

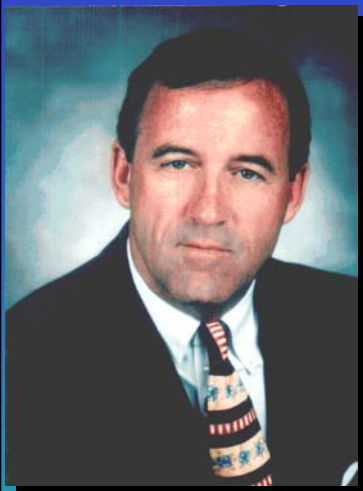
# COMMUNICATIONS MANAGEMENT AND THE LAW



**CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN**

**By Kerry C. Williams ©2005**

# 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.

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**CONSTRUCTION PARTIES**

**LENDER**

Public  
Employees  
Government  
Future owners  
Tenants

**CONSTRUCTION  
MANAGER**

**OWNER**

**ARCHITECT  
ENGINEER**

**SURETY**

**CONTRACTOR**

**UNDERWRITER**

**SUBCONTRACTORS  
VENDORS  
SUPPLIERS**

# ***LEGAL ISSUES AND LIABILITIES***

## ▶ **LITIGATION:**

- ▶ All documents must be produced
- ▶ But not attorney-client and anticipation of litigation

## ▶ **WORKPLACE LIABILITIES:**

- ▶ Sexual Harassment
- ▶ Racial, religious, age discrimination
- ▶ Ethnic origin

## ▶ **CRIMINAL LIABILITIES:**

- ▶ Sarbannes-Oxley issues
- ▶ Records Retention Policies

# ***STATISTICS ABOUT E-MAIL***

- ▶ **23% of all major companies had e-mail subpoenaed**
- ▶ **15% of major companies had lawsuits from e-mails**
- ▶ **6% of all companies archive e-mails**
- ▶ **35% of all companies have e-mail policies**
- ▶ **31% of all e-mail is either:**
  - ▶ **Profanity;**
  - ▶ **Sexual content;**
  - ▶ **Jokes;**
  - ▶ **Confidential information**
  - ▶ **Junk**

# ***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***

- ▶ **Document** everything
- ▶ 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***

- ▶ Writers are overly **glib**
- ▶ Writers tend to compose when **agitated**
- ▶ Writers tend to **copy** too many people
- ▶ Readers then **respond** to everyone on the list
- ▶ Writers respond to **unrelated** e-mails thereby copying **uninterested parties**
- ▶ E-mails can **never be erased**
- ▶ Increase volume of data



# ***PROBLEMS WITH E-MAIL***

- ▶ **E-mail is deemed sent from company**
- ▶ **E-mail in employment cases:**
  - ▶ **Pornography**
  - ▶ **Profanity**
  - ▶ **Lewd jokes**
  - ▶ **Anti-religious nature**
  - ▶ **Racism**
- ▶ **Company server used for hacking**
- ▶ **Blocking of e-mails**
- ▶ **Loss of information**

# ***PROBLEMS WITH E-MAIL***

- ▶ Need policy to **prohibit offensive e-mails**
- ▶ **Disclaimers** at bottom of e-mail
- ▶ **Lack of control** over recipients
- ▶ **Document destruction** policies
- ▶ Identities of senders can be **disguised**
- ▶ **Lack of certainty** as to receipt by reader
- ▶ Lack of certainty as to who is actually receiving the e-mail due to "**grouping**"

# ***E-MAIL MANAGEMENT***

- ▶ Avoid e-mail **externally**
- ▶ Never **criticize** in e-mails
- ▶ E-Mail is not considered as effective notice
- ▶ Watch who is copied on e-mails
- ▶ Never communicate an official matter by e-mail
- ▶ Never "*string*" together e-mails
- ▶ E-mails can never be erased
- ▶ When e-mail must be used, attach memos and send memo.

# 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:**

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***

**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!!

Three hand-drawn arrows point from the bottom towards the underlined text 'pipelay before this project!'.

# ***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***

**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***

**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.)

# ***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**

# ***FINAL, FINAL THOUGHTON E-MAIL***

**Recently the Attorney General for the State of New York said the following:**

**"I don't know why people still use e-mail, but it makes my job much easier."**

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