

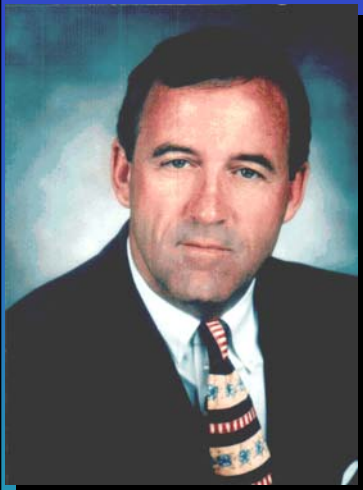
ENGINEERING ETHICAL ISSUES



CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

By Kerry C. Williams ©2008

ABOUT THE PRESENTER



KERRY C. WILLIAMS (B.S., Civil Eng. Texas A&M, M.S. Civil Eng., University of California-Berkeley, J.D., Honors, University of Maryland). Mr. Williams is a shareholder with the Houston law firm of Chamberlain, Hrdlicka, White, Williams & Martin. He focuses his practice entirely on construction, engineering, and international legal issues. Since 1984, Mr. Williams has been a registered professional engineer (Civil/Structural) in the State of Texas. Mr. Williams practiced as an engineer for 11 years with Brown & Root before commencing the practice of law. About half of his practice is in litigation with the rest transactional. Mr. Williams' clients include many engineering firms, owners and contractors. Since 2001 he has been the legal editorial writer for the Texas Society of Professional Engineers and writes an article, *The Legal Corner*, in their magazine – *The Texas Professional Engineer*. Mr. Williams regularly lectures on construction issues for the Houston Bar, Texas A&M and the Strategic Research Institute. Mr. Williams handles large, complex construction and engineering cases both in litigation and arbitration. He is an arbitrator with the American Arbitration Association – Construction Panel.

Chamberlain, Hrdlicka, White, Williams & Martin

1200 Smith Street, 2 Allen Center, Suite 1400

Houston, Texas 77002

Tel.: (713) 654-9626 Fax.: (713) 658-2553 Cell (713) 305-4897

Kcw2@ix.netcom.com kerry.williams@chamberlainlaw.com

PROGRAM

- 1. Standards of Professional Conduct**
- 2. Out-of-State Practice**
- 3. Right to Compete**
- 4. P.E. as Expert Witnesses**
- 5. Certificates of Merit**
- 6. Communications Management**

STANDARDS OF PROFESSIONAL CONDUCT



WHAT IS ENGINEERING?

"Practice of Engineering" means the performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work.

Tex. Occupations Code §1001.303

N.S.P.E. CODE OF ETHICS

1. Public safety, health & welfare of public

2. Perform services

3. Public statements

4. Act as a fiduciary

5. Avoid deceptive practices

6. Enhance the profession

AVOID DECEPTIVE ACTS

1. Do not exaggerate expertise

2. Truth in advertising

3. Cannot take kick-backs to influence awards

4. Cannot pay money to obtain awards

OUT-OF-STATE PRACTICE



OUT OF STATE PRACTICE ISSUES

- 1. Practice governed by Texas Occupations Code Sections 1001.310-311**
- 2. Provisional License for other state PEs:**
 - ▶ **Licensed for > 2 years**
 - ▶ **Other state has similar licensing statute to Texas**
 - ▶ **Passed national engineering examination**
 - ▶ **Sponsored by Texas PE**
- 3. Board can waive for significant hardship**
- 4. Permanent Texas PE issued within 180 days:**
 - ▶ **Passed Texas PE exam**
 - ▶ **Other state has similar licensing statute to Texas**
- 5. NAFTA Issues**

RIGHT TO COMPETE



RIGHT TO COMPETE

- 1. Covenant not to compete**
- 2. Arises when key engineers leave employment**
- 3. Prevalent where:**
 - ▶ **Specialized engineering**
 - ▶ **Proprietary designs**
 - ▶ **Special client relationships**
 - ▶ **Special project**
- 4. Approaches:**
 - ▶ **Restrictions at law**
 - ▶ **Restrictions under Contract**

RIGHT TO COMPETE

1. Restrictions at law:

- ▶ Trade secret protections
- ▶ Protection of proprietary property

2. Restrictions under Contract:

- ▶ At-will employment insufficient
- ▶ Non-compete part of employment agreement
- ▶ Consideration required
 - ▶ Must create Employer's interest in restraining employee
- ▶ Not valid consideration:
 - ▶ Agreement to allow access to confidential information
 - ▶ Agreement to pay future salary
 - ▶ Severance pay or stock options
 - ▶ Promises of future pay raises

RIGHT TO COMPETE

1. Covenant must be reasonable:

- ▶ **Scope of activities restrained:**
 - ▶ Only to extent to protect legitimate interests of employer
 - ▶ Must be specific
 - ▶ Cannot extend to activities unrelated to employee's work
- ▶ **Geographic Restrictions:**
 - ▶ Must be reasonable in area
 - ▶ Generally only area where employee worked
 - ▶ National restriction likely unenforceable
- ▶ **Length of time**
 - ▶ Must be reasonable in time
 - ▶ Texas courts have held 1-4 years reasonable

P.E.s AS EXPERT WITNESSES



P.E. AS EXPERT WITNESS

- 1. Expert should insist on following:**
 - ▶ **Contract for services**
 - ▶ **Set scope of work for expert**
 - ▶ **Establish rates for services and reimbursements**
 - ▶ **Clarify obligations**
 - ▶ **Retainer**
 - ▶ **Limit liability to fees**
 - ▶ **Choice of law (Texas law recommended)**
 - ▶ **Insert arbitration clause into contract**
 - ▶ **Limit liability for claims against expert**

CERTIFICATES OF MERIT



CERTIFICATE OF MERIT

- 1. Tort Reform measure from 2003 session**
 - ▶ Purpose to limit actions against design professionals
 - ▶ Model statute
 - ▶ 20% of other states have similar statutes
 - ▶ Pushed by TSPE
- 2. Requires affidavit from engineer to be attached to lawsuit**

CERTIFICATE OF MERIT

§ 150.002. CERTIFICATE OF MERIT. (a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, registered professional land surveyor or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer, registered professional land surveyor or licensed architect shall be licensed in this state and actively engaged in the practice of architecture, surveying or engineering.

CERTIFICATE OF MERIT

(d) The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(g) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

COMMUNICATIONS MANAGEMENT



E-MAIL ISSUES

- ▶ **Most Cases turn on E-mail**
- ▶ **Text messaging**
- ▶ **Instant messaging**
- ▶ **Federal Rules**
- ▶ **Management by E-mail**
- ▶ **Massive Volumes of Data**

STATISTICS ABOUT E-MAIL

- ▶ 1 page of a letter = about 30,000 bytes of information
- ▶ 1 bankers box of documents = about 2,500 pages
- ▶ 1 gigabyte of data = 1,000,000,000 bytes of data
- ▶ Therefore:
 - ▶ 1 gig = $1,000,000,000 / 30,000$
= 34,000 pages of paper
= $34,000 / 2,500 = 13.5$ boxes of documents
 - ▶ 1 terabyte = 34,000 pages x 1,000 = 34,000,000 pages

COMMUNICATIONS MANAGEMENT

- ▶ Use **Confirmatory Letters**, if necessary
- ▶ Write everything as if it would be **published**
- ▶ **Avoid use of e-mail** as main communications
- ▶ Avoid use of **Lessons Learned**
- ▶ Never use of **slang** and **cursewords**
- ▶ Never **slander** another person
- ▶ Never send **pornography**

PROBLEMS WITH E-MAIL

- ▶ **Glibness**
- ▶ **Composing when agitated**
- ▶ **Too much copying**
- ▶ **Loss of control (“grouping”, forward, reply all)**
- ▶ **E-mails always there**
- ▶ **Data Volume**
- ▶ **Deemed sent from employer**
- ▶ **Received – Who knows?**

E-MAIL MANAGEMENT

- ▶ **Minimize e-mail externally**
- ▶ **Never criticize**
- ▶ **Not effective notice**
- ▶ **Who is being copied**
- ▶ **Official matters**
- ▶ **Never "*string*" together e-mails**
- ▶ **Never be erased**
- ▶ **Attach letters**

ROGUES GALLERY OF INFAMOUS E-MAILS



E-MAIL MANAGEMENT

After a contractor was having problems due to late engineering, this internal e-mail was written by an engineer with the A/E:

I am afraid that we have oversold our capabilities on this project to the owner.

Our engineering department simply cannot keep up with the contractor's needs. We can expect significant claims from the owner. And we should pay them all as far as I am concerned.

E-MAIL MANAGEMENT

Internal Email from an Engineer:

----- Forwarded on 09/04/1998 09:12 PM ---
--


Subject: EXTRA WORK NEGOTIATIONS

Be careful when negotiating with Kevin tomorrow. He is a backstabbing jerk who would rather SCREW you than be honest. Make sure my comments get to everyone involved. I want everyone to know.

E-MAIL MANAGEMENT

**Internal Email from an Engineer
over the use of a new type of post-
weld heat treatment for pipeline
installation work.**

Guys ,
Looks like the PWHT is on the critical
path. Barge ops are ahead. Remember this
technology has never been done on any
offshore pipelay before this project!
Regards!!



E-MAIL MANAGEMENT

Internal Email from an Engineer:

I was asked to evaluate the work of our HVAC design group after the interference claims were submitted from the contractor in October. I found this group's work to be deficient and the lead engineer's guidance total lacking. Hopefully he is long gone.....My detailed memo is attached. Since this report is confidential, please don't circulate it to anyone.

E-MAIL MANAGEMENT

Internal Email from an Engineer when a dispute over massive engineering overruns occurred:

Why the hell were there no interference checks done like I recommended everyone to do. Now our mech. and elect., P&Ids and one lines all need to be redone. Only choice is to BLAME Pruitt [owner rep.] -- he has no idea what's going on anyway.

E-MAIL MANAGEMENT

Email from a subcontractor to the general contractor at contract negotiation phase. Later claims arose by Owner due to Subcontractor's poor performance.

Ray

Agree with you. You do the marketing and we will do the work and suffer their kinky sex wishes. We need to keep them happy and also keep them out of the way. We will start from a position of NO but as we give way we will increase the price til it hurts them. Remember the delivery date is related to these special issues that these guys feel so important. If it is important then pay for it.

E-MAIL MANAGEMENT

Email from an engineer to his supervisor about design problems uncovered during a peer review.

Jim:

There are some serious issues about the designs we have been doing for [REDACTED]. I only want to discuss this with you on a "double super-secret" basis since I don't want this getting around.

E-MAIL MANAGEMENT

On Oct. 30, the Securities and Exchange Commission opened a formal investigation of Enron and subpoenaed their accounting firm, Arthur Anderson. Partner who headed the firm's "Enron engagement team," immediately had his secretary send an e-mail to everyone in the firm stating:

RESULT - COLLAPSE OF ENRON

Per Dave - No more shredding We have officially been served for our documents.

E-MAIL MANAGEMENT

On Oct. 16, 2001 Arthur Andersen partner emailed a copy of an internal memo to in-house counsel criticizing Enron's accounting. The comments in response: :

RESULT - Arthur Andersen closes its doors to business, after 89 years

I recommend deleting reference to consultation with the legal group and deleting my name on the memo. Reference to the legal group consultation arguably is a waiver of attorney-client privilege advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.

E-MAIL MANAGEMENT

Senior Analyst at Merrill Lynch while praising stocks in public recommendations, but bashing them in internal emails, such as the following:

RESULT - Manager fined \$4 million and barred from broker business; Merrill Lynch fined \$100 million.

LFMN at \$4. I can't believe what a POS [piece of sh--] that thing is. Shame on me/us for giving them any benefit of doubt.

E-MAIL MANAGEMENT

Senior Manager at CFSB facing SEC grand jury investigation caused an upper level executive to send the following email to him and then sent it out as a mass email to employees:

RESULT - Criminal obstruction of justice conviction, \$30,000 fine and banned for life from securities industry - now on appeal.

Today it's administrative housekeeping.
Tomorrow it could be improper destruction of evidence.

We strongly suggest that before you leave for the holidays, you should catch up on file cleaning.

Having been a key witness in a securities litigation case...I strongly advise you to follow these procedures.

E-MAIL MANAGEMENT

This e-mail dealt with an appeals court decision that appeared to be important to an attorney's client, who was a week away from going to trial against a tenant the client claimed owed him about \$1.2 million. The client came across a case in a supplement to a real estate law textbook he owned.

RESULT - Malpractice case against lawyer for \$1.3 million

I completely overlooked an important recent decision that dramatically changed the landlord-tenant law. How I missed the case is a mystery since I read the advance sheets. Arguably the case is indistinguishable, but there is a \$1M risk of malpractice if I am wrong. ... I fell into the trap in a major way.)

E-MAIL MANAGEMENT

Citigroup Analyst upgraded AT&T stock to allow himself and others to benefit - the email :

RESULT - Analyst assessed \$15 million in fines, barred from securities industry, Citigroup pays \$400 million settlement.

I used Sandy to get my kids in the 92nd Street Y...and Sandy needed Armstrong's vote on our board to nuke Reed in showdown. Once coast was clear for both of us [i.e. Sandy clear victor and my kids confirmed] I went back to my normal negative self on [AT&T]. Armstrong never knew that we both (Sandy and I) played him like a fiddle.

E-MAIL MANAGEMENT

This e-mail was found in Salomon Smith Barney's e-mail system at a time when they were being sued over unethical behavior.

The officers of Salomon Smith Barney need your help. A climate of bad ethics and questionable morals has taken over the firm..The moral compass has gone adrift.

E-MAIL MANAGEMENT

This e-mail was written of one of the police officers in the famous Rodney King beating case.

RESULT – Riots, 2 trials – first was an acquittal, second felony conviction, prison time.

OOPS! I haven't beaten anyone so bad in a long time.

FINAL THOUGHTS ON E-MAIL

- ▶ **High volumes of data cause loss of efficiency**
- ▶ **Do not load up on the address lines**
- ▶ **Watch who is copied**
- ▶ **Watch out on "REPLY TO ALL"**
- ▶ **Watch out for address groups**
- ▶ **E-Mail is for wimps**
- ▶ **Once sent -- never can be pulled back**
- ▶ **E-mail is always there**

ENGINEERING ETHICAL ISSUES



CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

By Kerry C. Williams ©2008