

**WSBA NWSidebar**

**Posted: December 4, 2016**

## **New Alaska Opinion on “Web Bugs”**

**By Mark J. Fucile  
Fucile & Reising LLP**

The Alaska Bar recently released a new ethics opinion on “web bugs”—electronic trackers placed in email so that the sender can see (among other things) where the recipient forwarded the email and how long the email was reviewed. In the scenario that gave rise to the opinion, an Alaska Bar member had received an email with a “web bug” from opposing counsel. Although the recipient discovered the “web bug,” the apparent intent was to track the information secretly. The recipient asked the Alaska Bar about the propriety of using “web bugs.” The Alaska Bar in Ethics Opinion 2016-1 concluded that the use of “web bugs” is improper. The opinion is available on the Alaska Bar web site at [www.alaskabar.org](http://www.alaskabar.org).

The Alaska Bar’s analysis in Opinion 2016-1 turns primarily on Alaska RPC 8.4(c), which like its ABA and Washington counterparts, prohibits conduct involving “dishonesty, fraud, deceit or misrepresentation.” The Alaska Bar concluded that secretly using a “web bug” to learn about an email’s use by opposing counsel and/or an opposing party constitutes an impermissible form of deception under Alaska RPC 8.4(c). Apparently in an effort to draw a “bright line,” Opinion 2016-1 also concludes that even the disclosed use of “web bugs” is a “dishonest” attempt to invade another party’s attorney client relationship and,

therefore, also violates Alaska RPC 8.4(c). In light of those twin conclusions, the opinion finds that a lawyer-recipient does not have an affirmative duty under Alaska RPC 1.6(c), which requires lawyers to make reasonable efforts to safeguard confidential information and is similar to its ABA and Washington counterparts, to proactively use electronic countermeasures. The opinion also distinguishes its conclusions from the use of disclosed “read receipts” that are common on many standard email programs—likening “read receipts” to certified mail.

Although Washington does not have an analogous opinion, WSBA Advisory Opinion 2216 (2012) addresses the somewhat reminiscent topic of “data-mining” electronic documents received from an opposing counsel for electronic “metadata” in an effort to discover information that would ordinarily have been “scrubbed” through routine practices available through standard commercial office software. The Washington opinion concluded that such efforts are impermissible under RPC 4.4(a), which prohibits “us[ing] methods of obtaining evidence that violate the legal rights of [third persons].” Washington’s approach with “metadata” highlights another risk for a lawyer thinking of secretly using a “web bug” to spy on an opposing counsel or opposing party. Decisional law from both Washington’s federal (*see, e.g., Richards v. Jain*, 168 F. Supp.2d

1195 (W.D. Wash. 2001)) and state appellate (see, e.g., *Foss Maritime Co. v. Brandewiede*, 190 Wn. App. 186, 359 P.3d 905 (2015)) courts has generally taken the approach that the improper invasion of an opponent's privilege or otherwise confidential information may put the intruder at risk of being disqualified as a litigation sanction.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* 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 teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. 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 503.224.4895 and Mark@frllp.com.