

**April 2023 *Multnomah Lawyer Ethics Focus***

**Electronic Geography:  
New OSB Opinion on Remote Work**

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Late last year, the Oregon State Bar issued a new advisory opinion addressing “remote work.” As used in the opinion, “remote work” occurs when a lawyer resides in a jurisdiction in which the lawyer is not licensed but only does work through electronic means in a jurisdiction where the lawyer is licensed. Although remote work existed before the Covid-19 pandemic, the severe disruptions caused by the pandemic triggered many fundamental changes in the way lawyers practice—including remote work. The new Oregon opinion, OSB Formal Opinion 2022-200 (2022), aligns closely with an influential national counterpart, ABA Formal Opinion 495 (2020). The two opinions are available on, respectively, the OSB and ABA web sites.

OSB Formal Opinion 2022-200 examines remote work both from the perspective of a lawyer from another state moving here while continuing to practice in the lawyer’s licensed jurisdiction and an Oregon lawyer moving to another state and doing the same. In this column, we’ll survey both aspects of the Oregon opinion.

Before we do, however, three qualifiers are in order.

First, we’ll focus on situations in which lawyers do not plan to become Oregon State Bar members and handle matters here. Formal Opinion 2022-200

expressly assumes that the lawyers involved, although physically located in Oregon, will only practice in their licensed jurisdictions.

Second, we won't focus on lawyers who are practicing in exclusively federal forums where the admission requirements are set by federal rather than state law.

Third, lawyers who are in another jurisdiction temporarily to handle matters there should consult local equivalents to ABA Model Rule 5.5(c)—such as Oregon RPC 5.5(c)—that address temporary authorized practice in the jurisdiction concerned.

### ***Out-of-State Lawyers Moving to Oregon***

Formal Opinion 2022-200 is predicated on a scenario where a lawyer is actively licensed in another state and becomes an Oregon resident. The lawyer, however, continues to practice exclusively in the lawyer's licensed jurisdiction through technology such as email, mobile telephone and video conferencing. The lawyer does not work for Oregon clients, does not solicit Oregon clients and does not otherwise hold themselves out as being admitted and available to practice law in Oregon.

Based on that scenario, Formal Opinion 2022-200 concludes that the lawyer is not engaged in the unauthorized practice of law in Oregon. Formal

Opinion 2022-200 applies this conclusion both to lawyers who move here permanently and those whose presence is somewhat more transitory such as a Seattle lawyer who has a vacation home on the Oregon coast. Similarly, the opinion does not distinguish between lawyers in private practice and in-house counsel.

The Oregon opinion agrees with its ABA counterpart that the lawyer in the predicate scenario is not practicing law in Oregon:

ABA Formal 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.

ABA Formal Opinion No. 495 notes, at 3, 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 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, Lawyer A has not engaged in the unauthorized practice of law in Oregon under Oregon RPCs 5.5(a)-(b).  
(OSB Formal Op. 2022-200 at 3-4; footnotes omitted)

The Oregon opinion also agrees with ABA Formal Opinion 495 that “holding out” in this context generally means stating or implying that the lawyer is licensed in Oregon on the lawyer’s web site, letterhead, or business cards.

***Oregon Lawyers Moving Out-of-State***

OSB Formal Opinion 2022-200 counsels that Oregon lawyers moving out-of-state while continuing to practice here remotely need to carefully review the law of the jurisdiction in which they are physically located because it—rather than Oregon—will control whether they are engaged in the unauthorized practice of law in that other jurisdiction. Again, the Oregon opinion mirrors ABA Formal Opinion 495 in that regard.

Although the other jurisdiction controls what constitutes unauthorized practice, Oregon lawyers should remember that Oregon RPC 5.5(a) prohibits practicing in another “jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” Further, Oregon RPC 8.5(a) vests the Oregon Supreme Court with disciplinary authority over Oregon lawyers regardless of their

location. In other words, an Oregon lawyer who engages in the unauthorized practice of law in another jurisdiction is also subject to discipline in Oregon for that violation.

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.