

FORMAL OPINION NO 2022-200

Remote Work and Unlawful Practice of Law

Facts:

Lawyer A is actively licensed in another state (Other State) but not in Oregon. Lawyer A moves to Oregon and becomes an Oregon resident. Lawyer A, however, continues to practice law exclusively in Other State from Oregon through technology such as email, mobile telephone, and video conferencing. Lawyer A does not do work for Oregon clients, does not solicit Oregon clients, and does not otherwise hold themselves out to the public as admitted and available to practice law in Oregon.

Lawyer B is actively licensed in Oregon but not in Other State. Lawyer B moves to Other State and becomes a resident of Other State. Lawyer B, however, continues to practice law exclusively in Oregon from Other State through technology such as email, mobile telephone, and video conferencing. Lawyer B does not do work for Other State clients, does not solicit Other State clients, and does not otherwise hold themselves out to the public as admitted and available to practice law in Other State.

Neither Lawyer A nor Lawyer B practice solely in federal forums.¹ Neither Lawyer A nor Lawyer B have applied for admission in, respectively, Oregon or Other State.²

¹ See ABA Model RPC 5.5(d)(2) (addressing legal services performed by a lawyer who “is authorized by federal or other law or rule to provide in this jurisdiction”); Oregon RPC 5.5(d) (patterned generally on the corresponding ABA Model Rule); see generally Alaska Bar Ethics Op. 2010-1 (2010) (discussing exclusively federal forum practice by lawyer not licensed in Alaska).

² Out-of-state lawyers wishing to practice in Oregon pending admission should consult Oregon Admission Rule 13.70, which sets criteria for practicing in Oregon while an application for admission is pending with the Oregon State Bar. See also *In re Harris*, 366 Or 475, 466 P3d 22 (2020) (discussing temporary practice authorization pending admission). OSB Formal Ethics Opinion No. 2021-198 addresses the related topic of the scope of permissible activities that may be undertaken by recent law school graduates pending admission.

Questions:

1. Is Lawyer A engaged in the unauthorized practice of law in Oregon?
2. Is Lawyer B engaged in the unauthorized practice of law in Other State?

Conclusion:

1. No, qualified.³
2. See discussion.

Discussion:

1. Unlawful Practice of Law in Oregon

Oregon Rules of Professional Conduct 5.5(a)–(b) address the unauthorized practice of law:

- (a) 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.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.⁴

³ This opinion addresses unauthorized practice only. For a discussion of virtual practice generally, *see* ABA Formal Ethics Op No 498 (2021). *See also* OSB Formal Ethics Op No 2011-188 (rev 2015) (cloud computing), OSB Formal Ethics Op No 2016-191 (electronic files).

⁴ ORS 9.160(1) also prohibits the unauthorized practice of law in Oregon. *See also* ORS 9.990(1) (criminal penalties for violating ORS 9.160).

Neither the Oregon RPCs nor Oregon decisional law interpreting the Oregon RPCs have addressed the precise scenario posited in Question 1.⁵ The American Bar Association, however, discussed this issue in Formal Opinion 495 (2020) under the corresponding provisions of the ABA Model Rules of Professional Conduct (ABA Model Rules) on which Oregon RPC 5.5(a)–(b) is patterned. ABA Formal Ethics Opinion No. 495 also reviews Maine and Utah ethics authorities on this emerging issue.⁶

ABA Formal Ethics Opinion No. 495, at 3–4, concludes under ABA Model Rules 5.5(a)–(b):

The Committee’s opinion is that, in the absence of a local jurisdiction’s finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer’s licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer’s presence or availability to perform legal services in the local jurisdiction . . . unless otherwise authorized.

ABA Formal Ethics Opinion No. 495 reasons that, from the perspective of the ABA Model Rules, a lawyer working remotely in circumstances similar to Question 1 is not engaged in the practice of law in the remote location. Rather, a lawyer in those circumstances is practicing law in the lawyer’s licensed jurisdiction—albeit from a physical location outside that jurisdiction.

⁵ The interpretation of substantive law is beyond the purview of an advisory ethics opinion. *See* OSB Bylaw 15.3 (addressing OSB formal opinions); Oregon RPC 8.6 (same). Oregon substantive law, however, is not inconsistent with the conclusions reached in this opinion.

⁶ States have approached this issue in differing ways. Some, such as New Jersey and Utah, have issued ethics opinions. *See, e.g.*, N.J. Advisory Comm. on Prof. Ethics, Adv Op 742 (2021) (reaching conclusion similar to ABA Formal Ethics Opinion No. 495); Utah Ethics Op 19-02 (2019) (same). Others, such as Arizona and Florida, have enacted amendments to rules or comments. *See, e.g.*, Arizona E.R. 5.5(d) (rule amendment); Florida RPC 4-5.5 (comment amendment). These examples are not intended to be a comprehensive national list. This is a developing area of the law and lawyers are encouraged to closely review the legal authorities in the jurisdictions in which they are physically located.

ABA Formal Ethics Opinion No. 495, at 3, notes that its conclusion is consistent with the underlying purpose of ABA Model Rule 5.5:

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. (Emphasis in original.)

ABA Formal Ethics Opinion No. 495 is persuasive and is consistent with the corresponding Oregon RPCs under the circumstances described in Question 1.

Therefore, as long as Lawyer A practices exclusively the law of jurisdictions in which Lawyer A is licensed or otherwise authorized to practice law on behalf of non-Oregon residents and Lawyer A does not hold themselves out as being authorized and available to handle matters in Oregon,⁷ Lawyer A has not engaged in the unauthorized practice of law in Oregon under Oregon RPC 5.5(a)–(b).⁸

2. Unlawful Practice of Law in Other State

ABA Formal Ethics Opinion No. 495 notes that the question of whether a lawyer is engaged in the unauthorized practice of law in a given

⁷ ABA Formal Ethics Opinion No. 495, at 2, discusses what constitutes “holding out”:

A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is “holding out” as practicing law in the local jurisdiction.

⁸ This same conclusion would apply to a lawyer with a remote albeit less than permanent presence in Oregon, such as a lawyer who practices in Other State from a vacation home in Oregon. This opinion does not distinguish between lawyers in private practice and those working as internal counsel for organizations. Temporary authorized practice in Oregon on Oregon matters, in turn, is addressed in Oregon RPC 5.5(c). Temporary in-house practice in Oregon on Oregon matters is addressed by Oregon RPC 5.5(c)(5).

jurisdiction in which the lawyer is not licensed may depend on the law of the jurisdiction in which the lawyer is physically located or other choice of law considerations, and not the jurisdiction in which the lawyer is licensed.⁹

Therefore, whether Lawyer B has engaged in the unauthorized practice of law in Other State is determined by the law of Other State and not Oregon.¹⁰

Approved by Board of Governors, November 2022.

⁹ ABA Formal Ethics Opinion No. 495, at 1–2. notes in this regard:

If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

¹⁰ Under Oregon RPC 8.5(a), the Oregon Supreme Court has disciplinary authority over Oregon-licensed lawyers regardless of where their conduct occurs.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 11.6, § 19.5 (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 1, § 3 (2000).

