerry Ballard Action Sheriff's Return (Trans. ID. 60133489).
- 15 Paralegal Aff. ¶ 7 ("Plaintiffs' counsel received approximately 12 bankers' boxes full of summonses and complaints to be served in the month of January, 2017, including the second issued Jerry Ballard long arm writs. As a result of a clerical error, these Jerry Ballard long arm writs were mistakenly attached to another complaint and internally misfiled. The long arm writs were promptly mailed upon discovery of this clerical error.").
- 16 *Id.*; Jerry Ballard Action Affidavits of Service (Trans. ID. 60448380). Neither the paralegal's affidavit nor the affidavit of Plaintiff's counsel explains how the clerical error was discovered, by whom, or what events precipitated its discovery. In any event, another opportunity to discover both the double service in the Jerry Ballard Action and the lack of service in the Elisha Ballard Action was lost.
- 17 Case Management Order filed in multiple cases (Trans. ID. 60457834).
- 18 May 24, 2017 Hearing Transcript ("Hr'g Tr.") at 4:12–17 (Trans ID. 60652263); Paralegal Aff. ¶ 8.
- 19 Pl.'s Mot. ¶ 8.
- 20 Paralegal Aff. ¶ 6.
- 21 See Del. Lawyers' R. Prof'l Conduct 5.3 ("With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner in a law firm ... shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer ....")
- 22 Hr'g Tr. at 3:11–16.

- 23 *Id.* at 3:17–4:2.
- 24 *Id.* at 6:11–7:15.
- 25 *Id.* at 7:1, 12:7–18.
- 26 *Id.* at 16:13–23.
- 27 June 5, 2017 Letter from the Court to Plaintiff's Counsel (Trans. ID. 60681937).
- 28 Pl.'s Counsel Aff. ¶¶ 8–9.
- 29 Hr'g Tr. at 11:16–20.
- 30 Pl.'s Mot. ¶ 11.
- 31 Defendants' Opposition to Motion for Order Extending, for Cause, the Time Limit for Service of Process Under [Rule 4\(j\) of the Superior Court Civil Rules](#) at 1–2 (Trans. ID. 60620205).
- 32 *Id.* at 2.
- 33 *Id.*; see [Doe v. Catholic Diocese of Wilmington, Inc.](#), 2010 WL 2106181, at \*5 (Del. Super. May 26, 2010) (“If total inaction were to constitute a good faith effort, [Rule 4](#) would be rendered meaningless.”); [Huelsenbeck v. Fermin–Jimenez](#), 2013 WL 2481533, at \*1 (Del. Super. June 7, 2013) (denying plaintiff's [Rule 4\(j\)](#) motion where “[t]he record here shows an almost complete lack of diligence by [p]laintiffs”).
- 34 [Dolan v. Williams](#), 707 A.2d 34, 36 (Del. 1998) (quoting [Dominic v. Hess Oil VI. Corp.](#), 841 F.2d 513, 517 (3d Cir. 1988)).
- 35 *Id.* (quoting [Cohen v. Brandywine Raceway Assoc.](#), 238 A.2d 320, 325 (Del. Super. 1968)).
- 36 [DiSabatino v. DiSabatino](#), 922 A.2d 414, 2007 WL 812766, at \*3 (Del. 2007) (TABLE) (citing [McDonald v. S & J Hotel Enters.](#), 2002 WL 1978933 (Del. Super. Aug. 27, 2002)) (describing excusable neglect determinations under [Rule 60\(b\)](#)).
- 37 [Dolan](#), 707 A.2d at 36.
- 38 [Drejka v. Hitchens Tire Serv.](#), 15 A.3d 1221, 1224 (Del. 2010).
- 39 See [Anticaglia v. Benge](#), 2000 WL 145822, at \*1 (Del. Super. Jan. 20, 2000) (stating “the effect of this Court not granting the [m]otion for an enlargement of time will be to preclude a subsequent cause of action against [defendant] by [plaintiff]”). See also [Ellis v. Davis](#), 1997 WL 527941, at \*5 (Del. Super. July 22, 1997) (holding good cause for an extension of service after the 120 days did not exist and dismissing the complaint after the statute of limitations had run).
- 40 [Catholic Diocese](#), 2010 WL 2106181, at \*5 (“Stated another way, a plaintiff who did nothing at all to accomplish service could avoid the effects of the Rule merely by alleging prejudice, which would *always* arise from the dismissal of a defendant. Not only does the law in Delaware not allow prejudice to be the single guiding factor, but our decisional law does not excuse any noncompliance with the jurisdictional requirements on that basis alone, as to do so would effectively emasculate the Rule.”); see [Doe v. Colonial School Dist.](#), 2011 WL 7063682, at \*2 (Del. Super. Sept. 30, 2011) (“‘good cause,’ not mere ‘prejudice’ is required.”).
- 41 [DeSantis v. Chilkotowsky](#), 877 A.2d 52, 2005 WL 1653640, at \*2 (Del. June 27, 2005) (TABLE) (“There is nothing in [Rule 4(j)] that excuses noncompliance when it is alleged that a defendant is not prejudiced by the failure of service.”).
- 42 [Anticaglia](#), 2000 WL 145822, at \*2 (citing [Ellis](#), 1997 WL 527941, at \*2).
- 43 [Wass v. Calloway](#), 1996 WL 190020, at \*3 (Del. Super. Feb. 21, 1996) (citing [Braxton v. United States](#), 817 F.2d 238, 242 (3d Cir. 1987)).
- 44 [Dishmon v. Fucci](#), 32 A.3d 338, 346 (Del. 2011).
- 45 2011 WL 947069 (Del. Super. Mar. 17, 2011).
- 46 Pl.'s Mot. ¶ 10.
- 47 [Jackson](#), 2011 WL 947069, at \*1.
- 48 *Id.*
- 49 *Id.* at \*4.
- 50 *Id.*
- 51 *Id.*
- 52 1998 WL 283467 (Del. Super. Apr. 20, 1998).
- 53 *Id.* at \* 1.
- 54 *Id.*
- 55 *Id.* at \*1–2. (noting that the delay in service may have been a result of the holidays since the second praecipe was filed on December 3, 1997, but was not served until January 16, 1998).
- 56 *Id.* at \*2.

- 57 See [Super. Ct. Civ. R. 12\(a\)](#) (“A defendant shall serve an answer within 20 days after service of process, complaint, and affidavit, if any, upon that defendant....”).
- 58 Hr’g Tr. at 4:12–17.
- 59 See [Super. Ct. Civ. R. 12\(h\)\(1\)](#) (“A defense of ... insufficiency of service of process is waived ... if it is neither made by motion under this Rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.”).
- 60 *Id.*
- 61 *Id.* at 4:3–8.
- 62 See Del. Lawyers’ R. Prof 1 Conduct 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); Del. Lawyers’ R. Prof’l Conduct 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); Del. Lawyers’ R. Prof’l Conduct 1.3 cmt. 2 (“A lawyer’s workload must be controlled so that each matter can be handled competently.”).
- 63 See Del. Lawyers’ R. Prof’l Conduct 5.3 (“With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner in a law firm ... shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer; [and] (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer ....”).
- 64 2004 WL 1790113 (Del. Super. July 27, 2004), *aff’d*, 877 A.2d 52 (Del. 2005).
- 65 *Id.* at \*1.
- 66 *Id.*
- 67 *Id.*
- 68 *Id.*
- 69 *Id.*
- 70 *Id.* at \*1.
- 71 Pl.’s Mot. ¶¶ 9, 11 (quoting *Dolan*, 707 A.2d at 360).
- 72 *Desantis*, 2004 WL 1790113, at \*2. y construed unless plaintiff can establish good cause for its failure to comply.” Similarly, when evaluating the Federal Rules of Civil Procedure, the Third Circuit has consistently held that the 120 day time limit of [Rule 4\(j\)](#) must be “strictly applied.” *Catholic Diocese*, 2010 WL 2106181, at \*5 (quoting *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d. Cir. 1987)).
- 73 *Desantis*, 2005 WL 1653640, at \*2; see *Miller v. State, Dep’t of Public Safety*, 2009 WL 1900394, at \*5 (Del. Super. June 16, 2009) (stating “the fact that a defendant would not be prejudiced by plaintiff’s failure to serve is equally irrelevant in service of process issues or excusable neglect” (citing *Anticaglia*, 2000 WL 145822, at \*2)).
- 74 *Ellis*, 1997 WL 527941, at \*5 (“What happened here is unfortunate. One of the unhappy aspects of this job is rendering an opinion that neglect of counsel was not excusable, especially since we all commit errors. The Court should and does seek to decide cases on their merits. But a policy in favor of deciding cases on their merits does not permit either the parties or the Court to disregard the law of civil procedure and professional responsibility without colorable excuse. Plaintiffs bear the burden of showing that their failure to comply with the procedural requirements is excusable, and they have not met that burden here.”).

West's Delaware Code Annotated  
Delaware Rules of Court  
the Delaware Lawyers' Rules of Professional Conduct

Rules of Prof.Conduct, Rule 5.1

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

Currentness

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**Credits**

[Amended effective July 1, 2003; January 7, 2008.]

**Editors' Notes**

**COMMENT**

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See [Rule 1.0\(c\)](#). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See [Rule 5.2](#). Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also [Rule 8.4\(a\)](#).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and [Rule 8.4\(a\)](#), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See [Rule 5.2\(a\)](#).

Rules of Prof.Conduct, Rule 5.1, DE R RPC Rule 5.1

Delaware Uniform Rules of Evidence, Rules of the Supreme Court, Delaware Supreme Court Internal Operating Procedures, Chancery Court Rules, Superior Court Rules of Civil Procedure, Superior Court Rules of Criminal Procedure, and The Delaware Lawyers' Rules of Professional Conduct are current with amendments received through February 1, 2020. All other state and local court rules are current with amendments received through February 1, 2020.

West's Delaware Code Annotated  
Delaware Rules of Court  
the Delaware Lawyers' Rules of Professional Conduct

Rules of Prof.Conduct, Rule 5.2

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

Currentness

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

**Credits**

[Amended effective July 1, 2003; January 7, 2008.]

**Editors' Notes**

**COMMENT**

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under [Rule 1.7](#), the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rules of Prof.Conduct, Rule 5.2, DE R RPC Rule 5.2

Delaware Uniform Rules of Evidence, Rules of the Supreme Court, Delaware Supreme Court Internal Operating Procedures, Chancery Court Rules, Superior Court Rules of Civil Procedure, Superior Court Rules of Criminal Procedure, and The Delaware Lawyers' Rules of Professional Conduct are current with amendments received through February 1, 2020. All other state and local court rules are current with amendments received through February 1, 2020.

West's Delaware Code Annotated  
Delaware Rules of Court  
the Delaware Lawyers' Rules of Professional Conduct

Rules of Prof.Conduct, Rule 5.3

RULE 5.3. RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANCE

Currentness

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**Credits**

[Amended effective July 1, 2003; January 7, 2008; March 1, 2013.]

**Editors' Notes**

**COMMENT**

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to [Rule 1.1](#) (retaining lawyers outside the firm) and Comment [1] to [Rule 5.1](#) (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.



[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] *Nonlawyers outside the firm.* -- A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See [Rule 1.2](#). When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rules of Prof. Conduct, Rule 5.3, DE R RPC Rule 5.3

Delaware Uniform Rules of Evidence, Rules of the Supreme Court, Delaware Supreme Court Internal Operating Procedures, Chancery Court Rules, Superior Court Rules of Civil Procedure, Superior Court Rules of Criminal Procedure, and The Delaware Lawyers' Rules of Professional Conduct are current with amendments received through February 1, 2020. All other state and local court rules are current with amendments received through February 1, 2020.



# Lawyer-Client Relations

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Rachel D. Allen, Esquire  
*Weik, Nitsche & Dougherty*

Michael G. Owen, Esquire  
*Morris James LLP*

Catherine M. Cramer, Esquire  
*Marshall Dennehey Warner Coleman & Goggin*

Lisa M. Grubb, Esquire  
*Marshall Dennehey Warner Coleman & Groggin, P.C.*

# Avoiding a Disciplinary Complaint

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David A. White, Esquire  
*Office of Disciplinary Counsel*

Kathleen M. Vavala, Esquire  
*Office of Disciplinary Counsel*

Charles Slanina, Esquire  
*Finger & Slanina, LLC*

# Wellness and Work/Life Balance

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Carol Waldhauser

*Delaware Lawyers Assistance Program (DE-LAP)*

R. Judson Scaggs, Jr., Esquire

*Morris Nichols Arsht and Tunnell*

**R. JUDSON SCAGGS, JR. ("R.J.")**

Mr. Scaggs was born in Roanoke, Virginia, on August 19, 1959. R.J. graduated from Washington and Lee University in 1981 with a B.A. degree in philosophy. While at Washington and Lee, he was captain of basketball and track teams and was awarded the most valuable senior athlete award. In 1981, he entered the United States Marine Corps, where he served until 1985. R.J. became an artillery officer, attained the rank of captain, and was awarded a Navy Achievement Medal for meritorious peacetime service. He attended law school at the College of William and Mary from 1985 to 1988. R.J. was valedictorian of his graduating class and was awarded the Order of the Coif. He also was a member of William and Mary Law Review. He joined Morris, Nichols, Arsht & Tunnell as an associate in 1988 and became a partner on January 1, 1997.

His practice area is corporate litigation. He has provided representation to clients in a variety of litigation settings, including corporate governance disputes, mergers and acquisitions, contract disputes, validity of corporate bylaw and charter provisions, utility ratemaking as well as technology licensing, trade secret and commercial tort claims and appeals. He has been rated one of the top attorneys in the state by *Chambers*, *Super Lawyers*, *Corporate Counsel* and *Delaware Today Magazine*.

R.J. has been married to Colette M. Cudworth of Roanoke, Virginia since 1984 and is the proud father of three daughters.

He assists impaired and transitioning attorneys through his work as Chairman of Delaware's Lawyers Assistance Committee and is a frequent speaker on lawyer addiction, recovery and life transition.



The slide has a dark orange header with the title 'BEING A LAWYER' in white. Below the header is a large orange rectangle. Two white rounded rectangles with orange borders contain text. The left one has a light orange background, and the right one has a light orange background with a darker orange border.

## BEING A LAWYER

According to the Rules of Professional Conduct an attorney must be fit. The astute attorney, however, understands that fitness means more than just fitness of legal expertise; it means also those qualities of physical, mental and psychological health that enables a lawyer to carry out the demands and the responsibilities to their clients and to their profession.

More specifically, the fit attorney practices law while practicing personal wellness. Wellness leads to a balanced life-style. Data supports that without a balance life-style; lawyers are at high risk to burnout.

## THE PROBLEM:

- We are living through unnerving times.
- The barrage of disturbing news, the COVID-19/DELTA world, major disruptions to our everyday scheduling can, and often does, cause unrelenting stress, frustrations, fear and uncertainty - even for the healthiest of legal professions.
- In unnerving the nerves, we know too that it is perfectly normal to feel overwhelmed and anxious during this time



## OBSERVATIONS

Most of us went through the past year with a great deal of emotional disorientation - not understanding what was happening to us or people around us.

Many attorneys act as if they have it all together - thinking that something is wrong with them if they feel overwhelmed or confused. (Behind The Cool Image: Lawyering In the 21<sup>st</sup> Century.

We believe too that we are alone in our experience.

It is imperative in recovering our resilience and coming back to the playing field stronger is understanding where we were; what happened to us, and where we are going.



## PROBLEM: STRESS

- The “wear and tear” the body goes through as it adjusts to the constantly changing environment.
- The Biological response that prepares our bodies either for fight or flight
- Events vs. Perception



## DEPRESSION

Among Law Students & Lawyers



## FITNESS KILLERS: How Not To Cope With Stress



PRESCRIPTION  
DRUG ABUSE/  
DEPENDENCE



Alcohol abuse/dependence



INTERNET  
ADDICTIONS



MENTAL HEALTH  
ISSUES



### SOLUTIONS

LET'S DEFINE LAWYER  
WELL-BEING



# Stress management for lawyers



Wellness Inventory Program

# Tomorrow's top lawyers must think wellness today...



Wellness Inventory Program

## Essential TIPS

DON'T LET	DON'T LET YOURSELF GET TOO HUNGRY, ANGRY, LONELY OR TIRED
MAINTAIN	MAINTAIN INTEGRATION (balance) BETWEEN WORK, FAMILY AND YOUR PERSONAL INTERESTS, HOBBIES, ETC
FOCUS	FOCUS YOUR ENERGY ON WHAT YOU HAVE CONTROL OVER
DO	DON'T CATASTROPHIZE: EVERYTHING IS NOT A BIG DEAL
MAINTAIN	MAINTAIN PERSONAL AND PROFESSIONAL INTEGRITY
ACCEPT	ACCEPT YOUR OWN LIMITATIONS
SET	SET REASONABLE GOALS - EXPECTATIONS
ESTABLISH AND MAINTAIN	ESTABLISH AND MAINTAIN PERSONAL AND PROFESSIONAL BOUNDARIES
ASK	ASK FOR HELP WHEN NEEDED: CALL DE-LAP BEFORE YOU IMplode

## FITNESS ESSENTIALS

- KEEP ACTIVE: FIND A PHYSICAL ACTIVITY YOU ENJOY AND MAKE IT PART OF YOUR LIFE: GOT NO TIME MAKE TIME - PUT TREADMILL IN YOUR OFFICE OR JUST WALK.
- TAKE A BREAK: TO GET AWAY FROM YOUR DESK, STEP OUTSIDE FOR JUST A FEW
- SLEEP -IT IS IMPERATIVE BECAUSE IMPROVES CONCENTRATION AND RECHARGES YOU.
- EAT WELL: EAT WHAT YOUR BLOODTYPE RECOMMENDS.
- DRINK IN MODERATION. STAY WITHIN THE RECOMMENDED ALCOHOL LIMITS: HEAVY DRINKING AFFECTS BRAIN FUNCTION AND JUDGMENT.





## MORE...

- Keep in touch
- Share how you feel
- Give back
- Be mindful



YOU MIGHT ASK: What Is In It For Me?

think better?

have more energy?

gain enhanced confidence?

enjoy a greater sense of control?



develop a clearer sense of purpose?



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Improves productivity and performance WITH THE ESSENTIALS


REFRAME, RESET, RECHARGE!

Lawyers (workers) who experience stress and do not have the tools to manage





Over time, this can impact job performance and affect a practice's overall morals and bottom-

The symptoms may seek to reduce their stress through unhealthy (negative) coping skills.




Line if left unnoticed or untreated.

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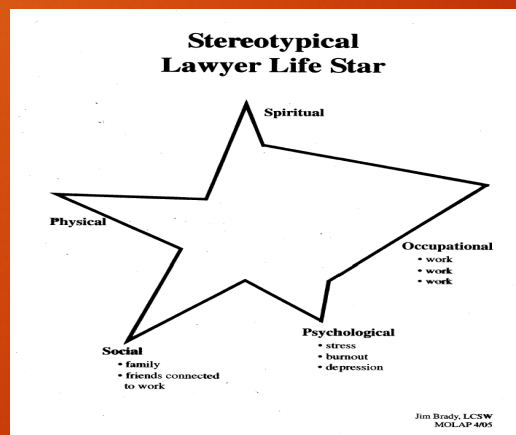


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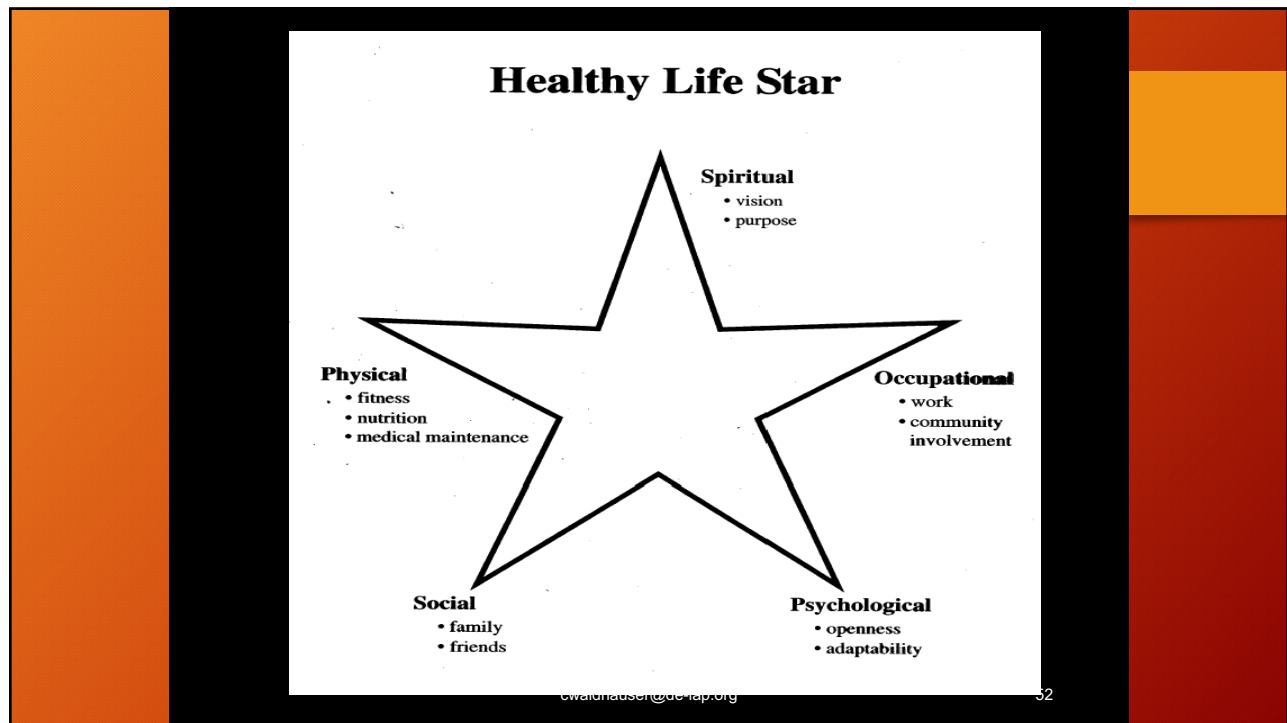
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Line if left unnoticed or untreated.







- Confidential assistance for judges and lawyers.
- Confidential assessment, referral, support and guidance
- Peer assistance is at the forefront of the program: lawyers helping lawyers/judges helping judges
- Toll - free: (877\_ 243-3527) or
- PRIVATE: (302) 777-0124
- E-mail: [cwaldhauser@de-lap.org](mailto:cwaldhauser@de-lap.org)
- [www.de-lap.org](http://www.de-lap.org)

**DE-LAP**

# Technology and Ethical Practices

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