

EMAIL TRACKING : Professional Ethics Violation or Business as Usual?

Is email tracking consensual?

No, email tracking is not consensual. Email tracking is hidden in the email, unlike read receipts where the user must consent.

What is revealed by email trackers?

- When and how often the message was opened
- How long someone reviewed it
- Whether the email was forwarded and to whom
- Location of the user when they opened the email
- Device fingerprint

What does the ABA say?

Nothing specifically on email trackers yet, but some states cite ABA rules as part of their opinions. In particular, ABA Rule 1.6 Duty of Confidentiality, ABA Rule 4.4 Respect for Rights of Third Persons, and ABA Rule 8.4 (a) (c) Misconduct.

Is email tracking actually illegal?

There is disagreement on this question. Some relevant information comes from the state opinions themselves:

- New York said "Although the state bar association does not have jurisdiction over questions of law, the committee suggests that misuse of some technology, particularly the use of email "bugs" may violate federal or state Communications Privacy Act, 18 U.S. §2511. "Interception and disclosure of wire, oral, or other electronic communications are prohibited."
- The Illinois committee compared the use of tracking software to that of the surreptitious recording of phone calls, which is illegal in Illinois without the consent of all parties, unless certain exceptions apply.

How prevalent are email trackers in the legal industry?

Several large law firms have reported over 70% of the emails their employees open have some form of email tracking embedded in them.

WHAT STATE BAR ASSOCIATIONS SAY



New York

Opinion 749: "Lawyers may not ethically use available technology to surreptitiously examine and trace email." The opinion also states that email tracking violates code DR1-102 (A)(4) prohibiting lawyers from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation.



Alaska

Opinion No 2016-1: "Sending 'bugged' emails...with embedded tracking devices constitutes an impermissible infringement on the lawyer's ability to preserve a client's confidences or secrets."



Pennsylvania

Opinion 2017-300: "...the use of a web bug which opposing counsel cannot determine is present violates Rules 4.4 (Respect for Rights of Third Persons) and Rule 8.4 (Misconduct)." Read receipts are allowed because there is clear notification and consent, unlike email tracking.



Illinois

Professional Conduct and Advisory

Opinion No. 18-01: The opinion concurs with the definition of misconduct in both the New York and Alaska opinions in terms of email tracking invading the client-lawyer relationship, but goes further saying:
"Other opportunities for intrusion into the representation of a client could arise from the monitoring of the email communications between the receiving lawyer and others involved in the representation..."