

Don't Let the Web Bugs Bite

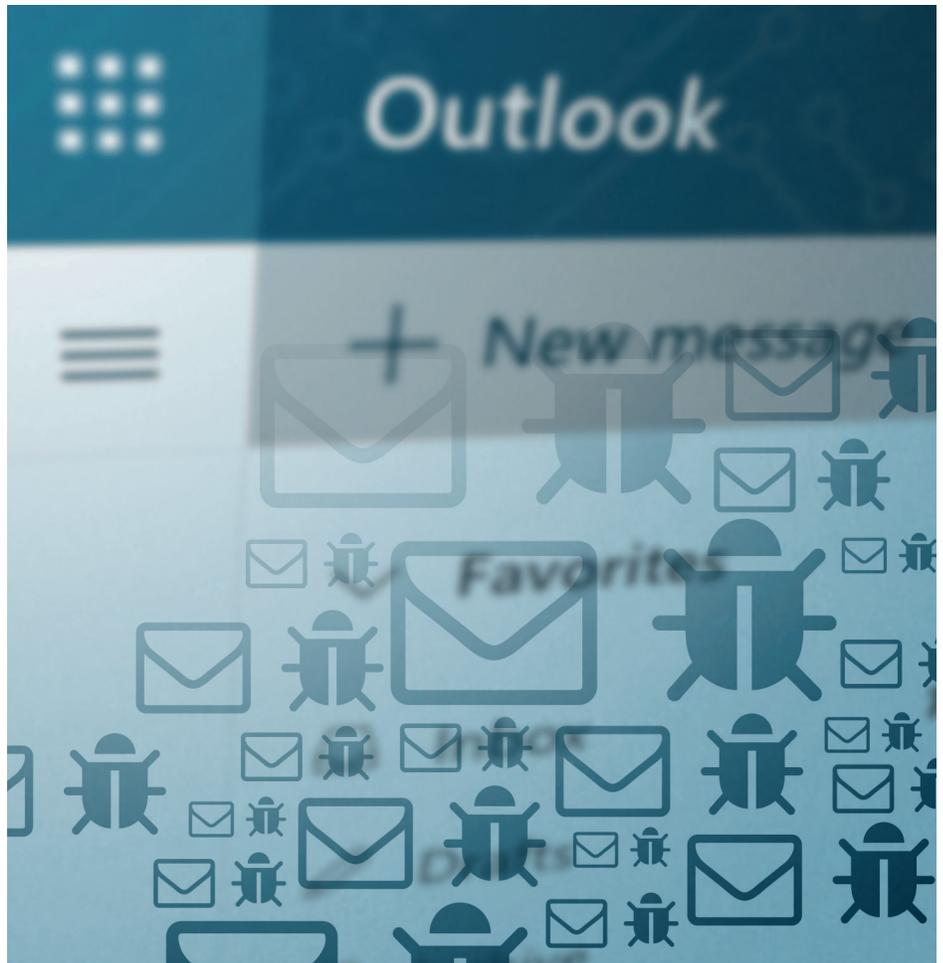
Tracking Client Emails With Web Bugs or Beacons Can Violate the Client-Lawyer Relationship

Have you ever searched for a product online, only to notice that ads for the product suddenly appear on websites you subsequently visit, even when you aren't still searching for the item? Or, have you ever received an email and clicked on one of the links in the email to get more information, and then receive an email from the sender saying that it saw you looked at the topic and wanted to know if you were still interested or wanted more information? Most of us are used to these types of ads or inquiries.

But, how would you feel if opposing counsel sent you an email and an attachment and not only knew that you read the email, but also knew that you forwarded it to your client, and that your client viewed the attached and responded to your email? You probably would feel violated.

In each of these examples, the information was being tracked by an email tracker known as a "web bug," a type of software that tracks who is reading an email or other electronic communication. Web bugs are commonly used by email marketers to determine who has opened an email, if it was forwarded and to provide other information to the sender. Some lawyers use web bugs to track who reads or forwards an email. Because the recipient of this business-related communication does not know whether the email contains a web bug, it is difficult, if not impossible, for the recipient to protect himself or herself.

To address this issue, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility has issued Formal Opinion 2017-300 ("Ethical Obligations of Lawyers Using Software to Track Email Sent to Opposing Counsel"). In the opinion, the committee concluded that an attorney



who knowingly employs web bugs under these circumstances violates Pennsylvania Rule of Professional Conduct 4.4 by impermissibly intruding into the client-lawyer relationship, and Pennsylvania Rule of Professional Conduct 8.4 by engaging in conduct involving dishonesty, deceit or misrepresentation for the purpose of obtaining client confidential information protected by Pennsylvania Rule of Professional Conduct 1.6.

In the opinion, the committee begins by explaining that web bugs, also

known as "web beacons," "pixel tags," "clear GIFs" and "invisible GIFs," are commonly used in commercial email to track a variety of information, primarily who reads the email, who clicks on links in the email and who forwards the email. Services such as Constant Contact or Vertical Response use the technology. Because commercial emails want recipients to click on the links in the email, they use prominently-displayed links and images to encourage users to click on the links, with the knowledge they are doing so.

The opinion explains that attorneys have an obligation to preserve attorney-client confidentiality, which requires them to take reasonable measures to assure that only clients view and participate in their communications. The use of web bugs intrudes upon this obligation by permitting the sending attorney to engage in an unwarranted and undisclosed intrusion into the confidential lawyer-client relationship.

On the other hand, lawyers who use web bugs do so surreptitiously, embedding them in documents and email without disclosing their presence to the recipients. More importantly, because web bugs track information as soon as an email is read, the recipient cannot “clean” the email until after providing the information to the sender. Thus, it is impractical, if not impossible, for a recipient to know if an email contains a web bug.

Because of the impossibility of protecting against the use of web bugs, the committee issued Opinion 2017-300. The opinion explains that attorneys have an obligation to preserve attorney-client confidentiality, which requires them to take reasonable measures to assure that only clients view and participate in their communications. The use of web bugs intrudes upon this obligation by permitting the sending attorney to engage in an unwarranted and undisclosed intrusion into the confidential lawyer-client relationship. As such, an attorney who uses web bugs engages in conduct that is dishonest, deceitful or misrepresents the sender’s

purpose, all for the purpose of obtaining client confidential information protected by Rule 1.6.

The opinion also explained that the use of “Read Receipts” or “Delivery Receipts” by Microsoft Outlook and other email programs is permissible because recipients are aware of, and may configure their software to permit such receipts, or to make their use optional, or to preclude their use. The opinion also does not prohibit the use of email services, such as Constant Contact or Mail Chimp, which are mass emails, and not personal to a client matter; display their links to encourage users to click on them; and make recipients aware they are clicking on the links. With web bugs, recipients cannot know the sender has embedded one in the communication.

Finally, the opinion discusses why the use of web bugs is different from the tracking of metadata, which the committee agreed was permissible in Formal Opinion 2009-100. In particular, metadata is information contained within electronic files, such as comments and tracked changes in documents created in Microsoft Word. Thus, the sender

knows, or reasonably should know, that a document may contain this type of potentially confidential information.

So, the next time you receive an email selling something and click on a link in the email, remember that the sender is using a web bug. While we may be used to living with these bugs, lawyers must be mindful that they can’t enable these critters to discover what opposing counsel does with matter-related communications. ■

Daniel J. Siegel, a member of the Board of The Philadelphia Lawyer, is the principal of the Law Offices of Daniel J. Siegel, which provides appellate, writing and trial preparation services to other attorneys, as well as ethical and disciplinary guidance. He is also the president of Integrated Technology Services LLC, a consulting firm that helps law offices improve their workflow using technology. He can be reached at dan@danieljsiegel.com.

