

Chicago Daily Law Bulletin®

Volume 163, No. 155

Serving Chicago's legal community for 162 years

If U.S. border agents ask to search your laptop, here's what to do

On July 25, the New York Bar Association Committee on Professional Ethics issued what appears to be the first ethics opinion on how lawyers should handle requests to have their electronic devices searched by U.S. Customs and Border Protection.

The opinion, New York City Bar Association Committee on Professional Ethics, Formal Op. 2017-5 (2017), is available at http://s3.amazonaws.com/documents.nycbar.org/files/2017-5_Border_Search_Opinion_PROETHICS_7.24.17.pdf.

While the possibility of having electronic devices searched at the border still remains low, incidents of such searches have nearly doubled in first six months of 2017.

These searches put lawyers at risk of violating their duty of confidentiality. Rule 1.6 prohibits lawyers from knowingly using or disclosing a client's confidential information without the client's informed consent or implied authorization.

To fully protect confidential client information, it is important that lawyers prepare for the possibility of a border search well in advance of conducting any international travel.

While not binding, the New York City ethics opinion provides helpful guidance about preparing for encounters with border agents.

Before crossing the border

As outlined in the ethics opinion, it is incumbent upon lawyers to take reasonable efforts to protect confidential client data before crossing the border.

First, before traveling internationally, lawyers should consider

whether it is truly necessary to carry a device containing confidential client information across the border at all — indeed, if there is no professional need to do so, the opinion urges lawyers to leave their devices behind altogether.

Alternatively, and in lieu of bringing their own electronic devices, lawyers should consider purchasing inexpensive “burner” phones or laptops that do not contain any client information.

These devices will allow lawyers to communicate and work internationally without the risk of compromising client information.

If the latter option is too cumbersome or expensive, lawyers can also delete software programs and confidential data from their devices prior to reaching a border

To fully protect confidential client information, it is important that lawyers prepare for the possibility of a border search well in advance of conducting any international travel.

crossing and reinstall them after entry into their international destinations.

Lawyers who choose this last option should be careful that they also (1) turn off syncing features to any cloud services, (2) sign out of any web-based services and (3) uninstall any applications that provide local or remote access to confidential client information.

During a border crossing

Despite these precautions, many lawyers might find themselves at the border with electronic devices containing confi-

By TRISHA M. RICH AND LISA M. KPOR

Trisha M. Rich is a professional responsibility attorney and commercial litigator at Holland & Knight LLP. Lisa M. Kpor is a litigation attorney at the firm. They can be reached at trisha.rich@hkllaw.com and lisa.kpor@hkllaw.com. Follow them on Twitter at @trishrich and @L_M_Kpor

dential client information.

To be clear, if a border agent demands to search such devices under a claim of lawful authority, Rule 1.6(b)(6) almost certainly permits compliance with this request. However, the ethics opinion notes that “compliance is not ‘rea-

and the U.S. Immigration and Customs Enforcement, this request alone — a claim of legal privilege — should elevate the incident to a supervising agent.

Attorneys should always bring along bar cards or other official forms of attorney identification to show current and active bar membership.

Finally, lawyers should take any other reasonable measures to protect confidential information. Only after all such measures have been exhausted, should lawyers permit searches and seizures of electronic devices containing confidential information.

After crossing the border

Most notably, the opinion declares that, if a lawyer's electronic device containing confidential information is reviewed or seized at the border, the lawyer must notify any affected clients about both the disclosure and the extent to which the client's confidential information may have been reviewed or seized.

This finding is based on a lawyer's duty to communicate with his or her clients under Rule 1.4; we each have a duty to communicate material facts to our clients and disclosure of confidential information certainly constitutes such a material fact.

While the ethics opinion offers guidance on handling requests to search devices containing confidential information, it also notes that there is no one-size-fits-all approach to responding to such requests.

As a result, attorneys should consider adopting safeguards that are warranted by the circumstances based on the sensitivity of their client's information.