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**PRIVACY****Attorney-Client Privilege**

In a must-read analysis for all attorneys who travel abroad for work, three Seyfarth Shaw LLP attorneys provide an in-depth analysis of a recent New York City Bar Ethics Opinion on the obligations of attorneys to protect client information from disclosure during border searches by U.S. Customs. The authors caution that, in the wake of increased border security, this first-of-its kind opinion is likely to be adopted in other U.S. jurisdictions. Extrapolating from that guidance, they also provide practical guidelines for attorneys seeking to comply with their ethical obligations during international travel.

**Don't Just Wing It: First-of-Its-Kind Ethics Opinion Gives Critical Guidance for All Attorneys Crossing Border with Client Information**

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As world markets continue to provide extraordinary growth opportunities, and as advances in travel and telecommunications have increasingly required businesses to think globally as well as locally, the attorneys who serve those businesses have found themselves traveling the world with increasing regularity. That sort of passport travel necessarily increases the risks to clients' confidential information, whether through a lost or stolen suitcase, an unsecured airline wireless network, or a tapped hotel phone line. And with President Donald J. Trump's increased focus on border security, those risks for lawyers entering or exiting the United

States have grown even further as the number of searches of electronic devices by U.S. Customs & Border Protection (CBP) has risen exponentially. For example, according to publicly available statistics, in the cold month of February 2017, the number of electronic devices searched by CBP reached approximately 5,000, as compared to just 23,877 in all of 2016 (an average of less than 2,000 per month). To be sure, unless and until federal courts say otherwise, CBP policy allows border agents to review information stored on electronic devices—including emails, text messages, and electronically-stored documents—and demand disclosure of social media and email account passwords with or without any reason for suspicion of illegal activity. Moreover, to exacerbate the situation, CBP's policies on

the searching of electronic devices does not provide customs agents with any guidance on how to handle potentially privileged information. This creates a very real risk to attorneys and their clients that confidentiality may be breached.

## Ethical Obligations

Under the American Bar Association Model Rules of Professional Conduct—versions of which have been adopted in most states, including, for example, jurisdictions with a high concentration of lawyers, such as Florida, Illinois, Massachusetts, New York, New Jersey, Pennsylvania, Virginia, and the District of Columbia—attorneys have an ethical obligation to safeguard their clients' confidential information. Rule 1.6(c) provides that “[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.” Comment 18 to this Rule makes clear the factors to be considered in determining the reasonableness of a lawyer's efforts in this regard, including:

- (1) the sensitivity of the information;
- (2) the likelihood of disclosure if additional safeguards are not employed;
- (3) the cost of employing additional safeguards;
- (4) the difficulty of implementing the safeguards; and
- (5) the extent to which the safeguards adversely affect the lawyer's ability to represent clients, for instance by making an electronic device excessively difficult to use.

If, when viewed in this light, an attorney's efforts to safeguard data were reasonable, it does not matter if the attorney's efforts were ultimately unsuccessful; protective measures are not required to be foolproof nor are they outcome determinative.

Rule 1.6(b)(6) permits an attorney to reveal information relating to the representation of a client if he reasonably believes it is necessary “to comply with other law or a court order.” Under Comment 15 to the Rule, when such a disclosure is ordered, “the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.” Additionally, should the attorney's arguments against disclosure fail, he or she must consult with the client about the possibility of appeal. And even when a disclosure is permitted under Rule 1.6(b)(6), Comment 16 explains that this Rule “permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.” In other words, an attorney must still seek to limit the amount of information disclosed and the number of individuals or entities who will have access to the client's information.

Finally, Comment 12 to Rule 1.6 notes that, when a disclosure of confidential information is made, “the lawyer must discuss the matter with the client to the extent required by Rule 1.4.” Rule 1.4 in turn imposes a general duty for attorneys to keep clients informed of the progress of the representation.

## New York is the First To Weigh In on Attorney-Client Confidentiality at the Border

On July 25, 2017, the Association of the Bar of the City of New York Committee on Professional Ethics issued the first ethics opinion to address the obligations of attorneys faced with border searches that could threaten confidential client information. Formal Opinion 2017-5 concluded that all attorneys have three basic categories of responsibilities in this regard, all based on New York's enacted version of Model Rule of Professional Conduct 1.6, discussed above. Those obligations are:

- (1) to take reasonable steps to avoid disclosing confidential information **before** even reaching the U.S. border;
- (2) to disclose client information to CBP at the border only to the extent reasonably necessary to comply with a claim of lawful authority; and
- (3) to inform affected clients about any border disclosures.

Although the Opinion is focused on U.S. border crossings, the lessons from, and guidance provided by, the Opinion has equal—if not more—application at international border crossings in continents such as Africa, Asia, Europe, and South America.

Specifically, the New York City Bar Ethics Committee concluded that, before going through border security, attorneys have an obligation to assess the risk that client information will be breached, the potential harms that could result, and any safeguards that could be implemented. This means that attorneys must become familiar with the relevant laws and practices regarding border searches of electronic devices if they choose to carry an electronic device that contains or can access client information. They must also think carefully about the client information they possess and how it could be harmful if disclosed, although it is important to note that any such disclosure is presumptively harmful under the Rules. Attorneys should consider not taking confidential client information across the border at all, such as by carrying blank “burner” phones or laptops, using software designed to securely delete information, turning off syncing of cloud services, signing out of web-based services, and/or uninstalling applications that provide local or remote access to confidential information. There are also technological solutions that permit secure remote access to confidential information without creating local copies on the device or encrypt information on mobile devices such that access is restricted.

Similarly, the obligation only to make disclosures that are “reasonably necessary” at the border requires attorneys to explore reasonable, lawful alternatives to disclosure. Attorneys should inform border agents that the devices they are attempting to search contain privileged or confidential materials, which should trigger a requirement (or your request) that the agents seek additional authorization from a supervisor before searching. Indeed, if necessary, attorneys should be more explicit, directly asking that materials not be searched or copied and asking to speak to a superior officer. To support a claim of confidentiality or privilege, attorneys should bring court-issued identification or at the very least a legal business or bar membership card to show

agents. It is also advisable to bring a printed copy of the CBP policies regarding searches of privileged information, in case the agents appear to be unfamiliar with them. Though attorneys must “test” agents’ requests for confidential material in this fashion, it is important to note that they need not assume unreasonable burdens to do so. Thus, quite importantly, the New York City Bar Ethics Committee concluded that attorneys need not refuse searches of their devices to the point that they are denied entry into the United States or taken into custody.

Finally, if disclosures are made at the border, attorneys have an obligation to promptly notify clients who are impacted. The notification must be specific enough that the client can tell precisely what happened and what information may have been reviewed or seized. This is so clients have the opportunity to determine whether they should file a legal challenge or undertake other responses to the search.

## Practical Guidance and Tips

So what does all of this mean: Although New York is so far the only jurisdiction to address the obligations of attorneys with regard to confidentiality during border searches, it is unlikely that it will remain that way. Of course, New York is an influential jurisdiction and tends to be an early-actor that sets the standard for other jurisdictions. And, as set forth above, the rules that the New York City Bar Ethics Committee relied on in issuing its opinion are versions of the ABA’s Model Rules that have been enacted in some form across much of the United States. As such, arguably, these obligations already exist in other states under those rules, even if the local ethics authorities have not yet specifically articulated them.

With the benefit of the New York City Bar Ethics Committee’s Formal Opinion 2017-5, all attorneys who plan to travel outside the country for business (or carrying client information on electronic devices during any international travel) may wish to take some of the following proactive steps:

- Consider whether international travel is truly necessary or if telephone or video conferencing could achieve the same goals.
- Consider not only the possibility of a U.S. border search, but a possible search and seizure during every country you visit during your trip and give individualized consideration to the reputation or privacy laws of each of these countries.
- Reduce or eliminate entirely the amount of confidential information included on electronic devices for international travel, such as by uploading needed content to a web-based service and carrying a “burner” device.
- Use file names that state “Attorney-Client Privileged.”
- Encrypt confidential information that must be carried through border security.
- Carry court-issued identification for international travel or at the very least a business or bar association card clearly identifying a legal role.
- Bring copies of CBP regulations dealing with border inspections in carry-on luggage in case a dispute arises.

- Be prepared to assert the privilege and ask to see a supervisor if necessary.

- Have a fully-charged cell phone handy when going through border security so that colleagues can be consulted as needed.

- If a search is executed, keep careful track of what confidential information is accessible and what is actually reviewed, so that clients can be notified and appropriate challenges to the search and seizure can be filed.

- If a device is seized, ask that any searches be delayed until such time as challenges to the seizure can be completed.

- If appropriate, caution clients and vendors possessing attorney-client privileged information of the risks of international travel with such information and relevant safeguards.

- Keep any impacted clients fully informed.

- Print this article and keep it with you along with above-referenced CBP regulations so you can show this article to the customs agent or so you can consult it as needed. Or, in the alternative, print and take with you Formal Opinion 2017-5.

These steps, and others like them, will ensure that client data is reasonably protected and, as a result, attorney ethical obligations are upheld and respected.

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## Conclusion

Crossing the border can be stressful. And, with the rise of border searches, attorneys have added responsibilities they must consider before they book a trip that requires use of a passport. In this regard, attorneys must be prepared to reasonably safeguard their clients' confidential information when they travel internationally. Indeed, they are ethically required to take reason-

able steps to do so. The hallmark, again, is reasonableness; attorneys need not undertake drastic, superhuman steps to protect client information nor should an attorney push their conduct to the point of being denied entry or even worse being detained. But with a little forethought, attorneys can avoid transporting confidential information across the U.S. (or any other national) border at all or, at the very least, be prepared to safeguard it should a search issue arise.