

One Minute Memo®



Recent Ethics Opinion Provides Key Guidance for All Attorneys Crossing the Border with Client Information

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Seyfarth Synopsis: *In a much-needed opinion, the New York City Bar recently issued a first-of-its-kind Ethics Opinion setting out the ethical obligations that all attorneys must adhere to when crossing the U.S. border with confidential client materials, whether print or electronic. The Opinion takes the groundbreaking step of setting out many of the best practices that attorneys can—and should—strive to achieve in their passport travels. And, given many of the same considerations that govern U.S. border crossings apply equally—if not more—to international border crossings in countries such as Brazil, Russia, India, and China, among others, the Opinion provides the analytical ethical framework for all border crossings undertaken by all U.S.-licensed attorneys regardless of practice area. In this regard, not only is the New York Opinion important in its own right but it also provides guidance that other jurisdictions are expected to follow or otherwise expound upon.*

With President Donald J. Trump's increased focus on border security, the number of border searches of electronic devices by United States Customs & Border Protection (CBP) has risen exponentially, from an average of less than 2,000 per month in 2016, to more than 5,000 in February 2017. For attorneys, who are obligated to safeguard client confidences under ABA Model Rule of Professional Conduct 1.6, this presents special concerns. The New York City Bar recently underscored those concerns in a groundbreaking Formal Ethics Opinion, namely, 2017-5, finding that attorneys are ethically obligated to (1) take reasonable steps to avoid disclosing confidential information before even reaching the U.S. border; (2) disclose client information to CBP at the border only to the extent reasonably necessary to comply with a claim of lawful authority; and (3) inform affected clients about any border disclosures.

The Ethics Opinion advises that attorneys have a variety of obligations towards their clients before they even get to the border, including duties to become familiar with the relevant laws and practices regarding border searches of electronic devices and to think carefully about the client information they possess and how it could be harmful if disclosed. According to Opinion 2017-5, attorneys should consider not taking confidential client information across the border at all, such as by carrying blank "burner" phones or laptops or using software designed to securely delete information. At the border, the Opinion states that attorneys have an obligation to limit disclosures by exploring reasonable, lawful alternatives to disclosure. This means informing border agents of the presence of privileged or confidential materials, supporting the claim of privilege with bar association identification or business cards, and asking to speak to a border supervisor. The Opinion makes clear 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, however.

If disclosures are made at the border, the Opinion counsels that attorneys have an obligation to promptly notify clients who are impacted, and to do so with enough specifics that the client can tell precisely what information was reviewed and seized, and how, so that the client may pursue a legal challenge to the search if so desired.

New York is an influential jurisdiction and tends to be an early-actor that sets the standard for other jurisdictions. And the ABA Model Rules upon which the Opinion relies 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. Moreover, the same logic underlying this Opinion applies with equal—if not more—force to all border crossings (such as those in the BRIC nations, among others), not just crossings in and out of the United States. Thus, U.S.-licensed attorneys everywhere should be prepared to take reasonable steps to safeguard client confidences when they travel.

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

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