

Navigating Ethical Issues in the New Remote Work World

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What have we learned from the pandemic?

- WFH is possible.
- We can adapt.
- But there are ripple effects.



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Unauthorized practice of law.

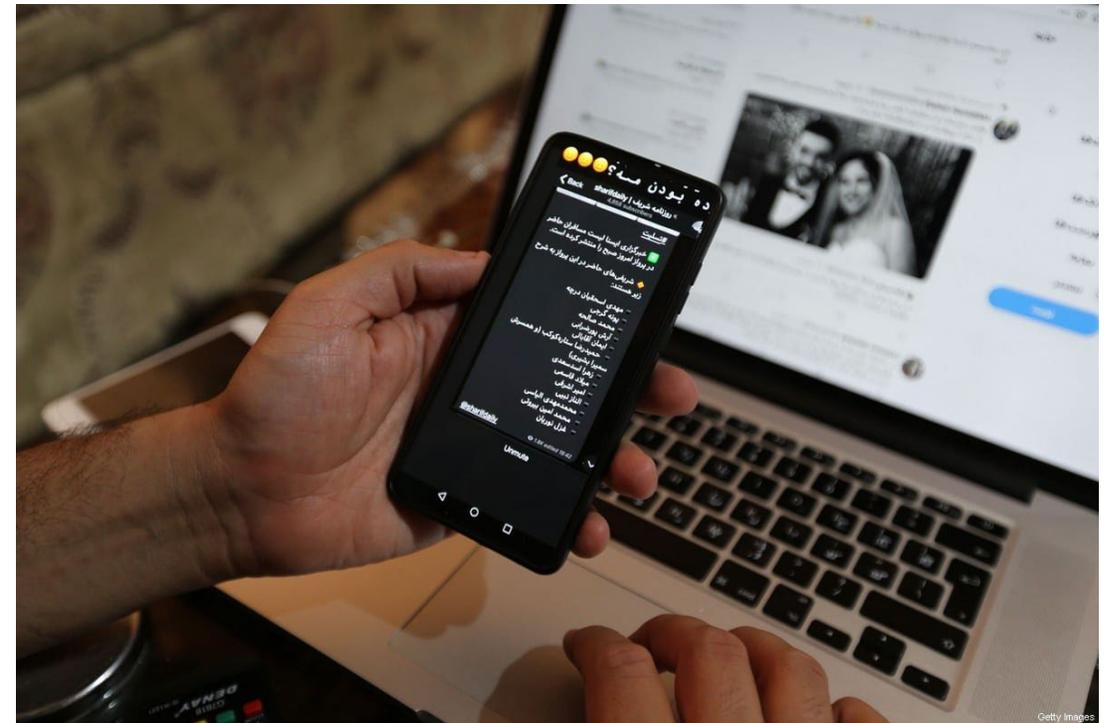
- Before: we worked where we held our bar licenses (most of the time, at least).
- After: many of us retreated to places outside the geographic areas designated by our bar cards.
 - Model Rule 5.5(a)'s general rule: “A lawyer **shall not** practice law in a jurisdiction in **violation of the regulation of the legal profession in that jurisdiction**, or assist another in doing so.”
 - Subsection (b) spelled out the **prohibition against “establishing an office or other systematic and continuous presence”** in a jurisdiction in which we were not admitted.

Unauthorized practice of law.

- “Unauthorized practice of law” is fuzzy.
 - Rule 5.5 cmt 2: “The definition of the practice of law is established by law and varies from one jurisdiction to another.”
- Basic guideline: it is the **application of legal principles to a client’s particular circumstances.**

Unauthorized practice of law.

- *Why* does a lawyer have to be physically present to give that advice?
- What happened when we moved to another jurisdiction while we hunkered down to wait out the pandemic?
- Our clients weren't going to stop needing our services, and we weren't about to sit for a bar exam to become licensed in other jurisdictions.



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Unauthorized practice of law.

- In [ABA Formal Opinion 495](#), the ABA's Standing Committee on Ethics and Professional Responsibility made some inroads, all while hedging its bets. (“You can take your hat to a new location, but don't hang it where people can see it.”)
- And in [ABA Formal Opinion 498](#), the ABA reminded us that our normal ethical duties don't go away when we WFH or WFElsewhere.
- Other states have likewise developed their own advice for working remotely. (*See, e.g.*, [Pennsylvania Bar Association Formal Opinion 2020-300 on Virtual Practice](#)).

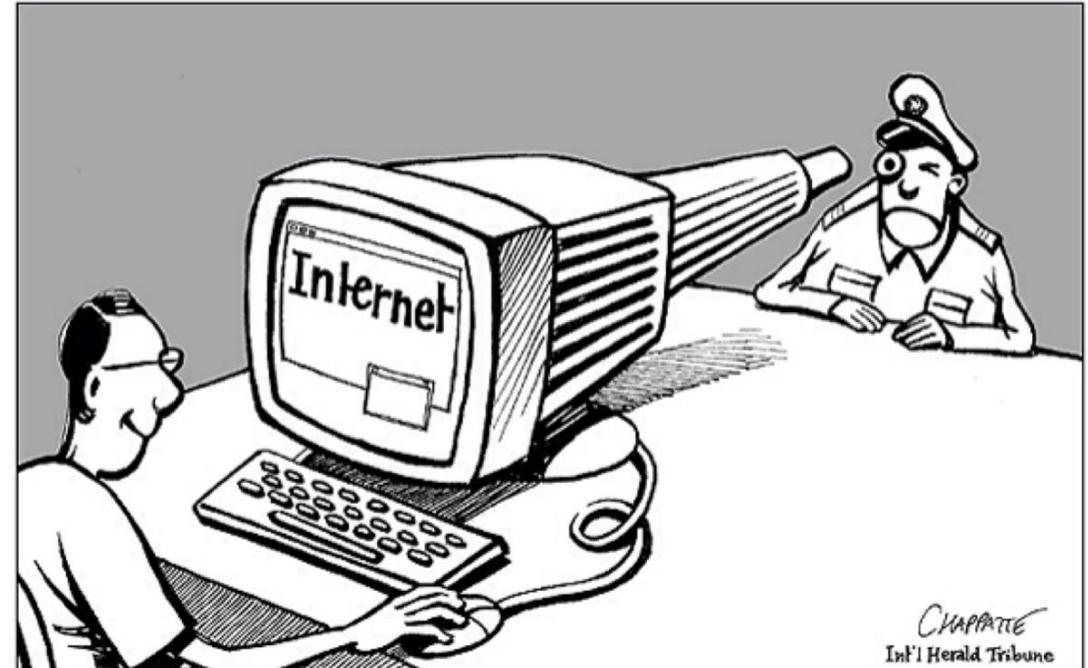
Confidentiality.

- Model Rule 1.6(c) provides: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”



Confidentiality.

- Documents: keep them out of view.
 - Zoom-screens: same.
 - Papers: secure them.
- Password-protect your electronics.
- Conversations should be in “door shut” / “headphones on” mode.



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Confidentiality.



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Technological competence.

- Comment 8 to Rule 1.1 says:
 - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

“LawyerCat” and “LawyerChipmunk”:

- Rule 1.1 + Comment 8 + Rules 5.1 and 5.3 (duty to supervise) = you can't just give your colleagues the instruction to “use this equipment at home” and hope that that instruction will satisfy your duties to manage and supervise.



Courtesy of <https://laptrinhx.com/cartoons-on-zooming-for-work-and-school-2454545772/>:



Comment 8 in real life:

- Dress for a court appearance or meeting.
- Be aware of what happens when you move during Zoom.
- If you can see it, I can see it.



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“I am not a cat” redux.

- Heads of departments or heads of firms must develop written policies to convey how employees can work remotely while still complying with the ethics rules.
 - Regular training / refreshers.



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Duty to supervise--Model Rule 5.1 (duty to supervise subordinate lawyers).

Rule 5.1:

- (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.

Duty to supervise--Model Rule 5.3 (duty to supervise non-lawyers).

- Rule 5.3 mirrors this approach with respect to the supervision of non-lawyers.
- Taken together, both rules require “reasonable efforts” to develop systems for compliance with the ethics rules.
 - Managers (the people who develop the organization’s policy, such as a managing partner, a department head, or a general counsel) are covered by subsection (a).
 - The lawyers who are working on a given matter as supervisors (and yes, associates can supervise other associates, along with supervising paralegals), are covered by subsection (b).
 - But every single lawyer in the organization can run the risk of ratifying unethical behavior.

Duty to supervise--Model Rule 5.3 (duty to supervise non-lawyers).

- The safe harbor for both Rules 5.1 and 5.3 is that, if the systems are sound (the policies and procedures) and no one has knowledge of misbehavior, the organization hasn't violated these rules.



What are some of your policies in support of ethics rules?

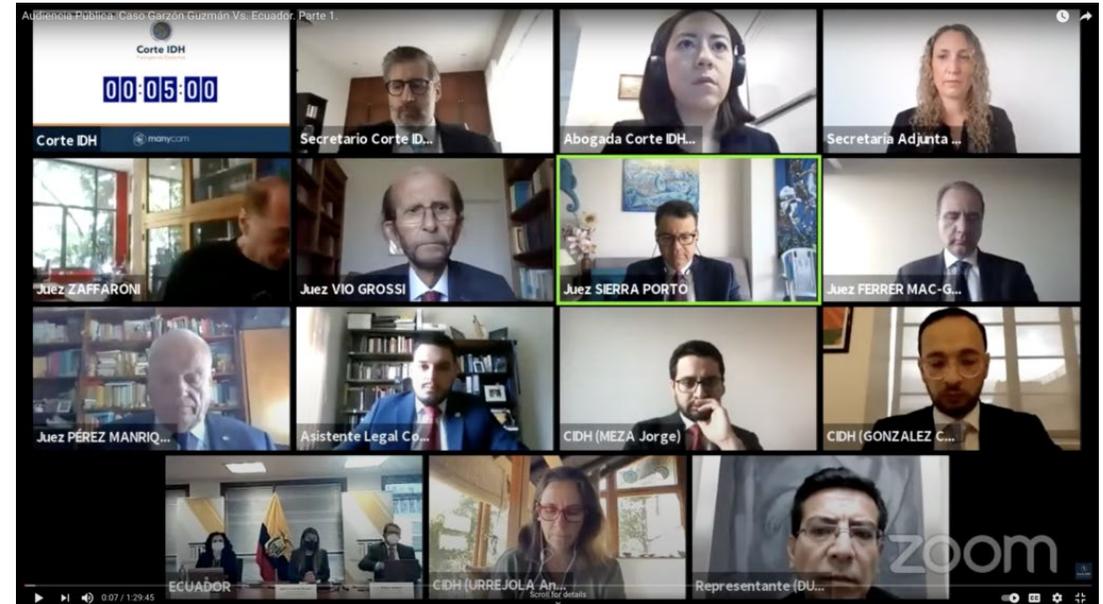
How to monitor behavior in a WFH environment.



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The special problem of hearings and depositions.

- How to avoid “coaching.”
 - Who’s in the room with the witness?
 - What’s in the room with the witness?
 - What do you do with an immuno-compromised witness who cannot travel?



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The four questions:*

1. Who is in the room with you?
2. What electronic devices do you have turned on?
3. Is your email on?
4. Is anyone who is not “on camera” and on the record able to communicate with you while you are providing testimony?



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* With apologies to *my* people and our Four Questions.

If we know these rules, why do we keep violating them?

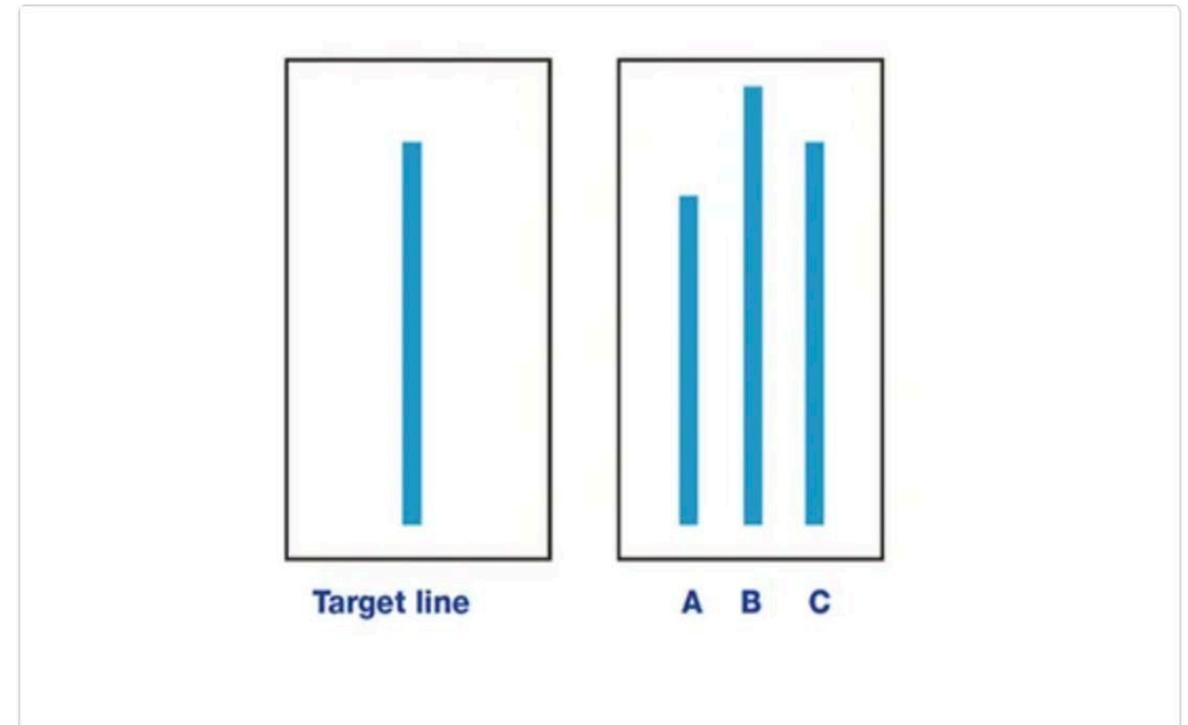
- [Cognitive dissonance](#). Humans generally think of themselves as good people, so when they do bad things, their brains will come up with a rationalization of their actions

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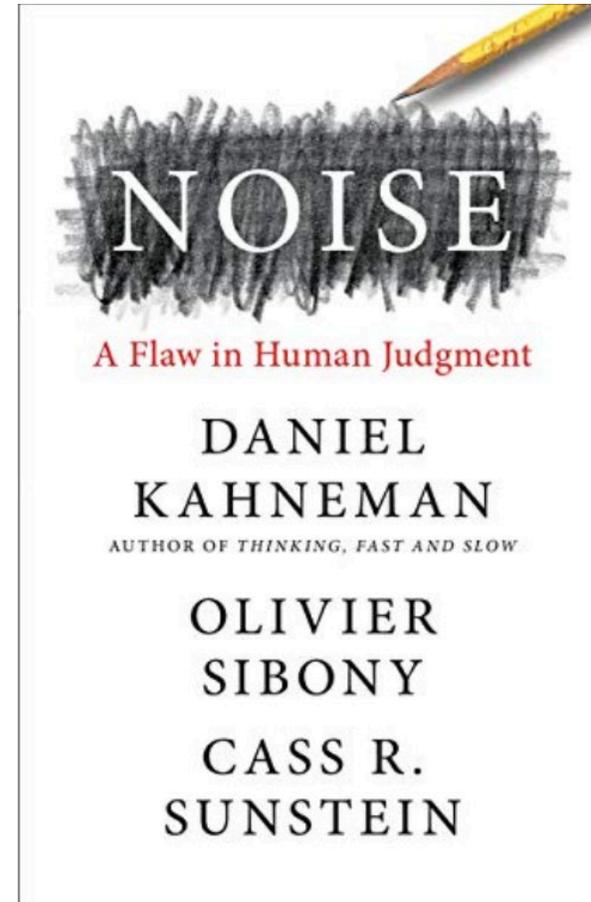
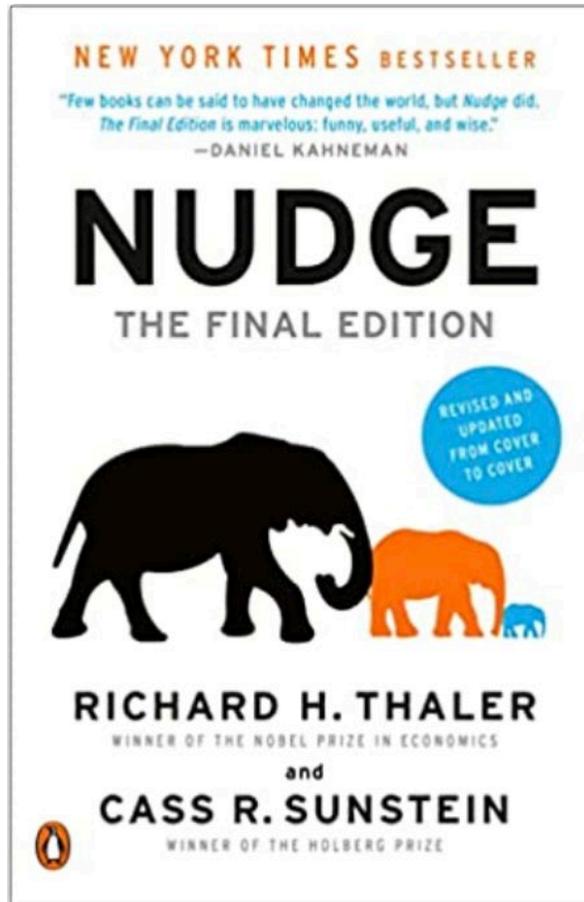
- [Diffusion of responsibility](#). No one wants to be the nail that sticks up, only to be hammered down. If someone knows of something unethical in an organization, it takes extra effort to decide to speak up, because each person assumes that someone else will do it.

If we know these rules, why do we keep violating them?

- Social pressure. We are likely to conform to our colleagues' behavior, rather than assuming that some of that behavior is wrong. See the Solomon Asch experiments →

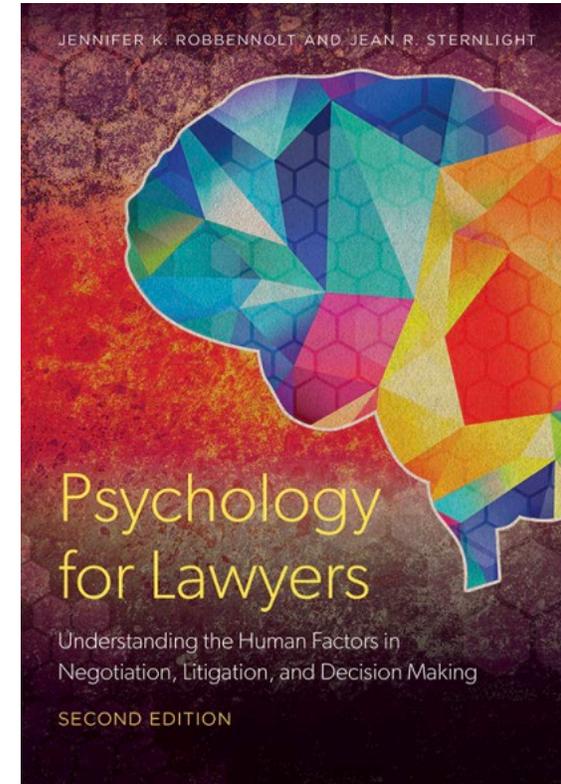


Behavioral economics is your friend here.



So many cognitive errors.

- There are countless cognitive errors, and these are just a few of the ones most likely to affect us as we work remotely.
 - Forewarned is forearmed.
 - But we're all still human.



Not just supervising, but also nurturing our newest colleagues.

- The more spread-out the members of a department are, the less likely that the same amount of nurturing is taking place.
 - Less learning-by-watching than we Boomers had.
 - A real risk that, as those new lawyers become more senior, the less prepared they will be for more sophisticated tasks.
- Supervisors need to find a way to ensure that junior lawyers are exposed to a wide variety of tasks that will undergird more complicated work.
 - Again, a systems approach is key.

Succession planning in a pandemic.

- Even before the pandemic, law firms were, on average, notoriously bad about succession planning.
 - Identifying potential talent early and developing it.
 - Providing leadership opportunities.



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Fees.

- In a virtual world, the ability to monitor billing so as to keep fees reasonable (see Model Rule 1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”)) is more challenging.



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Diligence.

- Rule 1.3 is pithy: “A lawyer shall act with reasonable diligence and promptness in representing a client.” But there are two Comments that are particularly apt in work-from-home situations:
 - Cmt. 2: A lawyer’s workload must be controlled so that each matter can be handled competently.
 - Cmt. 3: Perhaps no professional shortcoming is more widely resented than procrastination....



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Bottom line.

- Even beyond the scary new normal, allowing some remote work might entice your colleagues to stay with your organization, rather than leaving for a more remote-hospitable environment.
 - If you consider the costs that go into training and mentoring your newest colleagues, certainly it is less expensive to retain good people than to have a revolving door.
 - The conclusion, then, is that finding new ways to help keep happy colleagues is worth your while, not just from an ethics perspective but also from a business-preservation perspective.