

**Ethical E-mail:**  
**A Guide to Developing Law Firm**  
**Policies**



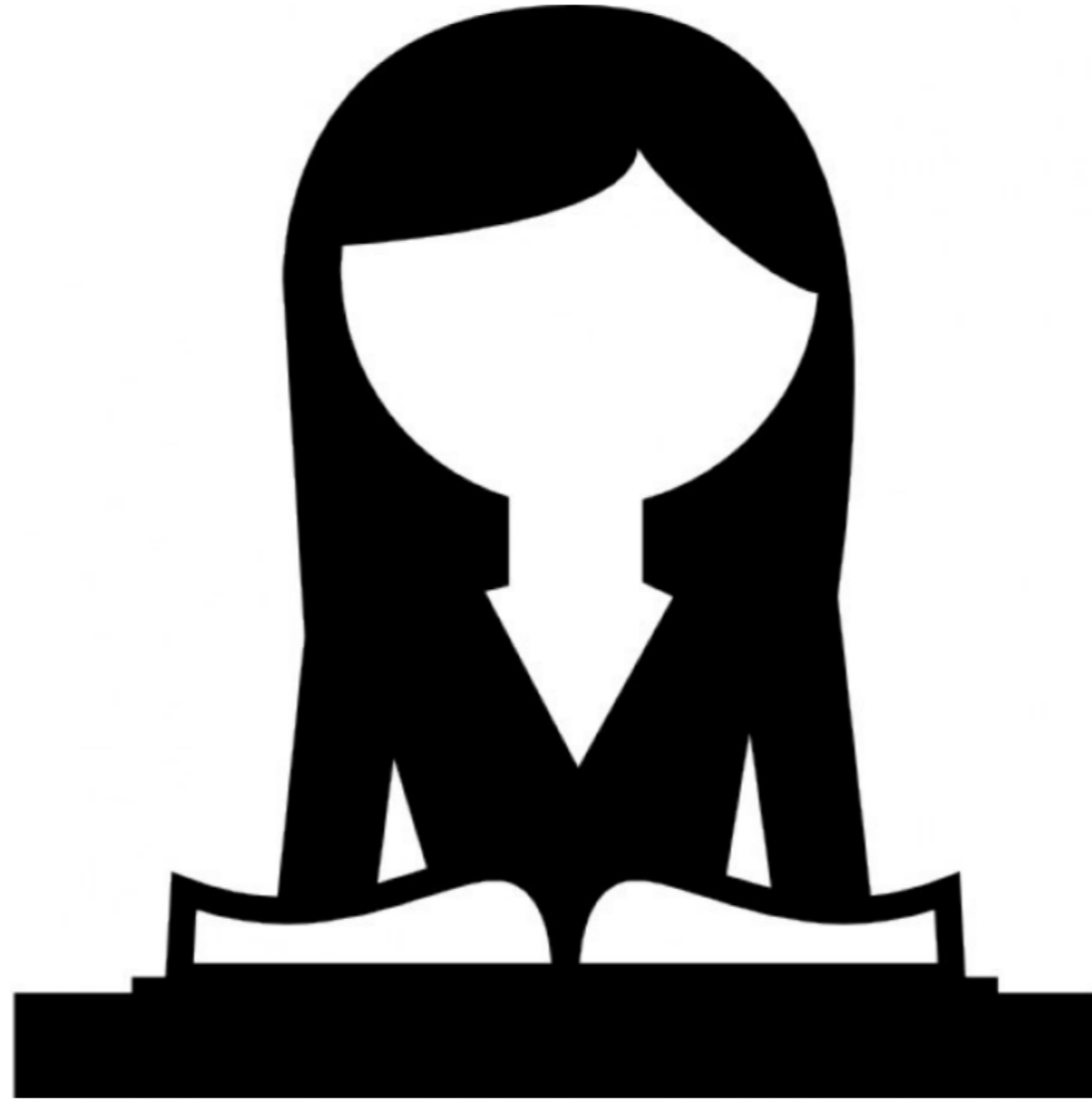
**Lesson Plan**

# Introduction

**Over the past 20 years, the technology supporting the world-wide use of e-mail has been accelerating at an incredible rate. In that time period, we have advanced from dial-up modems attached to primitive home and work-place computers to the ubiquitous use of smart phones and tablets supported by fiber-optic cables, satellites and cloud technology. The future portends additional, unimaginable innovations, including an expansion of artificial intelligence from hand-held smart phones to self-driving vehicles and household appliances. Clearly, e-mail access will be available on all of the future platforms as the entire world population evolves into a globally, connected network.**



**In contrast to the amazing advance of e-mail technology, the law related to the ethical use of e-mail by attorneys has lagged far behind. Simply put, there are few guidelines and fewer published cases to provide New Jersey attorneys with direct guidance on how to utilize e-mail in a manner that is consistent with the letter and spirit of the Rules of Professional Conduct (RPC).**



**? ? ? ?**

**By way of example, what steps must a New Jersey attorney take to make sure that law firm e-mails:**

- 1. Protect client confidences and privacy;**
- 2. Do not contain objectionable or unethical content;**
- 3. Are secure from hackers and other types of improper interceptions;**
- 4. Assure that non-attorney staff members and clients understand the need for secure e-mail**
- 5. Conform to the client's expectations of e-mail security?**



**With this in mind, the following section will review the applicable RPC requirements together with the case law in an effort to suggest law firm policies and procedures that will facilitate the use of attorney e-mail in an ethical manner.**

# Policy I - Mass e-mailing

## 1.) Workplace jokes and non-worked-related communications

### RPC 8.4(g)

It is professional misconduct for a lawyer to:

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

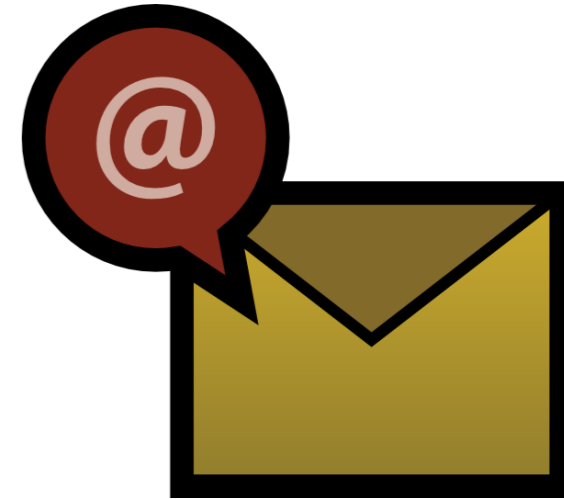
**Note that the violation can be committed either purposefully or negligently.**

#### **Leading Cases:**

**In re Pinto, 168 NJ 111 (2001) (Reprimand and 20 hours of sensitivity training)**

**In re Geller, 177 NJ 505 (2003) (Reprimand)**

**In re Witherspoon, 203 NJ 343 (2010) (one-year suspension based upon sexual discrimination and harassment)**



# Discussion

**To date, there have been no disciplinary cases where e-mail has triggered final discipline under RPC 8.4(g). (In one e-mail case, respondent was ultimately acquitted by the Supreme Court).**

**Before you are tempted to mass-e-mail a joke, photograph or other non-work-related message, please remember the three basic characteristics of internet communications. They are:**

**Global;  
Immediate; and  
Forever**



**An RPC 8.4(g) violation can be triggered as a result of a mass e-mail directed to members of a distribution list, list-serve or other type of closed network.**

**Often, the topic of the e-mail is a joke or cartoon that the sender regards as humorous. However when the subject matter or content may offend the sensibilities of even one recipient, there a potential for an RPC 8.4(g) grievance.**

**This is particularly likely when the joke involves RPC 8.4(g) topics:**

**politics**

**sexual content**

**national origin**

**race or religion**

**Here is an example of a mass-e-mail joke sent to a distribution list that could implicate RPC 8.4(g) when sent from an attorney:**



IF YOU BELONG IN THIS BATHROOM



AND YOU FOLLOW MY DAUGHTER  
OR MY WIFE INTO THIS BATHROOM



YOU'RE GONNA NEED THIS BATHROOM



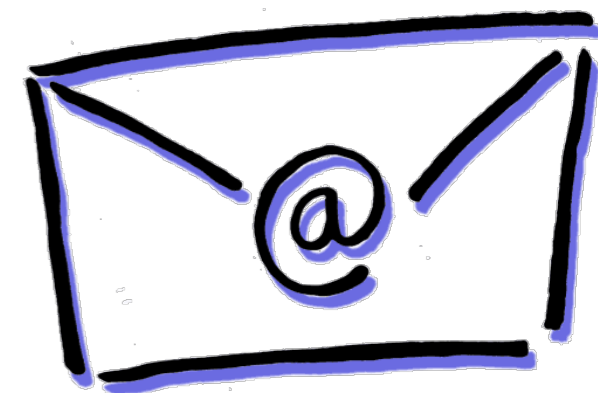
**Law firm policy:**

**Written office policy and training should forbid the use of law firm resources to disseminate mass e-mails unrelated or unnecessary to law firm business.**

## 2.) Marketing & soliciting new clients

**RPC 7.2(a) - Advertising (a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.**

**Law firm policy - the use of mass e-mails to solicit new clients is probably illegal under this RPC. Typically, direct-mail solicitation of potential clients is controlled by RPC 7.3(b)(5) which limits this form of communication to regular mail. There is no authorization of mass e-mail direct solicitation of potential clients.**



# Policy II - E-mail content

## 1.) Lawyer's services - potential clients

**RPC 7.1. Communications Concerning a Lawyer's Service (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;**

**(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;**

**(3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or (4) relates to legal fees other than: (i) a statement of the fee for an initial consultation; (ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive; (iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;**

## **Law firm policy:**

**This RPC is generally intended to provide protection to individual potential clients. An attorney who elects to use e-mail as a medium of communication during this phase of the attorney- client relationship must be sure to conform with RPC 7.1.**



## **2.) Invited e-mail from prospective clients.**

**When an attorney opens an e-mail channel of communications on a web site for prospective clients, adherence to RPC 7.1 becomes essential.**

**FOR  
POTENTIAL  
CLIENTS TO  
CONTACT US  
DURING NON-  
BUSINESS  
HOURS,  
PLEASE FILL  
OUT THE  
FORM.**

**Name:**  
  
**Cell Phone:**  
  
**E-Mail Address**

**Tell us a little about your case:**

# The invited use of e-mail from potential clients invokes both RPC 1.4 and RPC 1.18(a)



## RPC 1.4 Communication

- (a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.**
- (b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.**
- (c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**
- (d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.**

---

## RPC 1.18 Prospective Client

- (a) A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as [RPC 1.9](#) would permit in respect of information of a former client.**

---

**Law firm policy must stress the need for assuring e-mail confidentiality as well as providing advice only from New Jersey licensed attorneys.**

# Policy III - Ensuring client confidentiality

**RPC 1.6(a). Confidentiality of Information - A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).**

-----  
**NJRE 504 (NJSA 2A:84A-20)**



**[C]ommunications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness.**

**E-mail exchanges are covered by the privilege like any other form of communication. See [Seacoast Builders Corp. v. Rutgers, 358 N.J.Super. 524, 553 \(App.Div.2003\)](#), holding that e-mail from client to attorney is protected by the attorney-client privilege as a communication with counsel in the course of a professional relationship and in confidence.**

---

**In general, RPC 1.6(a) imposes an affirmative obligation to safeguard client confidences against all manner of disclosure. In the e-mail context, this may occur in a variety of ways. By way of example:**

- 1. E-mail directed to the wrong address or designee;**
- 2. Copies of e-mail inadvertently sent with original;**
- 3. E-mail intercepted by hackers during transmission; (encryption)**
- 4. E-mail hacked from law firm server; (encryption)**
- 5. E-mail made available to third parties by Internet Service Provider; (encryption)**
- 6. E-mail accessed by unauthorized law firm personnel;**
- 7. Insufficient instructions from attorney to client on the need to safeguard e-mail received from the firm.**

**No one measure can guarantee security, and no network can have perfect security. However, encryption guards the contents of an email from any third party, including an intercepting party or a third party accessing the stored messages. Thus, a copy of encrypted email in the hands of a third party, even a user's ISP, is useless.**

---

**Law firm policy: A breach of client confidentiality can result in devastating consequences for the client and potentially, a significant RPC violation for the responsible attorney. On the other hand, all use of e-mail involves a level of risk of interception or unauthorized access. Law firm policy should include reasonable steps intended to anticipate and ward off unauthorized access to e-mail communications to clients. By way of example, the firm can utilize the following practices:**



- 1. Use of e-mail encryption in all transmissions;**
- 2. Restricted access via passwords and other security to client e-mail in archive;**
- 3. Written and oral instructions to clients on the risks of using e-mail and the need to secure e-mail that has been received from law firm;**
- 4. Standards and practices designed to ensure that only the intended recipient will get the e-mail;**

# **Policy IV - Unauthorized receipt of confidential communications**



## **RPC 4.4 Respect for Rights of Third Persons**

**(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.**

**(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.**

**[According to the ABA Model Rules on which [RPC 4.4\(b\)](#) is patterned, the term “‘document’ includes e-mail or other electronic modes of transmission subject to being read or put into readable form.” *Model Rules of Prof'l Conduct R. 4.4 cmt. 2 (2004).*]**

## **Instructions from NJ Supreme Court:**

**[T]he Firm retained a computer forensic expert to retrieve e-mails that were automatically saved on the laptop's hard drive in a “cache” folder of temporary Internet files. Without Stengart's knowledge, browser software made copies of each webpage she viewed. Under those circumstances, it is difficult to think of the e-mails as items that were simply left behind. We find that the Firm's review of privileged e-mails between Stengart and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of [RPC 4.4\(b\)](#) and violated that rule.**

**To be clear, the Firm did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee's personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing in the record before us to suggest any bad faith on the Firm's part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails.**

**Stengart v. Loving Care, 201 N.J. 300, 325-26 (2010).**

**Law firm policy - Inadvertently intercepted e-mail involving attorney-client communications should not be read, but immediately isolated and held pending notification to the adversary and appropriate judge.**



# Policy V - Employee expectations of privacy in e-mail

**Office policy should stress that New Jersey law does not recognize a general expectation of privacy in information stored on workplace computers.**

**In [State v. M.A., 402 N.J.Super. 353 \(App.Div.2008\)](#), the Appellate Division found that the defendant had no reasonable expectation of privacy in personal information he stored on a workplace computer under a separate password. The defendant had been advised that all computers were company property. His former employer consented to a search by the State Police, who, in turn, retrieved information tied to the theft of company funds. The court reviewed the search in the context of the Fourth Amendment and found no basis for the defendant's privacy claim in the contents of a company computer that he used to commit a crime.**



**Doe v. XYZ Corp., 382 N.J.Super. 122 (App.Div.2005)**, the Appellate Division found no legitimate expectation of privacy in an employee's use of a company computer to access websites containing adult and child pornography. In its analysis, the court referenced a policy authorizing the company to monitor employee website activity and e-mails, which were deemed company property.

**In the context of e-mail, it is critical to remember that electronic communications sent from a workplace computer using a password protected account from an ISP can usually be retrieved from the workplace computer's archival storage.**



**Law firm policy: Under New Jersey law, there exists a limited expectation of privacy for workplace e-mail when the communications from the employee are directed to his attorney for the purpose of receiving legal advice. Law firm (and corporate) policy considerations and client advice on communications via e-mail should take the following into account:**

**Our conclusion that Stengart had an expectation of privacy in e-mails with her lawyer does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy. For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet.**

**But employers have no need or basis to read the specific *contents* of personal, privileged, attorney-client communications in order to enforce corporate policy. Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable.**

**Stengart v. Loving Care, 201 N.J. 300, 324-25 (2010).**



## **Policy VI - Conclusion**

**Before jotting off a quick email, attorneys need to consider the risks of email technology with their clients. Privacy expectations in email now depend on case-specific variables. Attorneys must be aware that these expectations may vary depending on local data privacy laws, privacy policies, and the devices used to access information. Model rules now require attorneys to be aware of the risks of the technology they are using and to educate themselves about technology. Using email for confidential or privileged communication requires an attorney's judgment, along with the client's informed consent.**

**Attorneys need to discuss email's risks with clients to mutually create a solution for that client's needs. Obviously, security needs will vary, but even the most benign content, such a scheduling email sent to an employee's email, may be devastating to a client. Before an attorney can make such a judgment call, he needs to understand the risks involved and discuss them with his client. Clients must work with their attorneys to decide what precautions are appropriate, as it will be the client filing the grievance.**

**Attorney and client levels of sophistication may vary; some clients may demand security measures or have their own policies for securing data.<sup>333</sup> Some law firms have the best security measures in the world and the personnel and training to enforce it. Unsophisticated clients and smaller practices may be less equipped to handle evolving technology. Attorneys need to educate themselves about the risks in email and consider their security policies and whether they know if their policies truly safeguard client's confidential information. Attorneys should consider policies about encryption and also about acceptable email use. When using third-party email services, attorneys should consider privacy policies and what types of data are appropriate to send to those systems.**



**Most importantly, attorneys must be able to educate their clients about the risks of technology they choose to use, including the risks of using third-party services to do so. When an attorney or his firm is unable to understand the risks, or if the burden of this education is too severe, email may not be the proper medium to communicate with clients. Technology-based ethics opinions can never be the solution for long, and it is dangerous to rely on their assurances. In a world with a battery of data privacy laws, evolving ethical guidance, and lengthy privacy policies, an attorney may wish to err on the side of caution, instead of risking his professional license on technology he does not understand.**

## **RISKY MAIL: CONCERNS IN CONFIDENTIAL ATTORNEY-CLIENT EMAIL,**

**81 U. Cin. L. Rev. 601, 654 (Winter, 2012)**



Garden State CLE presents:

**Ethical E-mail:**  
**A Guide to Developing Law Firm**  
**Policies**



**Lesson Plan**