

# One Minute Memo®



## New 2018 Customs Directive Provides Greater Protection for Attorney-Client Privileged Materials During U.S. Border Crossings

By Andrew S. Boutros and John R. Schleppenbach

This is Part II to our earlier One Minute Memo from November 2017, entitled "[Recent Ethics Opinion Provides Key Guidance for All Attorneys Crossing the Border with Client Information.](#)"

The recent increase in the number of border searches of electronic devices by United States Customs & Border Protection (CBP) has raised ethical concerns for all attorneys, including in-house counsel. Rule 1.6(c) of the widely-adopted ABA Model Rules of Professional Conduct 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."

In November 2017, we reported on a first-of-its kind Formal Ethics Opinion from the Association of the Bar of the City of New York Committee on Professional Ethics that construed New York's version of Rule 1.6(c). That decision concluded that attorneys have an obligation—before they cross any borders—to assess the risk that client information will be breached, the potential harms that could result, and any safeguards that could be implemented.

In a positive development, CBP recently issued a new 2018 Directive on inbound and outbound U.S. border searches that provides greater protection for client confidences. The Directive has application to all lawyers who practice in the United States who maintain attorney-client privileged communications. Most notably, the Directive makes clear that:

- absent reasonable suspicion of unlawful activity or a national security concern, an officer performing a border search may **not** connect external equipment to an electronic device to review, copy, and/or analyze its contents;
- border searches may **not** include using portable electronic devices to access remotely-stored information; and
- border officers are **required** to consult CBP counsel before searching any device as to which a claim of privilege is raised and to seek clarification from the individual asserting this privilege as to specific files, folders, attorney or client names, or other particulars that may assist CBP in identifying privileged information so it can be segregated during a border search.

For the full version of this most recent article, which originally appeared in *Bloomberg Law White Collar Report*, 13 WCR 221 (March 16, 2018), and contains the authors' detailed practical tips for complying with attorney ethical obligations during border crossings, [click here](#).

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