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Beyond the Passport: Confidentiality When Crossing International Borders

Mark J. Fucile
Fucile & Reising LLP

International travel has long been common for lawyers. Some is for pleasure, while some is for work. A generation ago when law firm client files were in paper form, the files that a lawyer would have with them when crossing an international border were usually very limited. If the trip was a family vacation in that bygone era, a lawyer would be unlikely to have any client confidential files with them. Even on a business trip, the universe of files was often comparatively small.

With the advent of electronic files and the ubiquity of personal electronic devices, however, that dynamic has changed. Lawyers crossing an international border for either business or pleasure may have a laptop computer or tablet stuffed with the electronic equivalent of a law firm “file room.” Smart phones, in turn, may have emails, texts or voicemails that fall within the attorney-client privilege. These technological developments raise unique issues in the context of crossing international borders because, depending on the country, electronic devices may be subject to varying layers of inspection.

In this column, we’ll first survey the duty of confidentiality when crossing an international border and then turn to some practical steps lawyers can take to protect client confidentiality in that context.

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

First, we won't try to comprehensively survey the border security practices of every member of the United Nations. That said, lawyers should be generally familiar with the regulations—and how they are enforced—for their travel destinations. Although not specific to border searches, the State Department's travel advisory website is a good starting point for gauging whether a destination is particularly problematic.

Second, confidentiality considerations for return crossings into the United States are heavily influenced by search and seizure law. Searches of cell phones and similar electronic devices generally require a warrant domestically under, among others, *Riley v. California*, 573 U.S. 373 (2014). Under the "border exception," however, electronic devices are generally subject to at least manual inspection when re-entering the country. *U.S. v. Cano*, 934 F.3d 1002 (9th Cir. 2019), and *U.S. v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), speak to the border exception regionally as applied to, respectively, cell phones and laptop computers. U.S. Customs and Border Protection, in turn, discusses its policy toward border searches of electronic devices on its website. Pending a definitive decision from the U.S. Supreme Court, however, considerable uncertainty remains.

Confidentiality at Borders

As of this writing, neither the ABA nor the OSB has issued an ethics opinion specifically addressing confidentiality in the context of border crossings. The Association of the Bar of the City of New York, however, has a very useful opinion available on its website at www.nycbar.org. The opinion—Formal Opinion 2017-5—analyzes confidentiality under the New York RPCs, which like Oregon’s RPCs are based on the ABA Model Rules. The opinion is focused on re-entry into the United States but offers a practical framework for analyzing risk regardless of destination.

Although the accent in the New York opinion is understandably on confidentiality under New York’s version of ABA Model Rule 1.6, it weaves competence under their version of ABA Model Rule 1.1 into the analysis as well. Taking the last point first, the opinion underscores that part of a lawyer’s duty of competent representation is understanding the technology they use in law practice sufficiently to protect client confidentiality. Competence in this context also includes understanding the search risks at the borders being crossed—including back into the United States. Moreover, the duty of confidentiality is not simply to “remain silent.” Rather, under state equivalents to ABA Model Rule 1.6(c), lawyers have an obligation to take reasonable steps to protect client

confidentiality. Therefore, lawyers should have a plan for safeguarding confidential files before they leave on an international trip.

Practical Steps

While not attempting to be a comprehensive catalog, NYC Bar Formal Opinion 2017-5 also offers practical suggestions to reduce confidentiality risks. The practical advice will inherently be colored by the purpose of the trip, the borders being crossed, and the sensitivity of the material a lawyer may have on electronic devices.

The New York opinion leads with a simple question on the practical advice front: do you really need to have confidential electronic files with you? In many instances, the answer is “no.” A family vacation is the easy example. Do you need to have instant access to client files when you are on a gondola in Venice? Probably not. Leaving a laptop stuffed with client files at home, therefore, is often the easy solution.

The New York opinion recognizes that a business trip presents a different dynamic. It counsels only having client files on electronic devices if necessary and instead accessing necessary files through a secure remote access platform so they will not be on the device when crossing the border. The New York opinion takes the same general approach with email. In particularly fraught

situations or destinations, the opinion counsels that lawyers may even wish to consider separate phones or laptops that do not have any client-related information on them. While not offering a solution for every situation, the New York opinion includes a menu of practical suggestions that will fit most lawyers' travel plans.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. 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 was 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 taught legal ethics for over a decade as an adjunct at the University of Oregon School of Law. 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 503.860.2163 and Mark@frllp.com.