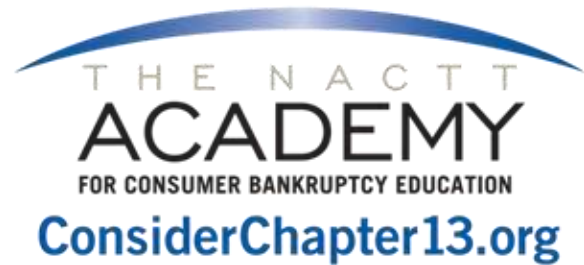


**NACTT 57th Annual
Seminar
San Francisco, CA
Educational Materials**



Thursday, July 7, 2022 - 9:30-10:30

Ethical Implications of Remote Lawyering Post-Pandemic

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Navigating Ethical Issues in the New Remote Work World

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What have we learned from the pandemic?

- WFH is possible.
- Everything (or almost everything) can be adapted (including depositions and trials).
- WFH has economic ripple effects (smaller office footprints; even less work/life balance than we'd thought possible).

2

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.

3

Unauthorized practice of law.

Rule 5.5(d): A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction ... may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires *pro hac vice* admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
- (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

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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.**

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Unauthorized practice of law.

- *Why* does a lawyer have to be physically present to give that advice?
 - We’ve all read emails and responded to client calls while on what is loosely termed a “vacation.”
 - We think about client issues while we’re on planes, flying across jurisdictions in which we’re unlicensed.
 - The practice of law is that it is an all-the-time, anywhere practice.
- 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:
 - If a particular jurisdiction has decided that a lawyer working remotely while physically located in that jurisdiction constitutes UPL, then Model Rule 5.5(a) prohibits the lawyer from doing so.
 - But if there's no outright prohibition, a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters.

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Unauthorized practice of law.

The opinion went on to develop some safe harbors:

- A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction **if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear** on letterhead, business cards, websites, or other indicia of a lawyer's presence....

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Unauthorized practice of law.

Other states have likewise developed their own advice for working remotely.

The [Pennsylvania Bar Association Formal Opinion 2020-300 on Virtual Practice](#) gave this advice: Make sure that:

- all of your communications minimize the risk of inadvertent disclosure of confidential information;
- protect the confidentiality of client communications and other sensitive data;
- your remote office is designed to prevent the disclosure of confidential information in both paper and electronic form;
- secure and backup confidential data stored on electronic devices and in the cloud;
- train your staff members about remote work policies; and
- use appropriate data security measures.

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[ABA Formal Opinion 498.](#)

- The ethics rules of 1.1 (competence), 1.3 (diligence), and 1.4 (communication) still apply, naturally enough, to both the virtual and real practice of law.
- Moreover, the supervisory rules (Rules 5.1 and 5.3) don't disappear just because the lawyers and non-lawyers who must be supervised aren't working down the hall from those who have the duty to supervise.

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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.”
 - Don’t name a living being “Siri” or “Alexa” (or, we guess, “Google.”)
 - Do a tabletop exercise on known risks like ransomware.
 - Cloud storage, even if secure, is still hackable, although companies like [Axel](#) make it more difficult to piece together confidential information.

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Confidentiality.

- Documents: keep them out of view.
 - Zoom-screens: keep extraneous material off of your “desktop.”
 - That rule holds true for papers and other client material stored in the lawyer’s home as well.
- Password-protect your electronics.
- Conversations should be in “door shut” mode.
 - To the extent possible, use headphones for additional security in conversations.

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Confidentiality.

- My spouse soundproofed my office door with foam squares.
- He has probably always wanted to do that, but the pandemic gave him a perfect excuse.



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The [“I am not a cat”](#) video.

- 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.
- 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.

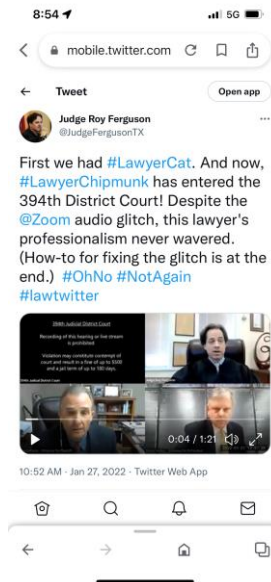
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Courtesy of <https://laptrinhx.com/cartoons-on-zooming-for-work-and-school-2454545772/>:



15

[And if you thought that being a cat was scary...](#)



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Comment 8 in real life:

- When the world first started doing Zoom hearings, I had a hearing in Delaware. (I was a testifying expert.)
 - When I testified, my office door was closed. There was nothing within the camera's view that involved confidential information.
 - But some of the others on the hearing didn't "clean up" as easily.
- I saw beds (all made up, though), which struck me as odd, but I also saw documents and notes that I might have been able to enlarge. And, of course, [I dressed for a court appearance](#), down to wearing the heels that no one on Zoom would see.

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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.

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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.
- 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.

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Examples of policies in support of ethics rules.

- My former law firm had the “clean credenza” rule, which said that nothing that a non-firm person could see while walking through the offices could show confidential material:
 - No phone message slips (remember those?).
 - No client documents facing up—in other words, only personal things like pictures could be on our assistants’ credenzas.
- We met non-firm members in conference rooms, not in our offices, because conference rooms could be cleared of everything that could be considered confidential. (And because people like me are very good at reading upside down, opposing counsel invited me into their offices at their peril.)
- We didn’t talk in elevators.
- We didn’t valet-park or check bags with any client materials.
- And we locked our computers when not using them.

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How to monitor behavior in a WFH environment.

- How would a supervisory lawyer know if a mentee has turned off “Alexa”?
- How would a supervisory lawyer know if a mentee is working on the kitchen table, surrounded by family, while preparing for a closing?
- “Spot checks” are unlikely, so without systematized training and reminders, there is no good way to fulfill these two duties.
 - And yet, we must.

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How to monitor behavior in a WFH environment.

- Some possible ways include:
 - Requiring remote workers to initial, regularly, the remote-work policies.
 - In drafting and disseminating those policies, have monthly updates, via Zoom or WebEx, discussing the inadvertent ways that people can violate the policies. (E.g., naming a pet “Alexa” or “Siri”.)
 - In those same monthly meetings, celebrate any new suggestions for how to comply that someone in the organization has developed. (This is where soundproofing a home office can be discussed.)
 - Pay for equipment that enhances security and is installed in someone’s home, such as a work-only computer.
 - Require work-from-home employees to use VPNs and other security.
 - Disseminate news articles about hacking and other security risks.

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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:*

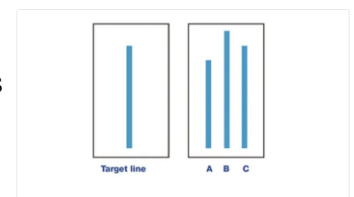
1. Who is in the room with you? (There's no need to have anyone else in the room.)
2. What electronic devices do you have turned on? (Turn them off. No texting during the active part of the deposition.)
3. Is your email on? (Same thing. Turn it off, so that the lawyer and the deponent aren't communicating in real time.)
4. Is anyone who is not "on camera" and on the record able to communicate with you while you are providing testimony? (Explain that, just as in court, lawyers aren't supposed to be providing their witnesses with feedback in real time.)

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

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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.
- [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.
- [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 →



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Behavioral economics is your friend here.

- There are two books—[Nudge](#) and [Noise](#)—that are easy reads and that can help you.
 - The idea behind both books is that there are ways subtly to encourage people to make good decisions.
 - So ideas like a “splash screen” that can pop up when someone logs into a work-from-home computer, with rotating messages like “are you in a secure location?” or “can anyone else see your work?” (or even “most law organizations do X or Y to protect client confidences”) can gently persuade people to behave more ethically.
 - One of those messages could be “you have a duty to let us know if you see one of your colleagues misapplying our work-from-home guidelines.”

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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.
 - (For a great book that explains how cognitive errors affect lawyers, see [this one](#).)
 - Forewarned is forearmed.
 - But we’re all still human.

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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.

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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.
 - Bad: “Let’s promote whoever is left.”
 - Good: Mentoring/sponsoring a diverse pool of talent. If junior lawyers are not being given equal opportunity to develop the range of skills that they need to have as more senior lawyers, then the law firms with spotty or haphazard associate development will be more likely to lose out in future “beauty contests.”

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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.
 - The “work anywhere, at any time” world can, if not monitored appropriately, lead to overbilling.
 - The risk of duplication of work, assigning tasks to the wrong level of professional, excessive time spent on certain tasks, and other billing mistakes occurred when everyone was working together in an office, but the risk is heightened as the working environment becomes more diffuse.

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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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Danger comes from both extremes.

- If a supervising attorney isn't careful, it's easy to over-assign work to someone who is working remotely.
 - The supervisor isn't necessarily seeing the bloodshot eyes or the glazed-over look of someone who has too much to do.
- But the flip side is also true: there are a lot of distractions that come with working from home, and it is easy to set aside work to deal with those other distractions.
- Although Rule 5.2 requires each lawyer to take responsibility for ethics rules compliance, Rules 5.1 and 5.3 still require supervising and managing lawyers to create systems to deal with these all-too-human risks.

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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.

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Speaker Biography



Nancy B. Rapoport is a UNLV Distinguished Professor, the Garman Turner Gordon Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas, and an Affiliate Professor of Business Law and Ethics in the Lee Business School at UNLV. After receiving her B.A., *summa cum laude*, from Rice University in 1982 and her J.D. from Stanford Law School in 1985, she clerked for the Honorable Joseph T. Sneed III on the United States Court of Appeals for the Ninth Circuit and then practiced law (primarily bankruptcy law) with Morrison & Foerster in San Francisco from 1986-1991. She started her academic career at The* Ohio State University College of Law in 1991, and she moved from Assistant Professor to Associate Professor with tenure in 1995 to Associate Dean for Student Affairs (1996) and Professor (1998) (just as she left Ohio State to become Dean and Professor of Law at the University of Nebraska College of Law). She served as Dean of the University of Nebraska College of Law from 1998-2000. She then served as Dean and Professor of Law at the University of Houston Law Center from July 2000-May 2006 and as Professor of Law from June 2006-June 2007, when she left to join the faculty at Boyd. She served as Interim Dean of Boyd from 2012-2013, as Senior Advisor to the President of UNLV from 2014-2015, as Acting Executive Vice President & Provost from 2015-2016, as Acting Senior Vice President for Finance and Business (for July and August 2017), and as Special Counsel to the President from May 2016-June 2018.

Her specialties are bankruptcy ethics, ethics in governance, law firm behavior, and the depiction of lawyers in popular culture. Among her published works are *CORPORATE SCANDALS AND THEIR IMPLICATIONS 3d* (Nancy B. Rapoport and Jeffrey D. Van Niel, eds. West Academic 2018), which addresses the question of why we never seem to learn from prior corporate scandals, *LAW SCHOOL SURVIVAL MANUAL: FROM LSAT TO BAR EXAM*, co-authored with Jeffrey D. Van Niel (Aspen Publishers 2010), and *LAW FIRM JOB SURVIVAL MANUAL: FROM FIRST INTERVIEW TO PARTNERSHIP*, also co-authored with Jeffrey D. Van Niel (Wolters Kluwer 2014). She is admitted to the bars of the states of California, Ohio, Nebraska, Texas, and Nevada and of the United States Supreme Court. In 2001, she was elected to membership in the American Law Institute, and in 2002, she received a Distinguished Alumna Award from Rice University. In 2017, she was inducted into Phi Kappa Phi (Chapter 100). She has served as the Secretary of the Board of Directors of the National Museum of Organized Crime and Law Enforcement (the Mob Museum) and currently serves as a Trustee of Claremont Graduate University. In 2009, the Association of Media and Entertainment Counsel presented her with the Public Service Counsel Award at the 4th Annual Counsel of the Year Awards. In 2017, she received the Commercial Law League of America's Lawrence P. King Award for Excellence in Bankruptcy, and in 2018, she was one of the recipients of the NAACP Legacy Builder Awards (Las Vegas Branch #1111). She has served as the fee examiner or as chair of the fee review committee in such large bankruptcy cases as *Zetta Jet*, *Toys R Us*, *Caesars*, *Station Casinos*, *Pilgrim's Pride*, and *Mirant*.

She has also appeared in the Academy Award®-nominated movie, *Enron: The Smartest Guys in the Room* (Magnolia Pictures 2005) (as herself). Although the movie garnered her a listing in www.imdb.com, she still hasn't been able to join the Screen Actors Guild. In her spare time, she competes, pro-am, in American Rhythm and American Smooth ballroom dancing. In 2014, she won the national U.S. Open Pro/Am Rising Star American Smooth Competition B Division, and in 2017, she came in 2nd in the "C" Open to the World Pro/Am American Style 9-Dance Championship. The most interesting thing about her is that she is married to a former Marine Scout-Sniper.